

The governance of the Internet in Europe with special reference to illegal and harmful content

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Summary: *This paper explains and advocates in the context of the Internet the shift from a narrow concern with “governmentality” to a broader political and social “governance”. The emergence of “Internet governance” entails a more diverse and fragmented regulatory network, with no presumption that the nodal points need be anchored primarily in nation-states. The paper will concentrate on the important developments within the United Kingdom, and within the European Union itself, with respect to the availability of illegal and harmful content on the Internet in order to contribute to the debate on Internet communications policy and how governance and the Internet can reflexively act upon each other.*

Introduction

Governance is concerned with a complex pattern of interrelationships between social institutions and individuals.¹ According to Rhodes, “governance is not a choice between centralisation and decentralisation. It is about regulating relationships in complex systems.”² A further aspect is explained by Hirst and Thompson whereby “governance...is a function that can be performed by a wide variety of public and private, state and non-state, national and international, institutions and practices.”³ The discourse of governance is especially relevant to analysis of the Internet and its possible control within Western Europe, not only because of the inherent nature of the technology but also because of the political and social nature of Western Europe.

As for the technological imperative, the prototype of the Internet was designed and developed in 1969 by Bolt, Beranek and Newman Inc,⁴ under contract to the Advanced Research Projects Agency (ARPA)⁵ of the US Department of Defense (DoD). The resulting network became known as the “ARPANET” and was designed as

* An earlier version of this paper was presented at the 8th Annual Conference of the Internet Society, Geneva, July 1998.

¹ See generally Osborne, D., and Gaebler, T, *Reinventing Government* (Addison Wesley, Mass., 1992) p.34; Jessop, B, “The regulation approach, governance and post-Fordism: alternative perspectives on economic and political change ?” (1995) 24 (3) *Economy and Society* 307.

² Rhodes, R.A.W. , “The Hollowing Out of the State: The Changing Nature of the Public Services in Britain” (1994) 65 *Political Quarterly* 138 at p.151.

³ Hirst, P., & Thompson, G., “Globalization and the Future of the Nation State” (1995) 24 (3) *Economy and Society* 408 at p.422

⁴ See < <http://www.bbn.com/aboutbbn/history.htm>>.

⁵ In 1996 ARPA was renamed DARPA - the Defence Advanced Research Projects Agency. See <<http://www.arpa.mil>>.

a flexible computer network which would be able to withstand a nuclear attack. US universities joined ARPANET in the 1970s, and some connections to European universities were made at the end of that decade. The Joint Academic Network (JANET) was established in the UK in 1984.⁶ Defence applications became partitioned in 1983, forming a distinct MILNET, and ARPANET ceased to exist in 1990. The World Wide Web was developed by a further governmental agency, CERN, the European Particle Physics Laboratory in 1992.⁷ The Internet then began to be opened up to commercial Internet Service Providers and, through them, private individuals. This history suggests that:⁸

“The origins, development and co-operative ethos of cyberspace are therefore directly related to the real and controlled world of government policy-making and public expenditure.”

But at the same time, the very design of Internet technology creates a potentially infinite and unbreakable communications complex which cannot be readily bounded by one government or even several or many acting in concert:⁹

“...the Internet is too widespread to be easily dominated by any single government. By creating a seamless global-economic zone, borderless and unregulatable, the Internet calls into question the very idea of a nation-state”

In this way, the Internet provides a paradigm of a late modern¹⁰ sub-society, in which the traditional structures of class or other socio-political commonality are replaced by new élites whose privilege is measured in terms of knowledge and technological access.¹¹ The Internet is a complicated, anarchic, and multi-national environment where old concepts of regulation, reliant as they are upon tangibility (rather than distanciation¹²) in time and space, may not be easily applicable or enforceable.

The European Union relative to the Internet

Placing these developments within Western Europe amplifies the discourses of fragmentation. The European aspect involves consideration of the impact of political movements upwards in terms of regional supra-national governmentality, as represented by the European Union, as well as downwards and outwards. Supranationality involves a developing tier of governmentality, which is at odds with traditional nation-statehood in Western Europe but which potentially plays an important role in regulation of transnational commerce and social affairs. The downward and outward trends may be represented by the cultural heterogeneity of

⁶ See <<http://www.ja.net/>>.

⁷ See <<http://www.cern.ch/>>.

⁸ Loader, B.D. (ed.), *The Governance of Cyberspace* (Routledge, London, 1997) pp. 6-7.

⁹ Barlow, J.P., “Thinking Locally, Acting Globally”, (1996) *Cyber-Rights Electronic List*, 15 January.

¹⁰ Giddens, A., *The Consequences Of Modernity* (Polity Press, Cambridge, 1990)

¹¹ See Castells, M., *The Rise of Network Society* (Blackwell, Oxford, 1996); O’Malley, P., and Palmer, D., “Post-Keynsian policing” (1996) 25(2) *Economy and Society* 137.

¹² See Poster, M., (ed.), *Jean Baudrillard* (Polity Press, Cambridge, 1988).

