The privatisation of censorship: self regulation and freedom of expression

Book section

Chapter 11

The Privatisation of Censorship?

Self regulation and freedom of expression

Introduction: Convergence, self-regulation and freedom of expression.

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

   European Convention on Human Rights Article 10.

Public policy debate concerning self-regulation of the media is deeply ambivalent. On one hand, public opinion in democratic states tends to support self-regulation enthusiastically where the alternative is regulation by the state. On the other hand, if

self-regulation is seen as effective, it can provoke uneasiness about 'privatised censorship' where responsibility for fundamental rights is handed over to private actors, many of which are centres of power in society.[1] The purpose of this section is to place the results of research on self-regulation across media industries in the wider context of freedom of expression concerns. The goal is to identify areas of conflict between the activities of self-regulatory bodies and freedom of expression rights, in order to understand the implications for freedom of expression of the restrictions on the content of speech that originate in the actions of those self-regulatory bodies.

We will consider how freedom of speech is understood in Europe, and address the areas of conflict or potential conflict between self-regulation and free speech. We will focus on whether imposing limits on freedom of expression via self-regulatory bodies is easier to justify than state regulation, and if so, with what conditions and to what extent limitations are tolerable in a system that takes rights seriously.[2]

Any form of content regulation in the media industry, whether through statute or code of conduct, may encroach on citizens' speech rights. Nonetheless, as it is clear in Article 10 of the ECHR, free speech is not an absolute, and can be balanced against other rights, or the rights of others. In this chapter we examine the question of self-regulation and freedom of expression in terms of the legal situation.[3] We investigate the balancing of rights as carried out by self-regulatory regimes and mechanisms not in isolation, but as this interacts with the courts, the legislature and the executive. We argue that it is not possible to resolve the difficult question of speech rights and self-regulation at a high level of legal abstraction. We look instead at policy and socio-legal implications, for example through the analysis of the nature and extent of

limitations imposed by self-regulatory bodies, and considering when and if these bodies are regarded as 'public authorities'- sharing the power of the state. State, public, and private organisations performing regulatory activities routinely balance the speech rights of citizens against other objectives; it is necessary to be aware of the detail of regulatory functions on a case by case basis. At a higher level of generality, we also need to revisit fundamental principles underpinning the justifications for free speech protection. A framework for evaluating the impact of self-, co- and state regulatory functions[4] is outlined.

Limits imposed on freedom of expression by self-regulatory bodies

Before we consider the limits imposed on freedom of expression by self-regulatory bodies let us turn our attention to the various models for media content regulation contemplated in current frameworks of regulation in Europe. It is important at this stage to note that the array of limitations placed on content varies in different models of regulation. Partly because of the emergence of frameworks tailored for specific forms of speech and modes of delivery, there exist widely different legal systems, ranging from prior rating and classification (film and video, video games, ISPs, internal self-regulatory mechanisms at broadcasters, etc.) to post-publication self-regulation via complaints (journalistic ethics and press councils for print/online publications, such as the UK PCC and German Presserat; Ombudsman or readers' editor systems at newspapers and other systems of accountability). Controls on content are set up with various goals in mind, such as protecting the reputation of others,[5] protecting minors from harmful speech, the need to keep up standards of journalistic ethics or to protect consumers by making the media accountable. For the

most part these different models of content regulation strike quite different balances between free speech concerns and the degree of intervention deemed acceptable.

The following historical models of content regulation based on means of delivery can be distinguished in EU member states:

- The book model, not addressed in this study, gives all content rights to the communicator, and consequently, regulatory intervention in content is deemed undesirable.

- The periodical print media model is strongly influenced by the concept of the free market of ideas, and so here content intervention is also deemed undesirable. Content regulation is based on ordinary law; above and beyond this, there is space for the ethical principles of the journalistic profession, which in turn help make the media accountable to its readership. The control on content via journalistic ethics is in some cases manifest as self-regulation, with or without a complaints commission charged with the task of implementing a code of conduct. The areas covered by the code concern voluntary regulation.[6]

- The European broadcast media model[7] involves the strongest content regulation considered here. Controls are based on a broad notion of the public interest. The rationale is that frequencies used for broadcasting are scarce, therefore must be coordinated, and access not automatically granted to everyone. In addition to ordinary law there is close regulatory control of

content based on statute and an array of codes connected to the award of a licence.

- The emerging Internet model of content regulation seems at first sight closer to the pure print model in EU countries, as it relies to a great extent on industry self-regulation by means of codes of conduct combined with technical controls. The model of content regulation for online news so far has been most similar to pure print media, but as we have seen, games, mobile, and other emerging variants present contrasting approaches.

New technological developments continually upset and erode these regulatory models and as a result may prompt new settlements, changing the boundaries between self-, co- and public regulation. On the one hand in the broadcasting sector, statutory regulatory bodies find it increasingly difficult to cope with the sheer volume of material that they are responsible for regulating. Technical progress makes available new services, for example on digital and interactive platforms.[8] The need to devolve at least part of the regulatory responsibility to the Regulatee (or to pass part of the control to the consumer) is particularly felt for content, where the Regulator had traditionally held responsibility for detailed monitoring and reporting. As we have seen, not only are the means of regulation under challenge, but the current justifications of regulation are undermined by technology, as many argue that, given increased volumes of media content, and higher levels of user control and choice, it becomes both less practical and less justifiable to have central regulatory oversight of content. In this context, self-regulatory codes of practice are becoming the preferred practical solution.

The acceptability of limits imposed on freedom of expression depends on the type of speech that is being conveyed. Not all content is treated in the same way. Commercial speech or "commercial statements" in the wording of the ECHR, i.e. speech whose main objective is the proposal of a commercial transaction, is subject to a considerable degree of control.[9] The rationale is the potential of commercial speech for confusing or misleading the public. Political speech is subject to the lowest level of control. The rationale here is that the ability to criticise public officials in all matters of public interest must be wide-ranging in order to protect the health of democracy. As the European Court of Human Rights clearly expressed it in *Haes and Gijsels v. Belgium*, even unpleasant or problematic information deserves to be protected:

> … the Court reiterates that freedom of expression 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 section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[10]

Artistic speech is in between those two extremes. Article 10 offers protection either in the case of prior control or ex post facto control. As regards the philosophical underpinnings of this right, both the justifications from democracy and self-fulfilment are deployed in the jurisprudence of the European Court of Human Rights, although the emphasis tends to be on the argument from democracy[11]. There is a gradation, and

we see that reliance by the European Court upon the justification from democracy made the case law less tolerant of restrictions of political expression[12] while in cases in which freedom of expression is supported by concerns relating to self-fulfilment there is more scope for the member states to impose limits on freedom of expression (e.g. *Wingrove v. UK*).