Europe and are given a constitutional recognition in terms of the doctrine of “subsidiarity” in the Maastricht Treaty of European Union of 1992.¹³ In this way, fragmentation in order to preserve rather than to regiment social and cultural texture has become a constitutional article of faith within the European Union. Further pressures to respect difference can be expected to flow from the commitment at the recent Amsterdam Summit to expand the Union into Eastern Europe.¹⁴

At Member State level within the European Union, there is no doubt that there is a strong commitment, based on global economic competition but equally political populism, to embrace in principle “the age of the Information Society”.¹⁵ Yet, because of cultural, historical and socio-political diversity, there will inevitably be divergent approaches to the growth and governance of the Internet in different European societies. For example, while the German government has political fears and sensitivities about the use of the Internet by Neo-Nazis, the United Kingdom takes a more relaxed attitude to the dangers of racism but conversely has a long cultural tradition of repression towards the availability of sexually explicit material. It is then for the European Union to try to reflect these differences. The legitimate and predominant constitutional concerns of the European institutions are the working and openness of the internal market. The regulation (or non-regulation) of the Internet by individual member states may create risks of distortions of competition (such as through the potential liabilities of the Internet Service Providers) and thereby hamper the free circulation of these services, and lead to a distortion and loss of competitiveness externally of the internal market producers.

Faced with the fragmentation of both the Internet and the all-purpose nation state, and having regard to the cardinal principles of respect for difference and subsidiarity, it is not surprising that both nation Member States within Western Europe and the European Union have each avoided domineering stances and the imposition of monopolistic forms of governmentality. This does not mean that the Internet is a “lawless place.”¹⁶ Rather, in the current stage of modern, or late modern society, one can expect a trend towards “governance” rather than the “government”, in which the role of the nation state is no longer ascendant. The nation state must abjure the traditional monopolisation of the policing function not only on political and philosophical grounds associated with growth of neo-Liberalism or new Conservatism,¹⁷ but also because of the pragmatic difficulties in doing otherwise in a

¹³ (Cm. 1934, HMSO, London, 1992) art.3a. See House of Commons Foreign Affairs Committee, *Europe after Maastricht* (1992-93 HC 642); Dehousse, R., *Europe after Maastricht : an ever closer union?* (Law Books in Europe, Munich, 1994).

¹⁴ Treaty for Europe (Cm.3780, Stationery Office, London, 1997). See Duff, A., *The Treaty of Amsterdam* (Federal Trust, Sweet & Maxwell, London, 1997); House of Commons Foreign Affairs Committee, *The Treaty of Amsterdam* (1997-98 HC 305).

¹⁵ See House of Lords Select Committee on Science and Technology, *Information Society* (1995-96 HL 77, HMSO, London) paras.1.1, 1.6 (the *Government Response* is at Cm.3450, 1996); European Commission Communication, *The Information Society and Development: the Role of the European Union* (COM(97) 351, Brussels-Luxembourg, 1997).

¹⁶ Reidenberg, J. R., (1996) “Governing Networks and Cyberspace Rule-Making” (1996) 45 *Emory Law Journal* 911.

¹⁷ See Habermas, J., *The New Conservatism* (Polity Press, Cambridge, 1989); Gamble, A., “The political economy of freedom” in Levitas, R., (ed.), *The Ideology of the New Right* (Polity Press, Cambridge, 1986); Sheptycki, J., “Policing, Postmodernism and Transnationalism” (1998) 38 *British Journal of Criminology*, 485.

situation of instantaneous, mass participation and global modes of Internet communication.¹⁸ It therefore seeks further sustenance by the activation of more varied levels of power at second hand. In this way, laws, regulations, and standards will affect the development of the Internet (and, one might say, self-reflexively, vice versa), and this is also true for self-regulatory solutions introduced for the availability of certain types of content on the Internet. So:¹⁹

“Rules and rule-making do exist. However, the identities of the rule makers and the instruments used to establish rules will not conform to classic patterns of regulation.”

The result is that there appears not to be a single, harmonised site for the regulation of illegal and harmful content on the Internet. Even where the formal mechanisms for harmonisation exist in an enforceable and sanctionable form (in other words within the European Union), the approach has been discursive rather than directive. This hesitancy is understandable since the condemnation of content is itself culturally and politically specific²⁰ and even where there is some commonality, such as with the outlawing of child pornography, one finds that the exact definition of offences varies markedly from one country to another. The European Commission issued last year a Communication Paper in which it concurred that “each country may reach its own conclusion in defining the borderline between what is permissible and not permissible.”²¹ This “margin of appreciation” between Member States is of course very much in line the approach fostered by the Council of Europe’s European Court of Human Rights.²²

Therefore, a multi-layered solution seems a suitable response to the altered states of virtual reality, though many of the proposed levels of governance entail their own problems, so that the effect is often to localise rather than to solve disputes about state coercive powers. Nevertheless, one might predict that the framework of multi-layered governance of the Internet, at least in so far as it applies in Western Europe, will eventually comprise a neo-corporatist²³ mixture of:

- Global international regulatory solutions by the likes of OECD and the United Nations.
- Regional supranational legislation such as by the European Union.
- Regulations by the individual governments at national or local level, such as through specialist police squads and customs control units.

¹⁸ Garland, D., “The limits of the sovereign state” (1996) 35 *British Journal of Criminology* 445; Walker, C., (1997) “Cyber-Contempt: Fair Trials and the Internet” (1997) 3 *Yearbook of Media and Entertainment Law* 1.

¹⁹ Reidenberg, J. R., (1996) “Governing Networks and Cyberspace Rule-Making” (1996) 45 *Emory Law Journal* 911 at pp.911-912.

²⁰ A good example is the tolerance of the English law offence of blasphemy which protects only the Christian religion: *Gay News & Lemon v U.K.*, Application no. 8710/79, D.R. 28, p.77.

²¹ See European Commission Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions, *Illegal and Harmful Content on the Internet* (COM(96)487, Brussels-Luxembourg, 16 October 1996). An on-line copy is available at <<http://www2.echo.lu/legal/en/internet/communic.html>>.

²² *Handyside v UK*, App. no. no. 5493/72, Ser A vol.24, (1976) 1 EHRR 737. See: Jones, T.H., “The devaluation of rights under the European Convention” [1995] *Public Law* 430

²³ See Habermas, J., *The New Conservatism* (Polity Press, Cambridge, 1989) p.61.

- Self imposed regulation by the ISPs²⁴ with the creation of industry wide codes of conduct²⁵ - these may cut across the above boundaries since ISPs (such as America Online and CompuServe) can operate at a global level.
- Representation of on-line users through national and transnational pressure groups at both national and international level.
- Rating systems such as Platform for Internet Content Selection (“PICS”)²⁶ and Recreational Software Advisory Council on the Internet (“RSACi”)²⁷ - again, the precise siting of these interventions remains debatable.
- Self imposed regulation, such as through software filters, to be used by end-users, whether individually (especially by parents and by teachers in schools) or collectively (especially by social rules within network communities such as discussion groups).²⁸
- Hotlines and pressure organisations to report illegal content such as child pornography on the Internet. The leading example in the UK is the Internet Watch Foundation.²⁹ The Internet Watch Foundation (“IWF”) was announced in September 1996 initially as a hotline to deal with the existence of illegal content on the Internet. But the IWF also fosters the development of rating systems at a UK level, and in February 1998 it recommended these systems as the best way to deal with the availability of harmful Internet content especially for minors.³⁰ The Department of Trade and Industry and the Home Office played key roles in the establishment of the body, and have since endorsed its work on a number of occasions³¹ as well as undertaking a review of its achievements to date.³²

In total, these levels of intervention reflect late modernity in that there is a dispersal of regulatory power not only in regard to levels of governance but also in the shifting boundary between the public and the private, with the latter taking a strong role in

²⁴ See Dunne, R.L., “Deterring unauthorized access to computers: controlling behavior in cyberspace through a contract law paradigm” (1994) 35 *Jurimetrics J.* 1

²⁵ For proposals at a EU level see European Council, *Recommendation on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity* (Brussels-Luxembourg, 28 May, 1998 at <http://europa.eu.int/comm/dg10/avpolicy/new_srv/recom-protoc_en.pdf>).

²⁶ See: <http://www.w3.org/pub/www/pics/>. PICS has been developed by the World Wide Web Consortium, an association of academics, public interest groups and computer companies. See further: Whittle, R., “Internet censorship, access control and content regulation” (<<http://www.ozemail.com.au/~firstpr/contreg/>>).

²⁷ See < <http://www.rsac.org/homepage.asp>>. The (non-governmental) Recreational Software Advisory Council has developed a content advisory system which has been integrated within web browsers.

²⁸ The House of Lords Select Committee emphasised self-regulation, especially by end users, as the “best hope” of controlling undesirable materials: *Information Society* (1995-96 HL 77, HMSO, London) para.5.50. See also Government Response to the House of Lords Select Committee on Science and Technology, *Information Society* (Cm.3450, HMSO, London, 1996) para.6.10.

²⁹ See <<http://www.internetwatch.co.uk>>. For a critique of its activities, see Akdeniz, Y., “Child Pornography on the Internet,” (1998) 148 *New Law Journal* 451.

³⁰ See *Rating and Filtering Internet Content - A United Kingdom Perspective* at <<http://www.internetwatch.org.uk/annual.html>>.

³¹ See Government Response to the House of Lords Select Committee on Science and Technology, *Information Society* (Cm.3450, HMSO, London, 1996) p.6; Barbara Roche, HC Debs. Vol.296, col. 615 (Written Answers), 26 June, 1997.