Functions and models of self-regulation

For analytical purposes it is also important to distinguish different functions in the process of speech regulation. The legal traditions of liberal democracies (and hence the case law of the ECHR) have not applied a blanket presumption in favour of freedom of expression: they have adjusted both for the type of content involved, and for the form of regulation. To take one example from English law, in *Venables v. News Group Newspapers Ltd and others*[13] we see the High Court prioritising the claimants' right to protection of their new identity over the freedom of expression rights of the defendant newspapers. The claimants had sought injunctions to protect their identities on their imminent release from detention – they were 10 years old when they had murdered a child. They had grown up and hence physically changed since their detention and a new identity could protect them from revenge. The injunction was granted: a restriction a priori, as the after-publication system offered by print media self-regulation would not be able to offer protection in the circumstances. "The press code, as applied by the Press Complaints Commission, is not, in the exceptional situation of the claimants, sufficient protection. Criticism of, or indeed sanctions imposed upon, the offending newspaper after the information is published would, in the circumstances of the case, be too late. The information would

be in the public domain and the damage would be done. The press code cannot adequately protect in advance."[14]

Concerns with freedom of speech can be radically different according to which control function is being undertaken, which kinds of speech, and the means of delivery for that speech. In Western Europe in some cases (rating content for taste and decency in broadcasting for instance) we see that a society is much more comfortable with state or governmental organisations undertaking regulatory functions than we would with others (monitoring news or political content in the press for example).

In the following chart the regulatory functions have been considerably simplified for analytical clarity. In practice many of the functions overlap. For each one, a variety of public, governmental, quasi-governmental and industry bodies are involved. Alongside the question of their role with regards to freedom of expression, and the balancing of public interest arguments for regulation or rights balancing freedom of expression, different traditions of freedom of expression place a differing emphasis on the relative importance of state, public, or private curtailments of those rights.

[Insert Figure 11.1 near here]

With the basic philosophical justifications (outlined above) in mind, it is clear that concerns with freedom of expression differ across the various objects of regulation. There are, for example, some functions of regulation more appropriately carried out by a body independent of both Government and the Regulatee. Other functions are best left to the industry board or individual providers. In the latter case it may of

course be necessary to define very well the standards and benchmarks of regulatory transparency and accountability before self-regulation can be defended.

Although over-arching categories fail to capture the complexity of regulatory tools and regimes, in order to make sense of regulatory schemes some approaches[15] have categorised them as either self-, co- or statutory regulation. Others[16] have taken a more functional approach, referring for example to self-monitoring. Categorisation facilitates the understanding of issues at a theoretical level; in practice, however, most individual media outlets operate in a complex ecology of all three main types of regulation. Regulatory schemes interact for example when the ratings set by an industry-managed self-ratings board are applied within a legal framework governing broadcast licenses or video retail and rental as is the norm in Europe. The Press on the other hand is subject to civil (or criminal) penalty for defamation, libel, obscenity, and hate speech and at the same time is subject to self-regulatory codes that overlap with some of that general law. Models of co-regulation seem to allow governments not to abdicate from their ultimate goal of protection of the public from harmful content. (NB co-regulation is generally termed “regulated self-regulation” in German administrative law[17]).

This functional approach to self-regulation permits us to make explicit some policy concerns which are connected with the development of self-regulatory activity. Let us take the UK as a case study, and apply this functionalist view to regulatory activity, as we outline in Table 11.1.

[Insert Table 11.1 near here]

[18]

This table is a simplification, but it helps us spell out some of the freedom of expression concerns that arise with convergent content self regulation, and it also helps us to transcend the polarised debates where those concerned with harms (e.g. child protection agencies) oppose those who defend free speech. We can see that the shift between self-, co- and state regulation is a complex one. Communications regulation more often than not involves elements of all three forms of regulation. Taking the example of internet content regulation of illegal content: legislation determines the scope of what is forbidden. The role of the hotline, the IWF in dealing with illegal content, and the particular stress and focus taken by the IWF is determined by the IWF itself, and content is removed by ISPs themselves. Complaints come mainly from the public to a hybrid industry-public board which adjudicates. Some aspects of this chain, for example writing the criteria for determining what constitutes illegal material, and setting the operational priorities for the access control agency should arguably be kept away from government agencies. For legitimacy some role for Parliament may be required. In others, we may be more relaxed, but – and this is the important point – only if sufficient safeguards of transparency and procedure are observed.

The European and the American experiences

As noted, the fundamental justifications for the protection of speech draw traditionally on three arguments – from truth, from democracy and from self-expression – which will have different relevance at different times[19]. For example, as a society we should be particularly concerned (and argue the point from democracy) if political speech regulation falls under governmental control as this would risk compromise of political pluralism. Governments wishing to remain in power have a very direct interest in closing down or controlling political debate and should not be given tools to do so. In the case of pre-viewing and rating of content we would have a similar caution in relation to political speech but case law – as with the case of *Wingrove* (see below) – tends to illustrate the fact that prior restraint is of less concern where speech is artistic and not political.

The European tradition of free expression is enshrined in the national legal traditions of the countries surveyed in this study, as well as in the ECHR case law – in this paper we take Strasbourg to illustrate the European tradition, as a reflection of a "common European denominator" [20] on the matter. Unlike the First Amendment to the United States Constitution, which prioritises freedom of speech over other rights[21], the system of the ECHR tends to be more comfortable with the idea of balancing the competing rights set out in the convention, giving free speech is similar strength to other rights.[22]

The American tradition, however, appears less concerned with curtailment of speech rights by private organisations than the European. This is illustrated by the *Yahoo*

case, which concerned the possibility of French Internet users accessing websites selling Nazi memorabilia hosted in the United States. Under French law the display and sale of that type of merchandise is illegal. The key issue of difference between the legal reasoning of the courts in the US and France lies in the conception of freedom of expression and the acceptability of limitations on free speech. In the United States, the answer is to allow even more speech. The United States has repeatedly expressed free speech reservations against outlawing hate speech, a concern which tends to be viewed in less absolute terms in Europe.[23] For example, the indictment in 1997 of Felix Somm, the head of the ISP CompuServe in Germany for failure to prevent the dissemination of neo-nazi material[24], can be contrasted with the US Supreme Court's finding that it was unconstitutional to regulate expression on Internet through the Communications Decency Act.[25]

In Europe, Article 10 sets out freedom of speech as a fundamental right subject to restrictions "prescribed by law" and "necessary in a democratic society."[26] As a commentator put it, the question is often how far a member state can limit freedom of expression to protect third parties against damages.[27] In Strasbourg the question therefore is about managing the tensions arising out of the applicants' free speech claims over the governments' exercise of powers that encumber those rights. In the adjudication of those tensions, the ECtHR indicates whether or not the burdens placed on free speech by the national authorities were within their "margin of appreciation". Our focus in this chapter is on limitations placed on free speech by self- (and to some extent co-) regulatory bodies. Pre-publication restrictions are viewed with suspicion, particularly in a First Amendment environment. In Europe, in contrast, there is still a measure of censorship, in varying degrees according to countries, regarding the a

priori classification of films and video and also, the quite detailed control of broadcast content.

Control over limitations placed by self-regulatory bodies: the interface between self-regulation and the state

Speech may be restricted prior to publication or penalties/redress imposed after. It is expedient, given new technology and globalisation, to regulate media industries through private or semi-private organisations funded (and in many cases entirely controlled) by industry. For some, this is positive for freedom of expression, as it moves content regulation away from the State or government. This view is particularly prevalent in US approaches to self-regulation where the First Amendment tradition focuses on a mistrust of state or government, and on expansive protection of free speech, particularly against viewpoint-based regulation.

An opposing view claims that this is a narrow, negative treatment of freedom of expression[28]. In this view, industry bodies increasingly regulate not only the voluntarily delegated content of their funding members, but the speech – as is the case with ISPs – of the broader population of users. Speech could be suppressed without the protections that the legal system grants, had the limitation originated in the authorities. Were the activities of industry bodies to take over these public functions, it is argued, such self-regulation would in fact constitute a direct threat to speech rights as it instates a so-called 'privatised censorship'. In these terms, the shift of regulatory authority to co-regulation and self-regulatory functions should be viewed

with suspicion, as by means of self-regulation more onerous standards may be imposed in the shadow of the law.

Due to the increasing complexity brought about by technical progress across all mass media, coupled with the tendency towards devolving at least part of the content regulation to the Regulatee or the consumer, equally, there appears to be a trend towards the de-constitutionalisation of freedom of speech. Are we in the presence of valid waivers to the fundamental right to free speech when parties enter into a voluntary self-regulatory regime? Are we leaving public law concerns behind and moving into the realm of contract? The apparent private erosion of rights granted by the (public) copyright law regime by means of the use of "click here" adhesion contracts has been noticed some time ago.[29] Similarly, Lawrence Lessig warns about the use of (computer) code to regulate cyberspace as an "invisible regulation" which is harder to resist than government regulation,[30] although he sees contract as less dangerous for rights than computer code because a court is the ultimate arbiter of rights set out in a contract.[31] Private law prioritises the discretion of the parties. The risk those authors are warning against is that the substantive choices that are being made in the shadow of the law appear to be the ones that are less protective of the values of freedom of speech or that favour too much the commercial interests of the industry.

If self-regulation means that the parties to a system privately establish the scope of their legal obligations instead of government imposing them, and a regime in which a code of conduct or a code of journalistic ethics imposes a voluntary set of restrictions on an industry and on stakeholders (e.g. consumers, readers, users, etc.), this does not

necessarily lead to a situation in which fundamental rights are not taken seriously. If the result tends to be too often that parties suppress or limit speech – to an extent that the government may not[32], or to an excessive degree – this may be an indication that not enough safeguards are in place and the discretion of the self-regulatory body in question may need to be reviewed and brought back to margins that are acceptable. Angela Campbell points out, for example, that in the United States self-regulation could be used instead of government regulation so as not to engage First Amendment protection (in her example, no constitutional issue arises if a station, a group of stations, or an industry body chooses not carry alcohol advertising.)[33] If they were obliged by law or a statutory regulator not to carry a certain content first amendment challenges would be more likely. Similarly, internet filtering software voluntarily introduced by providers of content and others was viewed by First Amendment activists as a panacea that conciliates free speech ideas with the protection of minors.[34]

The tendency we observed is that in Europe self-regulatory regimes all impose more onerous requirements than those of ordinary law. This can be seen across the media industries. Where consumers can chose between different companies' codes of conduct, these codes are less of a freedom of expression concern. A consumer may trade off some of the freedoms of choosing an ISP with a restrictive code for the increased security, for example. But where codes become sector-wide or cross-sectoral, there may be increased concerns. If all ISPs operate filter level blocking based on a non-transparent blacklist provided by government (as the new Finnish code will require)[35] this is more likely to chill speech.

For this very reason it is likely that self-regulation – particularly if it continues to expands its scope, as we have seen in the trends highlighted by our research – will come under increasing scrutiny and challenge in Europe. If the concern is to make self-regulatory regimes more acceptable to all stakeholders and to the public, from the point of view of public interest, then it seems necessary to start viewing self-regulation in terms of specific safeguards and measures taken to limit liability of self-regulatory institutions themselves in the face of a challenge to their activities via ordinary law. A potential solution is to increase accountability to include procedural protection for rights (perhaps by means of court reviewability of decisions taken by self-regulatory bodies), or by strengthening the codes and/or the decision-making of those self-regulatory bodies. One possible way to achieve this would be to place them in the context of a co-regulatory regime where the privately-agreed limitations may be audited by the authorities with the specific purpose that substantive free speech rights are given due attention.

If we consider Meiklejohn's argument from democracy to protect free speech – the argument that the sovereign people have delegated a part, but not all, of their self-government to the state authorities – we can see that self-regulation of the media can be placed among that realm of rights to self-government which were not delegated to the state. The argument for self-regulation of the media as an alternative to legislation means using self-regulation mechanisms (codes, bodies able to apply a code, etc.) to provide a framework of limitations which in turn provides a system of accountability. Nonetheless, a self-regulatory regime can offer protection of freedom of expression of newspaper editors and proprietors, broadcasters, etc. against government regulation

and also against those restrictions lobbied for by certain groups (e.g. protecting against low standards of journalism, intrusion into private life, etc.)