³² See <http://www.coi.gov.uk/coi/depts/GTI/coi8435d.ok>

policing.³³ In so far as they point towards self-governance and the mobilisation of concerned and active groups, there may also be some rationale and impetus provided by the communitarian movement.³⁴ Applied to the availability of illegal and harmful materials on the Internet, it might be argued that it is ultimately up to good “Netizens” to sustain the voice of communal morality rather than expecting some state law enforcer to surf in to clean up the virtual town.³⁵ However, the success of such an appeal to the localised governance of crime or anti-social behaviour will itself raise profound questions as to the constitution of “community”, the choice of moral precepts which are to prevail and democratic accountability.³⁶ So, such appeals to a communal spirit should not be allowed to mask the fact that repression will continue, whether through traditional policing institutions or through the tyranny of societal standards.

Legislative History of the EU Initiatives

The foregoing model of a mixed political economy has been recognised by the European Commission, which suggested in a recent Communication Paper on illegal and harmful content that:³⁷

“...the answer to the challenge will be a combination of self-control of the service providers, new technical solutions such as rating systems and filtering software, awareness actions for parents and teachers, information on risks and possibilities to limit these risks and of international co-operation.”

The Communication Paper emanated as a response to calls for the regulation of the Internet within the European Union in early 1996. The Communication Paper was launched together with a Green Paper on the Protection of Minors and Human Dignity in Audio-visual and Information Services in October 1996.³⁸ The European Commission documents follow the resolution adopted by the Telecommunications Council of Ministers in September 1996, on preventing the dissemination of illegal content on the Internet, especially child pornography. While the Communication gives policy options for immediate action to fight against harmful and illegal content on the Internet, the Green Paper sets out to examine the broader challenges that society faces

³³ Rose, N., and Miller, P., “Political power beyond the state” (1992) 43 *British Journal of Sociology* 173; Jones, T., and Newburn, T., *Private Security and Public Policing* (Clarendon Press, Oxford, 1998).

³⁴ Etzioni, A., *The Spirit of Community* (Simon Schuster, New York, 1993).

³⁵ Braithwaite, J., and Pettit, P., *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press); Selznick, P., *Moral Commonwealth* (University of California Press, Berkeley, 1995); Strang, H., “Replacing courts with conferences” (1995) 11 *Policing* 212; Leadbeter, C., *The Self Policing Society* (Demos, London, 1996).

³⁶ See Crawford, A., *The Local Governance of Crime* (Clarendon Press, Oxford, 1997); Wall, D., “Policing and the regulation of the Internet” [1998] *Crim. L.R.*???

³⁷ See European Commission Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions, *Illegal and Harmful Content on the Internet* (COM(96)487, Brussels-Luxembourg, 16 October 1996. An on-line copy is available at < <http://www2.echo.lu/legal/en/internet/communic.html>>.

³⁸ See European Commission, *Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services* (COM (96) 483 final, Brussels-Luxembourg, 16 October 1996). An on-line copy is available at < <http://europa.eu.int/en/record/green/gp9610/prottec.htm>>.

in ensuring that these issues of overriding public interest are adequately taken into account in the rapidly evolving world of audio-visual and information services. It suggests that:³⁹

“If such mechanisms of international governance and re-regulation are to be initiated then the role of nation states is pivotal. Nation states are now simply one class of powers and political agencies in a complex system of power from world to local levels but they have a centrality because of their relationship to territory and population.”

The UK Government welcomed the EU Communication with its emphasis on multi-layered governance as entirely consistent with the UK’s approach, which would emphasise self-governance at a national level:⁴⁰

“The UK strongly agrees with the Commission that since a legal framework for regulation of the Internet already exists in Member States, new laws or regulations are unnecessary.”

More recently, Chris Smith, the Secretary of State for Culture, Media and Sport stated that:

“It is vital...in considering how best to address [the problem of illegal and harmful content on the Internet], that we bear in mind that only a small fraction of the material available to the public poses a threat to the protection of minors or human dignity. It will be important, therefore, not to impose hasty regulation upon these new services and thereby constrain their development and the educational, commercial and social opportunities and other benefits they can engender.”⁴¹

The Communication and the Green Paper were followed by the European Commission Working Party Report⁴² in early November 1996. According to the Working Party Report, a self-regulatory system, including representatives of industry and users, to advise on whether or not a breach of the Code of Conduct has occurred, should be developed. The next stage in the discussion was that the European Parliament adopted a resolution on the Commission Communication Paper in April 1997.⁴³ According to the European Commissioner for industrial affairs and information and telecommunications technologies, Martin Bangemann, it is difficult to pass legislation

³⁹ Hirst, P., & Thompson, G., “Globalization and the Future of the Nation State,” (1995) 24 (3) *Economy and Society* 408 at p.430.

⁴⁰ House of Commons Select Committee on European Legislation Fourth Report, (1996-97 HC 36) para 14.8.

⁴¹ See House of Commons Select Committee on European Legislation, Second Report (1997-98 HC 155-ii). See particularly “The Information Society and Protection of Human Dignity” at para.60.

⁴² European Commission Working Party Report, *Illegal and Harmful Content on the Internet* (1996) at <<http://www2.echo.lu/legal/en/internet/content/wpen.html>>.