To make sense of self-regulatory mechanisms and their codes of conduct, and to include issues of accountability, we therefore suggest understanding those schemes as if they were contractual agreements - part of the discretion enjoyed by parties in the realm of private law. Parties enjoy freedom to agree to a mechanism and code. Admittedly, not all parties have equal bargaining power and the readership, audience or users agree to abide by a self-regulatory system by a "click here" type of adhesion contract or by signing to in the small print of contracts with ISPs, for example. Hence the heightened need for transparency, consumer protection, stakeholder involvement and other ways of ensuring accountability and preventing abuse.

We recognise the existence of principled objections to intrusions on a fundamental right such as free speech, whether the intrusions result from state action or the action of private parties. The other side of the coin is that like any right, free speech may however be subject to legitimate limitations. There is agreement among writers and practitioners at the level of fundamental principles that the freedom of expression of one person could harm another and therefore curbing certain forms of expression ensures fair play (that certain ideas do not dominate), which in turn furthers the goals of free speech.[36] There is agreement also at the more concrete level of the everyday functioning of the media that regulation is in order (for the reasons discussed in Chapter 2), and that the media are unlike any other regulatory object because, among other reasons, the media are systems of communication by which members of a society understand themselves and others. In a liberal democracy the mass media also

fulfil the extremely important role of watchdog of the authorities. Limitations, of course, need to be imposed by an authority or a private party that enjoys legitimacy, and following transparent procedures. Limitations can be placed directly or indirectly, for example the informal influence from the authorities and threat of state action if nothing is done. Examples of the symbolic manoeuvring and dialogue between governments and media are numerous; state involvement in ISPs ranges from exhortation in ministerial speeches, to direct involvement in setting up task forces. In Italy, the 'voluntary' ISP code was drafted by the Ministry of Communications.

The courts and self-regulation: interface between limits imposed via self-regulation and limits imposed by state authorities via regulation

Self-regulatory institutions have to judge the limits of free speech. As an English court said of the UK Press Complaints Commission: "the commission has to consider and balance in many cases the important but countervailing freedoms of privacy and of expression. The Commission then has to exercise a judgement on the particular facts as to when the right to privacy of a complainant ends and where the freedom of expression of the publisher against whom the complaint is made begins"[37]

A key question is to what extent self-regulatory bodies are likely to be challenged in court, in particular with regard to the standards set out in Article 10.[38] In the UK as a the courts have generally left a great deal of room for manoeuvre to self-regulatory organisations. Where reviewed, their curtailment of speech is rarely overturned. But there is very little case law, (and none on ISPs or hotlines). In an analogous sector, the press, judges have repeatedly supported the view that although the PCC could be

amenable to judicial review, its decisions should be left unchallenged under Article 10. In any case the PCC generally errs in favour of free expression in its adjudications and code.[39]

Turning from the PCC to the BBFC (the self-regulatory body of the UK film industry) allows us to consider a case in which Article 10 was invoked. The BBFC classifies films with the approval of central and local government, who retain the power to review decisions or refuse a local showing of a film classified by the board.[40] We should indicate that this case pre-dates the Human Rights Act 1998 (HRA) and the issue whether self-regulatory bodies can be considered "public authorities" within the terms of the HRA.

Nigel Wingrove, a London based film director, was refused a certificate by the BBFC for his film "Visions of Ecstasy", deemed blasphemous (it addresses erotic fantasies of St. Teresa of Avila focused on the crucified Christ). Wingrove would have been liable to prosecution under the Video Recordings Act 1984 had the film been distributed. After his appeal was rejected by the Video Appeals Committee, Wingrove took his case to Strasbourg. Although the result may well be viewed as disappointing for free speech, the point we would like to highlight is procedural. The limitation placed on speech by the self-regulatory body here was subject to appeal to higher instances. We want to illustrate with this example a case in which self-regulatory bodies function within a system in which it is perfectly possible to challenge the balance of rights performed by those bodies. It is not a situation of privatised censorship without further recourse. It remains to be seen if other bodies exercising a semi-judicial function are open to similar challenge. ISP associations, hotlines and

individual ISPs are currently protected by a limited liability regime, but they do exercise significant censorship functions.

There was an initial victory for Wingrove at the then Strasbourg Commission, which deemed the UK in breach of Article 10. The ECtHR, however, found for the UK Government. The judgment stated that there had been no violation of Wingrove's freedom of artistic expression. The Court accepted the view that the UK government was entitled to consider the impugned measure necessary in a democratic society. In the sphere of morals or especially, religion, the margin of appreciation is quite wide.

In scholarly writings on the balance of rights reached by the BBFC, the ECtHR in *Wingrove* were seen as disappointing. Voorhoof[41] explains that the European Court did not rely on a survey of existing legislation in other European countries which could have perhaps countered the arguments of the UK government. Legislation on blasphemy exists only in few other European countries and those laws are rarely used. Strasbourg also missed the opportunity to explore the well-known inconsistency in the English law on blasphemy, which only extends to the Christian religion. Neither did the Court estimate the measure as disproportionate, even though it amounted to a total ban of the film. The European Court was persuaded that the values the BBFC and domestic law were trying to protect took priority over the concerns of freedom of expression. Prior restraint in this case was considered as necessary, because otherwise in practice, the film would escape any form of control by the authorities.

We provide a second example. Self-regulatory bodies' exercise of their powers and the limitations they place on fundamental rights continued to be subject to Strasbourg

review. In *Peck v. the United Kingdom*,[42] the applicant, Geoffrey Peck, had attempted suicide by cutting his wrists with a kitchen knife in Brentwood High Street in 1995. He had lost his job and his partner was terminally ill. His actions were caught on CCTV and an operator alerted the police. The police took Peck to a police station and he received medical help. The footage was broadcast and frames appeared on newspapers. Peck complained to the UK broadcast regulators BSC and ITC, and to the UK PCC. The broadcast regulators upheld Peck's complaints. The UK PCC, on the other hand, rejected it. Peck applied for judicial review of the press self-regulatory body, but this was rejected. He complained to Strasbourg. The European Court found that in the UK there was no adequate protection for privacy (Article 8 of the ECHR) as the self-regulatory and statutory regulators did not offer sufficient redress:

> The Court finds that the lack of legal power of the commissions to award damages to the applicant means that those bodies could not provide an effective remedy to him. It notes that the ITC's power to impose a fine on the relevant television company does not amount to an award of damages to the applicant. While the applicant was aware of the Council's disclosures prior to "Yellow Advertiser" article of February 1996 and the BBC broadcasts, neither the BSC not the PCC had the power to prevent such publications or broadcasts.[43]

We have seen that self-regulation operates in an area of freedom of choice associated with the sphere of the private. We have observed that via self-regulation limitations on speech rights can be introduced, and had those limitations been applied by law or a

statutory regulator challenges could be mounted on the basis of breach of fundamental rights. It seems, therefore, that self-regulatory mechanisms and codes are less protective of individual rights.

Are Self-regulatory bodies public authorities?

The examples discussed above beg the question - are self-regulatory institutions bodies against which ECHR rights are enforceable? The question in the UK hinges upon whether or not the body in question can be considered a "public authority" as expressed in the 1998 Human Rights Act, the statute that incorporated the ECHR into domestic law in the UK. In other signatory countries, there are different approaches to this question of how to define a public authority. Taking the UK again as a case study, we can ask how the dividing line between state and self-regulating bodies should be drawn. The reasoning of UK courts to declare the Advertising Standards Authority (ASA; the self-regulatory body for advertising) reviewable focuses on it being a body "clearly exercising a public function which, if the ASA did not exist, would no doubt be exercised by a (statutory office)."[44] We also supply some examples from other jurisdictions.

Editors control newspaper content, and television broadcasters likewise perform a gate-keeping function. But do ISPs, content ratings bodies or press councils have the right to interfere in this process? These questions are applicable in all the countries surveyed. We do object to regulators, states and governmental bodies getting involved in the filtering process behind publication if that results in free expression rights being curtailed without transparency and due process. We object because

interference in the marketplace of ideas by state authorities should be subject to the strongest inspection, as the marketplace enables democratic pluralism and debate about competing truth claims. Clearly, the extent to which a self-regulatory body – be it a press council, a video games or internet content rating body – is viewed as a state or, in UK HRA terms, a "public authority" is important to freedom of expression.

If one's view of freedom of expression defines it negatively – i.e. as the absence of state interference, then support for self-regulatory bodies will generally be viewed as conducive to speech freedom. At one level this is a technical question. EU member states all have a slightly different framework for assessing whether a body is to be considered a public authority and therefore whether Convention rights such as the right to free expression are enforceable against them. A parallel question arises with regard to which bodies are subject to the binding effects of EU directives. According to Craig and De Burca "a body which has been made responsible for providing a public service under the control of the State is *included* within the Community definition of a public body. Case law since then has not notably clarified the situation but has left it to the national courts to apply the loose criteria."[45]

How the question of applicability is resolved will have a fundamental impact on the nature of self-regulatory bodies, and their responsibilities to uphold freedom of expression. Taking the example of the UK, section 6 of the Human Rights Act makes it unlawful for a public authority to act incompatibly with Convention rights including Article 10. This applies to both pure public authorities such as statutory regulators, government departments and the police and also 'functional public authorities' which combine public and private functions. The upshot of this is that if industry self-

regulatory bodies take on more public functions they will eventually trigger a greater responsibility to uphold freedom of expression and other convention rights. Should they fail to do so they could face judicial review under Article 10.

In the case Selisto v. Finland (2004) the ECtHR accepted that the exercise of the freedoms guaranteed by Article 10 carries with it "duties and responsibilities" for a journalist as the statements made in an article may affect the reputation and rights of private persons. And these duties and responsibilities may be established by self-regulation and contained in a code of journalistic ethics. In the Court's own words: "By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism". [46]

The converse theoretically also applies, with more worrying consequences. As regulatory functions are shifted from public authorities to private ones, the public may have fewer, if any opportunities for redress on Convention rights such as Article 10. Put simply, the actions of self-regulatory bodies could fall outside the scope of ECHR protection. However, member states of the Strasbourg system are under an obligation under Article 1 of the ECHR to ensure the effectiveness of the freedoms contained in the Convention. If self-regulation is not effective the state cannot absolve itself from responsibility by delegating to private bodies or individuals.[47] The key is the adequate balance of the different interests: "Restrictions on the information flow due to self-regulation may, however, qualify as legal restrictions under Art. 10 (2), hence

rendering the state liable for not guaranteeing the fundamental right of journalists and the public's right to receive information and ideas on matters of crucial importance."[48]

There is no evidence that sufficient thought has been given to this issue by self-regulatory authorities or by those who fund them or in the broader policy framework. At present, there is some dispute regarding criteria for deciding whether a body is to be considered a public authority. In the UK for example, the Parliamentary Committee on Human Rights has recently expressed concern that the constitution and organisation of the Authority, rather than the public nature of the function performed determines whether a body is public or not. In such a context, the gradual transfer of control over regulation of content to privately funded bodies would result in a lack of remedy or reviewability of those decisions. Technically, the shift of emphasis might lead to a decline in freedom of expression cases. So the simple example of reducing risk of challenge by adopting self-regulation rather than statutory regulation – to use the example cited by Angela Campbell (1998) – would be a solution that masks an overall reduction in protection against the actions of regulators. In this view a shift to self-regulation could lead to an overall diminishment of protection and redress, rather than an improved climate of free expression.

The Government and self-regulation

It is a cliché to say that self-regulatory institutions often find themselves in a relationship of threat and response with governments. Many self-regulatory codes are written with the express aim of heading off potential statutory regulation and in many

cases governments go as far as drafting model self-regulatory codes to stimulate 'spontaneous' action by industry. This was the case recently in Italy, where the Department of Communications took the initiative in convening a stakeholder group from the Internet industry and drafting a code of conduct that would be 'voluntarily' applied by ISPs. Leaving aside the strategic problems with this approach (in terms of legitimacy and sustainability of codes) it also raises the interesting case of when self-regulatory institutions cease to be self-regulatory because they are effectively government-sanctioned bodies. Whilst the Italian code as originally drafted was not implemented by the stakeholders, it would have been an interesting case were it implemented. Not only was the code essentially imposed on the industry by Government, but the code itself essentially consisted not in a set of agreed voluntary standards, but a summary of existing statutory standards, i.e. a guide to compliance with existing law. It seems unlikely that such a code – were it enforced - would be viewed as a pure form of self-regulation. In fact, it was largely rejected by the Italian ISP industry in its original form. Frydman and Rorive[49] argue for the Internet industry itself to self-regulate according to international standards. Under the European E-Commerce Directive, Internet Service Providers, to avoid potential liability, must take down illegal content that they are hosting, if notified of its presence. The liability of ISPs for third party content is an example of indirect public ordering. Since the ISP is not the originator of the speech the freedom of expression protections are not engaged by imposing liability on them rather than directly on the speaker. The difficulty with this approach (as we have seen above) is that ISPs might be too willing to avoid liability and hence be too quick at taking down material, thereby curtailing speech. The fact that the interaction will be in the realm of private law (limited as to whether the take down violated the contract between the user

posting material and the ISP rather than as regards the broader constitutional implications of limiting free speech) might result in chilling effects on free speech.[50] [51]