⁴³ See European Commission, *Communication on illegal and harmful content on the Internet* (COM(96)0487 - C4-0592/96) Committee on Civil Liberties and Internal Affairs, 20 March 1997, available at <<http://www.europarl.eu.int/dg1/a4/en/a4-97/a4-0098.htm>>.

at international level on “harmful” content on the Internet, but there is less cultural difference in what is “illegal”, and the response must be global.⁴⁴

Taking up that wider perspective, in a resolution adopted at the meeting of October 1996, the Council of Ministers of the European Union has recognised the need for further analysis of the issues underlying development of information society policy internationally with a view to reaching a common understanding on means and conditions governing the use of global information networks. The Council of Ministers stressed the need for co-ordination between initiatives relating to the subjects, both in the Union framework and in other international fora. These issues were discussed at the “Global Information Networks, Ministerial Conference,” in Bonn, in July 1997.⁴⁵ The resultant “Bonn Declaration”⁴⁶ underlined the importance of clearly defining the relevant legal rules on responsibility for content of the various actors in the chain between creation and use. The Ministers recognised the need to make a clear distinction between the responsibility of those who produce and place content in circulation and that of intermediaries such as the Internet Service Providers, thus beginning to accept that it is producers and users who must exercise normative choice and discernment and that carriers are not in a position to act as content guardians in this medium. Despite these calls and initiatives, the manager of CompuServe Germany, Felix Somm was successfully prosecuted in May 1998 for the dissemination of child pornography to its customers in Germany.⁴⁷

The EU ministers also declared at the Bonn Conference “their intention to co-operate fully within the Council of Europe, the OECD, the WTO and other appropriate international fora, in order to identify and dismantle existing obstacles to the use of new services on Global Information networks, to prevent the establishment of new barriers, and to establish a clear and predictable legal framework at national and, where appropriate, European and global levels.” This statement serves to emphasise that Internet-related problems deserve not only national and supranational attention but also global levels of governance because the Internet remains beyond the control of any single nation state or even the EU Member States combined.

The Bonn Declaration was followed in September 1997 by Martin Bangemann’s call for an Internet charter, which would focus on issues to do with technical standards, illegal content, licenses, encryption and data privacy:⁴⁸

“The current situation may lead to the adoption of isolated global rules with different countries signing up to different rules agreed under the auspices of different international organisations. An international charter would provide a suitable answer.”

⁴⁴ *ibid.*

⁴⁵ See the “Global Information Networks, Ministerial Conference,” Bonn 6-8 July, 1997, <<http://www2.echo.lu/bonn/conference.html>>.

⁴⁶ See <<http://www2.echo.lu/bonn/final.html>>.

⁴⁷ See Leong, G., “Computer Child Pornography - the liability of distributors?” [1998] Crim. L.R. 19; <<http://www.cyber-rights.org/isps/somm-dec.htm>>.

⁴⁸ See “A New World Order for Global Communications,” a speech by Martin Bangemann to Telecom Inter@ctive ’97, ITU Geneva 8 September 1997 at: <<http://www.ispo.cec.be/infosoc/promo/speech/geneva.html>>.

The idea was given further substance when Martin Bangemann and fellow-Commissioner, Sir Leon Brittan, launched a proposed framework for international policy cooperation and sought to start a process which could lead to the adoption of an International Communications Charter for the Internet in February 1998.⁴⁹

In November 1997, the European Commission adopted a new proposal for an Action Plan, promoting the safe use of the Internet, which would cover a three year period between 1998 to 2001.⁵⁰ The new Action Plan recognised that the Internet does not exist in a “legal vacuum”. However, because of the global nature of the Internet, the EU prefers self-regulatory solutions for the regulation of illegal and harmful content. The Action Plan, therefore, encourages the creation of a European network of hot lines to report illegal content such as child pornography by online users, the development of self regulatory and content-monitoring schemes by access providers, and content providers for combating illegal content. It also seeks the development of internationally compatible and interoperable rating and filtering schemes to protect users (especially children at risk from harmful content), and measures to increase awareness of the possibilities available among parents, teachers, children and other consumers to help these groups to use the networks whilst choosing the appropriate content and exercising a reasonable amount of parental control. The Commission’s Action Plan was adopted by a decision of the Council and the European Parliament in September 1998.⁵¹ It now returns to the European Parliament for second reading under the co-decision procedure.

Critique of the EU Initiatives

While all these initiatives appear attractive to concerned users, there are certain matters which should be carefully addressed before developing the suggested solutions.

First, although the new EU Action Plan suggests that “harmful content needs to be treated differently from illegal content”, what is “illegal” or “harmful” is not clearly defined. The Action Plan states that illegal content is related to a wide variety of issues such as instructions on bomb-making (national security), pornography (protection of minors), incitement to racial hatred (protection of human dignity) and libel (protection of reputation). But none of those issues listed is necessarily “illegal content”, nor even considered as “harmful content” (a concept probably undefinable in a global context)

⁴⁹ See the European Commission, *Communication on International Charter: The need for strengthened international co-ordination - Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions* (COM (98) 50, Brussels-Luxembourg, at <<http://www.ispo.cec.be/eif/policy/com9850en.html>>). See also Tucker, E., “Internet: EU tries to forge system of rules,” *Financial Times*, 5 February 1998.