The ECHR requires limitations on speech to be 'prescribed by law' as well as 'necessary in democratic society'. Whilst this aspect of the role of communications self-regulation is yet to be tested in court, there is clearly a scope for discussion in many cases as to whether certain aspects of the self and co-regulatory regime constitute rules that are 'prescribed by law'. At one end of a continuum purely voluntary ethics codes of single companies are clearly not law, but at the other, codes that are encouraged through a legislative framework but administered by an industry association may be considered for these purposes to be law.

Justification for limitations imposed on freedom of expression by self-regulatory mechanisms: Important procedural considerations to ensure accountability: transparency, openness, due process, stakeholder participation

Free speech considerations, as set out in Article 10, constitute a yardstick of first principles in the field of media regulation. Although it is arguable the extent to which the "horizontal effect" of the ECHR applies (i.e. its application between private parties, or between a private party and a self-regulatory body)[52], it is clear that self-regulatory bodies of the media must act in a way that is compatible with the provisions of the ECHR. Their activities – and codes and methods of implementation

– are to be measured, ultimately, against the free speech standards contemplated in the ECHR.

For the ECtHR there must be "expression" and a "restriction". The triple test[53] applied by the European Court of Human Rights in the field of free speech is as follows:

- Is the restriction "prescribed by law" (Art. 10 (2) ECHR)? Law means written or unwritten law. (The common law member states of the Council of Europe would have been discriminated against, as explained in the *Sunday Times Case (No. 1)*[54] if an institution such as contempt of court would have been declared not to satisfy the conditions of accessibility and foreseeability of an interference "prescribed by law" for the sole reason that it was not set down in statutory form.[55])
- Is there a legitimate aim in the restriction placed on freedom of expression? There is a list of enumerated reasons in the case law of ECtHR, for example the restrictions based on the protection of public morals placed on pornography.[56]
- Is the restriction proportional to the aim sought by the authorities? Is the limit necessary in a democratic society? Free speech concerns are balanced with opposing interests.

On the other hand, to prevent unlimited discretion on the part of self-regulatory bodies, it is of great relevance that good practices are adopted in their decision making and other activities. Good practices make the action of those bodies less likely

to hamper freedom of speech beyond the threshold of an interference deemed "necessary in a democratic society". Let us now focus on the guidelines for good (self-) regulatory practice discussed in more detail in chapters concerned with sectoral analysis in this report:

- External involvement in the design and operation of the self-regulatory scheme. Two examples will illustrate this point of good practice. In the case of the video games industry the now dominant model for self-regulation on a pan-European level is the PEGI rating system (the Pan European Games Information), whose rating system was a result of a period of collaboration and negotiation between stakeholders from national self-regulatory organizations and the industry, and the project also received either advice or support from major video console manufacturers, experts in the field, and relevant stakeholders within the European Commission. Another example of ratings is the "Platform for Internet Content Selection – PICS" which has the same shortcomings as any ratings system.[57]

- Strong stakeholder involvement. The Catalan Information Council had strong stakeholder involvement from its inception. This grassroots initiative by the Union of Journalists of Catalonia included members of civil society in all stages of its creation and functioning. At launch, the voluntary and consensual character of the council and code was emphasised and formalised by the signature of a document of creation; the council was established for a limited but renewable period of time. The agreement involves the provision of support, cooperation and financial support to the Council, a promise to accept

its moral authority and its decisions. Stakeholder participation fosters "ownership" of the self-regulatory mechanism, increases its legitimacy, compliance and effectiveness, and from the point of view of free speech concerns shows the mechanism in an altogether better light, which may well prevent challenges. The limits imposed via decisions taken by self-regulatory body may be more likely considered as being within an acceptable field of discretion which does not breach fundamental rights.

- Independence from the industry. The key to achieving this lies in the membership of the board and the sources of financial support. To avoid the creation of a 'corporative' body members of the public must be included in the main board. In the case of the UK PCC there is a majority of lay members and minority of senior editors from across the industry (one of the advantages claimed for self-regulation is expertise), and an independent chairman who is appointed by the industry, but not engaged or connected with the industry.

- Representation of consumers. Press councils, for example, are not simply mechanisms for industry self-monitoring, and a way of opening up the mechanism is by means of including members of the public in their boards. Although one of the advantages claimed for self-regulation is industry expertise, the inclusion of makes the bodies less 'corporative' and distinguishes press councils from the tribunals created at professional organisations. In the case of the UK PCC and other press councils there is a majority of lay members and minority of industry representatives. The approaches of the press councils differs as to, for example, the background of

the members. Legal knowledge is deemed of importance at some councils, for example, the chair is filled by lawyers in the Netherlands or Sweden. In the case of the UK, the PCC has a chairman appointed by the industry, but who is not engaged or connected with the industry.

- Well publicised rules and/or complaints procedure: an example of good practice to ensure good communication of standards is NICAM, in which the Dutch government worked with industry to raise the profile of the newly introduced system and inform the parents about the meaning of the different age categories and content descriptors. As successful branding of NICAM's Kijkijzer symbols and the public campaign behind it have been credited as crucial factors in determining the future not only of NICAM but also, possibly, of other self-regulatory schemes in media classification. Another example of good communication (and of stakeholder involvement, and incidentally showing that these guidelines are intertwined) can be found in the discussion on self-regulation in mobile communication. The UK Code was drafted by a committee.[58] Informal consultation with content providers, infrastructure and handset suppliers and government at national and European Commission levels took place. The UK operators present included all four of the largest pan-European operators. A draft was presented for public consultation prior to the full publication of the Code in January 2004.

- Updating the scheme: an example is the UK PCC where the Code of Practice is under constant review.

- Reporting and publication requirements placed on self-regulatory bodies. A standard for transparency of regulation is the publication of basic regulatory data on websites. Our survey on ISPs shows that there are many examples of good practice in this regard, such as active internet self-regulatory hotlines. In the case of the print media, we praised the completeness of information available on websites such as the UK PCC or the German Presserat. There are also areas of the self-regulatory regimes that remain opaque and therefore it is difficult to gain an accurate picture of the overall level of self-regulatory activity. The Luxembourg Press Council is an example of an information-poor website. Ample disclosure of information is a good practice to enhance consumer trust.

Conclusions: The Privatisation of Censorship?

We close this chapter by posing again the question with which we began - "Does media self-regulation advance or impede freedom of expression?" The answer depends upon issues such as how the powers of the self-regulatory institutions are in fact used as well as the strength and nature of the limitations that are being imposed on speech. We also need to make a clear distinction between freedom of expression in narrow legal terms and in practice. A blanket condemnation of self-regulation for being contaminated by the seed of censorship is as mistaken as the view that welcomes self-regulation on the sole grounds that it means (or appears to mean) less governmental intervention.

We have identified the possibility of a clash between the freedom of expression rights such as they are laid out in Article 10 of the ECHR, and the limitations on speech imposed by self-regulatory bodies. We acknowledge the tension that there is between the expediency and advantages offered by an industry self-regulating versus the need to take the limits imposed by the contractual and voluntary self-regulatory bodies seriously whenever they engage speech rights. We have tried to move the debate to the legal arena, beyond arguments of the left that believes self-regulation privatises censorship and that of the right that self-regulation means less government.

Once we see that self-regulation and freedom of speech need not necessarily be in opposition, a more constructive policy debate on the components that make up a self- or a co-regulatory regime can take place. From our analysis it emerges that self-regulatory bodies have the technical expertise which seems particularly relevant in a field in which there is fast technological change. Efficiency reasons justify regulatory decisions being taken at lower levels and in a decentralised manner, with courts being able to examine the correctness of the decision making process in case of complaints, thus ensuring that the protection of the law has opportunities to become effective. Procedural considerations are of great relevance. Regulatory decisions are strengthened by transparency in decision making and stakeholder participation. Curbs on free speech are justifiable when, for example, the balance of rights as set out in Article 10 is accomplished by bodies not only following, but which are seen to be following, impartial and legitimate procedures. This answer may be, however, too narrowly technical.

There are therefore two ways to answer the general question we posed at the beginning of this chapter. In legal terms the response is that whether curbs placed on free speech by self-regulation are justifiable depends on a number of variables. For example, the categorisation of self-regulatory institutions, their functions, and the extent to which they can be deemed as public/state authorities or if private, the extent to which their margin of action falls within contract or public law and the extent to which they could be subject to review by a higher authority. Even though this approach is useful in that it illustrates the basic legal concern with state and public authorities as well as the need to place fundamental (or constitutional) safeguards on any limitation of free speech, the answer may be ultimately unsatisfactory. The law is not clear, as the degree of "horizontal protection" offered by ECHR for example (i.e. protection of speech rights against private bodies by controlling the restrictions placed on freedom of expression) has yet to be defined.

This research highlighted key background justifications that would be brought into play by courts and other bodies called upon to adjudicate in this new, fast-changing sector. What is abundantly clear is the need for caution as regards the free expression implications of the current embrace of self-regulation, in other words, the margin of the acceptable in terms of private regulation via contractual and volunteer devices. The second way to answer the question we posed at the beginning of this chapter is by adopting a pragmatic and procedural case-by-case approach to those functions in regulation which were deemed by policy makers as more appropriately undertaken by private bodies. We argue that expedience should not dominate policy choices, and if self-regulation is an advantageous procedure for decision-making and control, then it is its implementation – including how due process considerations are taken into

account – that will determine whether freedom of expression concerns are sufficiently respected.

What constitutes expression worthy of protection has been a new battleground with the rise of the internet. The promise of the internet, particularly to bring freedom of expression to closed societies, has brought with it a sometimes healthy scepticism of internet policy per-se: 'the best internet policy is no internet policy' we were told in the first years of the net. Our approach to freedom of expression has overwhelmingly focused on protecting *negative rights,* i.e. *freedom from* control as censorship. Most discussion of media freedom on the internet remains focused on a case-by-case negative rights discussion. This is not to deny the importance of this: in conflict prevention and democratic transitions the role of the internet is crucial.

Freedom from[59] control, particularly state control, is absolutely necessary in protecting broader freedom on the internet. The question we would like to pose is whether it is sufficient. We must keep protecting the net from censorship. But we must not neglect the positive conditions for media freedom, nor should we be distracted by the crusade against censorship to the extent that we view the creation of any rules, or any dispute resolution as 'the thin end of the wedge'. Is it possible to identify rules that are steps on the slippery slope from those that are not? As Hosein put it discussing the Communications Decency Act: "It is a case of the ever-articulated "slippery slope" argument: if you begin with one form of content regulation, even with the most noble intents the rest will naturally follow. Other forms of regulation will arise either intentionally, using the "verification" technologies to verify someone's geographic location to prevent access to non-indecent information,

or less directly through the chilling of online speech for fear of surveillance or eventual censoring"[60]. Hosein takes some rather large steps in that paragraph. Whilst we can say that there is a danger of, as he calls it 'chipping away at the marketplace for ideas', we need to be more specific about which forms of intervention and rule-setting are steps onto this slippery slope, and which are not. In order to assess the value or the threat posed by new developments such as co-regulatory search level, internet filtering of the kind being experimented in the UK, Norway and Finland, we have to reach beyond the shrill opposition between rules and freedom posed in much of the debate. We need to acknowledge that rules can also open up spaces, and grow the space for debate. We also need to look beyond the law and return to the philosophical justifications of media freedom more generally: the arguments from truth, democracy and self expression. Some rules genuinely do place us on a slippery slope to censorship, but others certainly do not.

Freedom to is also crucial. Free communication on the internet will itself depend on maintenance of an open internet. Real media freedom requires access and capabilities, content that can be easily shared, and public fora used by wide and overlapping communities of interest. There are various forms of rulemaking going on on the internet, some private and some state led, some led by users themselves. It is the interplay between these public and private, voluntary and obligatory rules that will determine the future scope of freedom on the internet.