⁵⁰ See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Action Plan on promoting safe use of the Internet* (Brussels-Luxembourg, November 1997). An online version is available at <<http://www2.echo.lu/legal/en/internet/actplan.html>>.

⁵¹ European Parliament and Council, *Decision No 10182/98/EC adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks*, (Brussels-Luxembourg, 16 September, 1998 at <<http://www2.echo.lu/iap/position/en.html>>.

by many European countries.⁵² Such laxity in the use of language was at the core of the successful challenge to the US Communications Decency Act 1996 in the US Supreme Court,⁵³ and states within Western Europe should especially avoid pandering to the lowest common denominator where the least tolerant can set the pace. The European Court of Human Rights in its judgment in *Handyside*⁵⁴ stated that the steps necessary in a democratic society for the protection of morals will depend on the type of morality to which a country is committed. Therefore, “harm” is a criterion which will depend upon cultural differences.⁵⁵ This emphasis on freedom of trans-frontier expression is prescient, especially if territorial expressions about rights or otherwise are under attack.

Second, as well as concerns about standards to be enforced, one should also examine closely the viability of the chosen mechanism. The creation and use of hotlines for reporting illegal content is encouraged by the EU Action Plan, and according to the UK’s Internet Watch Foundation’s annual report of March 1998 (which covers the period between December 1996 and November 1997), there have been 781 reports to the Foundation from online users and in 248 of them action was taken (206 involved child pornography, 16 adult pornography, 12 financial scams and 9 other). These reports resulted in the review of 4324 items, and the Foundation has taken action in 2215 of them (2183 referred to the Police and 2000 to ISPs). 1394 of these originated from the US, while only 125 of the items originated from the UK.⁵⁶ Yet, these figures tell us little, as the actual amount of child pornography on the Internet is unknown⁵⁷ so it is difficult to judge how successful the UK hotline has been. Another downside is that the efforts of the organisation are concentrated on the newsgroups carried by the UK ISPs. This means that while illegal material is removed from the UK servers, the same material will continue to be available on the Internet carried by the foreign ISPs in their own servers. The expensive monitoring of the Internet at a national level is of limited value as the few problems created by the Internet remain global ones and thus require global solutions.

While the EU Action Plan emphasises self-regulatory solutions, these may result in the privatised censorship of “controversial speech by banishing it to the

⁵² See further the European Commission, *Interim report on Initiatives in EU Member States with respect to Combating Illegal and Harmful content on the Internet, Version 7* (Brussels-Luxembourg, 4 June, 1997, at <<http://www2.echo.lu/legal/en/internet/wp2en.html>>).

⁵³ *ACLU v Reno* 117 S. Ct. 2329 (1997); Akdeniz, Y., “Censorship on the internet” (1997) 147 *New Law Journal* 1003.

⁵⁴ *Handyside v UK*, App. no. no. 5493/72, Ser A vol.24, (1976) 1 EHRR 737.

⁵⁵ European Commission Working Document, *Protection of minors and human dignity in audiovisual and information services: Consultations on the Green Paper*, (SEC(97) 1203, Brussels-Luxembourg, 13 June, 1997 at <<http://www2.echo.lu/legal/en/internet/gpconsult.html>>).

⁵⁶ See the IWF statistics at <<http://www.internetwatch.org.uk/stats.html>> and the annual report at <<http://www.internetwatch.org.uk/annual.html>>.

⁵⁷ But see the survey in the (Irish) Department of Justice, Equality and Law Reform, *Illegal and Harmful Use of the Internet* (Pn.5231, Dublin, 1998) pp.34-35, which suggests that 0.07% of the 40,000 newsgroups carry “child erotica” or “pornography”, plus 238 (out of around 50 million web pages) “girl-related child pornography or erotica” web sites (an unspecified larger number were boy-related). The definitions used are far from tight (see p.30), and claims that this source of child pornography is either “major” or “increasing” are unsubstantiated in the absence of earlier measures or measures of other forms of trafficking.

farthest corners of cyberspace with blocking and rating schemes”.⁵⁸ Rating and filtering products claim to empower users to block unwanted material from their personal systems. The most sophisticated and widely recognised of these systems is the Platform for Internet Content Selection (“PICS”), introduced by the World Wide Web Consortium.⁵⁹ European governments have been especially enthusiastic about this projected self-regulatory solution to Internet content. But according to a recent American Civil Liberties Union (ACLU) paper, third-party ratings systems pose significant free speech problems, creating a “cloud of smoke.”⁶⁰ Therefore, with few third-party rating products currently available, the potential for arbitrary censorship increases. According to the ACLU paper, “it is not too late for the Internet community to slowly and carefully examine these proposals and to reject those that will transform the Internet from a true marketplace of ideas into just another mainstream, lifeless medium.”

In July 1998, the Economic and Social Committee of the European Commission published its opinion on the EU Action Plan.⁶¹ Although favourably disposed in general, the Committee noted that very little attention has been given to illegal content in relation to protection of intellectual property, human dignity, and privacy or to offences relating to national and economic security.⁶² Furthermore, the Committee was not convinced that the technological solution proposed by the Commission on harmful Internet content is the most effective way of tackling a social problem. One of the dangers noted by the Committee with this approach is that, the use of filtering tools may create a false sense of security for parents and teachers, while children will quickly find any loopholes.⁶³ The Committee further questioned the claim that PICS will turn the Internet into an environment free of harmful content.⁶⁴ More importantly, the Committee was worried that the possibility of Internet Service Providers using filtering and rating systems at the level of entry would render these systems, dubbed as “user empowering”, an instrument of control, “actually taking choice out of citizens’ hands.”⁶⁵ Therefore the Committee stated that:⁶⁶

“The Committee supports the Commission in its view that cultural and social diversity based on freedom of expression is a thing of great value which must not be compromised by efforts to achieve a safe Internet; also that, in deciding what is harmful and what is not, the onus must be on the individual, whether or not in his capacity as educator.”

⁵⁸ Per Steinhart, B., Associate Director of the ACLU, see American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet*, 1997 at <<http://www.aclu.org/issues/cyber/burning.html>>.

⁵⁹ See above.

⁶⁰ See Washington Post editorial, “Filters and Free Speech,” *The Washington Post*, 24 November, 1997.

⁶¹ Economic and Social Committee of the European Commission, *Opinion on the Proposal for a Council Decision adopting a Multiannual Community Action Plan on promoting safe use of the Internet*, (OJEC, 98/C 214/08, Brussels-Luxembourg, 10 July, 1998) pp.29-32.

⁶² *Ibid* para 3.1.1.1.

⁶³ *Ibid* para 3.2.1.

⁶⁴ *Ibid* para 3.3.1.

⁶⁵ *Ibid* para 3.4.

⁶⁶ *Ibid* para 3.4.

Overall, the Committee felt that the Action Plan was over-ambitious. The Committee considered it highly unlikely that the proposed measures will in the long term result in a safe Internet⁶⁷ with the rating and classification of all information on the Internet being “impracticable”. The Committee, therefore, “sees little future in the active promotion of filtering systems based on rating.”⁶⁸ In the view of the Committee, the scope of the Action Plan should be restricted to combating illegal content, and a lower priority should be assigned to the development of means of combating harmful content. It may be noted that the Civil Liberties Committee of the European Parliament has also adopted a report on the Action Plan which concluded that combating Internet content which is liable to prosecution is a matter for the Member States.⁶⁹

A third point of critique of the Commission’s initiatives is that there are some overarching principles which are in danger of being lost from sight.

In political terms, these firstly include respect for national sensitivities and difference, so that most regulation must be pursued, if at all, at a localised level (the principle of subsidiarity). One might compare here the European standard-setting in the field of data protection,⁷⁰ where the problem was much narrower and where regional harmonisation was seen to be in furtherance of rights and mainly in conflict with other interests (economic or governmental) rather than other rights.

A second political principle tends in the opposite direction - towards universalisation. This consideration is the constant demand for respect for individual rights, which, as expressed through the Council of Europe’s European Convention on Human Rights and Fundamental Freedoms of 1950.⁷¹ Much of the text of this “external bill of rights” is shortly to be incorporated into UK law by the Human Rights Bill 1997-98.⁷² Amongst its many provisions relevant to criminal law and process⁷³ is a strong (though not absolute) statement in favour of free expression in Article 10(1)⁷⁴

“(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...”

⁶⁷ *Ibid* para 4.1.

⁶⁸ *Ibid* para 4.1.1.

⁶⁹ European Parliament, News report, “Promote use of Internet but crack down on illegal content,” 8 June, 1998, at <http://www.europarl.eu.int/dg3/sdp/newsrp/en/n980608.htm>.

⁷⁰ See Council of Europe Convention on Data Protection 1980; European Communities, Directive on Data Protection, 95/46/EC, OJ L281, 23 November 1995 (<http://www2.echo.lu/legal/en/dataprot/dataprot.html>). The Directive is now reflected in the Data Protection Act 1998.

⁷¹ Cmd 8969. See Harris, D., O’Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights* (Butterworths, London, 1995).

⁷² 1997-98 H.C. No.219. See “The House of Commons Library Research Paper, *The Human Rights Bill [HL], Bill 119 of 1997/98: Some constitutional and legislative aspects* (No: 98/27, 1998).

⁷³ See Leigh, L.H., “The influence of the European Convention on Human Rights on English criminal law and procedure” (1993) 1 *EJC, CL & CJ* 3; Ovey, C., “The European Convention on Human Rights and the criminal lawyer: an introduction” [1998] *Crim. L.R.* 4.

⁷⁴ Note also the requirement of respect for privacy of communications in Article 8(1), as recognised in *Malone v. U.K.* (Application no. 8691/79, Judgment of Court Ser. A. vol. 82, (1984); *Halford v UK*, Appl. no. 20605/92, (1997) *The Times* 3 July.

According to a European Commission working party report, “respect for the principles of the protection of minors and human dignity is a *sine qua non* for the development of the new services.”⁷⁵ But there are problems related to the use of rating systems and filtering software⁷⁶ not necessarily addressed by the EU initiatives. Far from empowering individual users or supervisors (such as parents), systems such as PICS are reliant upon a centralised system of classification of material content. But this classification process clearly takes control away from end-users and imposes standards which most do not have the time, inclination or knowledge to question (or even notice). The classification process also imposes forms of cultural hegemony which are most undesirable. What is illegal and harmful depends on cultural differences, and there are significant variations in different societies. There is even diversity in the most common example of child pornography. The definition of a “child” varies in different countries and also the creation and possession of computer generated (pseudo-photographs)⁷⁷ images of children are not always a crime. It is therefore imperative that international initiatives take into account different ethical standards in different countries in order to explore appropriate rules to protect people against offensive material. In this context it might be useful to quote from one of the more recent judgments of the European Court of Human Rights at Strasbourg stating that:⁷⁸

“... freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], 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. Such are the demands of that pluralism, tolerance or broadmindedness without which there is no democratic society.”

Next, there are also economic ground-rules. It is often the commercial exploitation of the Internet which predominates in governmental thinking.⁷⁹ However, inappropriate regulation of content may threaten the growth of the information technology and result in loss of market share and investment to competitors such as the USA or in the Far East.

⁷⁵ European Commission Working Document, *Protection of minors and human dignity in audiovisual and information services: Consultations on the Green Paper* (SEC(97) 1203, 13 June, 1997).

⁷⁶ See American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (August 1997, <http://www.aclu.org/issues/cyber/burning.html>); Cyber-Rights & Cyber-Liberties (UK) Report, *Who Watches the Watchmen: Internet Content Rating Systems, and Privatised Censorship* (November 1997 at <http://www.leeds.ac.uk/law/pgs/yaman/watchmen.htm>).

⁷⁷ Criminal Justice and Public Order Act 1994 s.84.

⁷⁸ *Castells v. Spain*, App. no.11798/85, Ser.A vol.236, (1992) 14 EHRR 445, § 42. See also *Lingens v Austria*, App. no.9815/82, Ser. A vol.103, (1986) 8 EHRR 407; *Demicoli v Malta*, App. no.13057/87, Ser.A vol.210, (1992) 14 EHRR 47; *Oberschlick v Austria* App. no.11662/85, Ser.A vol.204, (1995) 19 EHRR 389; *Jersild v Denmark*, App. no.15890/88, Ser. A vol.298, (1995) 19 EHRR 1

⁷⁹ See DTI, *Converging Technologies* (<http://www.dti.gov.uk/future-unit>) (1998)); European Commission, *Green Paper on the Convergence of the telecommunications, media and Information Technology Sectors, and the Implications for regulation towards an Information Society Approach* (COM(97)623); European Commission Directorate-General XIII, *Communication on the Need for Strengthened International Coordination* (COM(98)50).

Conclusion

By providing quick and cheap access to any kind of information, the Internet is the first truly interactive “mass” medium. It should not be surprising that governments around the globe are anxious to control this new medium,⁸⁰ and the Internet seems to be sharing some patterns common to the regulation of any new media. Most of the people concerned about the Internet are non-users of it, and there is exploitation of their concerns both by politicians and by the mass media.⁸¹ The full potential of the development of the Internet will depend upon society accentuating its opportunities for speech, information and education, whilst empowering, but not demanding, very localised forms of policing (often at the level of individual user) to permit or block any message according to content.⁸² The political and social diversity of Europe and the innovative technical openness and boundlessness of the Internet make other approaches virtually impossible and certainly undesirable.

⁸⁰ Human Rights Watch, “Silencing The Net: The Threat to Freedom of Expression On-line” [1996] 8(2) *Monitors: A Journal of Human Rights and Technology* at <<http://www.cwrl.utexas.edu/~monitors/>>.

⁸¹ Akdeniz, Y., “Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach,” in Edwards, L and Waelde, C eds, *Law and the Internet: Regulating Cyberspace* (Hart Publishing, Oxford, 1997).

⁸² Compare (Canadian) Information Highway Advisory Council, *Preparing Canada for a Digital World* (1997, at <<http://strategis.ic.gc.ca/SSG/ih01650e.html>>); (French) Conseil D'Etat, *Internet et les réseaux numériques*, 1998 at <<http://www.internet.gouv.fr/francais/textesref/rapce98/accueil.htm>>; (Irish) Department of Justice, Equality and Law Reform, *Illegal and Harmful Use of the Internet* (Pn.5231, Dublin, 1998) paras.5.1.3, 5.2, 5.3, 5.5.