[1] See for example Hardy, Ch and Möller, Ch (2003) 'Putting Freedom Back on the Agenda: Why Regulation must be opposed at all costs' in Starr, S, *Spreading the Word on the Internet*, Vienna: OSCE

[2] I.e. a system in which "the majority cannot travel as fast or as far as it would like if it recognizes the rights of individuals to do what, in the majority's terms, is the wrong thing to do." (Dworkin, R *Taking Rights Seriously*, London: Duckworth, 9th impression 2000, at p. 204).

[3] Main legal instruments in the field of freedom of expression: *Universal instruments*: Universal Declaration of Human Rights 1948 (Art. 19); ICCPR – International Covenant on Civil and Political Rights (Articles 19 and 20); *Regional instruments*: African Union: African [Banjul] Charter on Human and Peoples' Rights (Article 9); the Americas: OAS - Organization of American States, American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (Pact of San Jose, promulgated 1969) and Europe: ECHR (Art. 10); and an example of a *national instrument*: 1st. Amendment to the US Constitution

[4] Gordon, W. (2005) 'Copyright, Norms and the Problem of Private Censorship' in *Copyright and Free Speech: Comparative and International Analyses*, Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, p. 71-2

[5] Collins, M *The Law of Defamation and the Internet*, Oxford: OUP, 2001, at p. 344

[6] see Barendt. E. M.(1995) *Broadcasting Law: A Comparative Study*, Oxford: Clarendon, at p. 404.

[7] Some view this control as excessive. Smith, P 'Censorship by Stealth' Ent. L. R. 1993, 4(3), pp. 63-66.

[8]In 2001, following extensive consultation, the former UK television regulator the ITC published its Guidance to Broadcasters on Interactive Television Services, on regulation of interactive advertising. The problem of sheer volume, and an uncertainty about how many 'click throughs' in advertising can be regulated were identified as key challenges for the future.

[9] The expression 'commercial speech' has American origins, but the ECtHR case law on the topic is developing: some ECtHR cases in which the restriction on expression was upheld in Strasbourg: *Markt Intern v Germany* – 1989; *Jacubowski v Germany* – 1994; *Casado Coca v Spain* – 1994; *Lindner v Germany* - 1999 and cases in which the restriction was deemed in breach of Art. 10: *Verein Gegen Tiefabriken v. Switzerland* – 200; *Stambuk v. Germany* – 2002

[10] *De Haes and Gijsels v Belgiun*, Judgment by the European Court of Human Rights, 24/02/1997.

[11] Griffiths, J (1999) 'The Human Rights Act 1998, Section 12 – Press Freedom over Privacy' Ent. L. R., 10 (2), 36-41, at p. 40.

[12] There is abundant case law supporting this position. To name one recent example: in 2005 in *Turhan v. Turkey*: the applicant was the author of a book entitled 'Extraordinary War, Terror and Counter-terrorism' and under national law had been ordered to pay damages to a Secretary of State, since certain passages of his book were held to have been defamatory. The ECtHR found this to be a violation of Art 10 ECHR as in a democratic society there is ample freedom to be critical of the authorities.

[13] 9 BHRC 587.

[14] 9 BHRC 587, at para. 96

[15] See: Schulz, W. and Held, T. (2004) *Regulated Self-Regulation as a Form of Modern Government: An Analysis of Case Studies from Media and Telecommunications Law*, Eastleigh: University of Luton Press.

[16] Palzer, C. 'Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-Regulation Frameworks' IRIS 2002-6, http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus6_2002.pdf.en

[17] See: McGonagle, T. 'Co-Regulation of the Media in Europe: the Potential for Practice of an Intangible Idea', IRIS 2002-10, http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2002.pdf.en .

[18] Ganshof van der Meersch, W. J. (1980) 'Reliance in the Case-law of the European Court of Human Rights, on the Domestic Law of the States' 1 HRLJ- Human Rights Law Journal 13, at p. 19. See also Leonardi, D. A. (1996) 'The Strasbourg System of Human Rights Protection: "Europeanisation" of the Law through the Confluence of the Western Legal Traditions' 8 European Review of Public Law, 1139-96. An alleged breach of the ECHR may be gauged against a set of common principles coming from the general body of the laws of the member states taken as a whole, and incidentally, by which the ECHR itself was inspired.

[19] See for a full discussion:

Barendt, E., *Freedom of Speech*. (Oxford University Press, 1985) ; Craufurd-Smith, R., *Broadcasting Law and Fundamental Rights*. (Clarendon Press, 1997); Schauer, F., *Free Speech: A Philosophical Inquiry*. (University of Cambridge Press, 1982); Sunstein, C. R., *Democracy and the Problem of Free Speech*. (The Free Press, 1993).

[20] Schauer, F. 'Media Law, Media Content and American Exceptionalism' pp. 61-70 Iris Special: 'Political Debate and the Role of the Media: The Fragility of Free Speech' *European Audiovisual Observatory*: 2004 at p. 67.

[21] See: Craig, J. D. R 'Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort' EHRLR, 1998, 2, 162-180, at p. 165.

[22] Rosenfeld, M (2003) 'Hate Speech in Comparative Perspective: A Comparative Analysis' 24 Cardozo Law Review 1523.

[23] Kim L. Rappaport, (1998) 'In the Wake of Reno v. ACLU: The Constitutional Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online' 13 Am. U. Int'l L. Rev. 765, at p. 791.

[24] Cabe, T *student note* (2002): 'Regulation of Speech on the Internet: Fourth Time's The Charm?' 11 Media L. & Pol'y 50 at p. 55. See on the European Union and the United States approaches to internet regulation: Jose Ma. Emmanuel A. Caral, (2004) 'Lessons from ICANN: Is self-regulation of the Internet fundamentally flawed?' 12 International Journal of Law and Information Technology 1, at p. 7.

[25] See also: Black, J (1996) 'Constitutionalising Self-Regulation' 59 MLR 24

[26] Mahoney, P (1997) 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining some recent Judgments' in EHRLR, 4, 364-379, at p. 368.

[27] By 'negative' we mean the notion of negative rights (Berlin, I., 1969, 'Two Concepts of Liberty', in I. Berlin, *Four Essays on Liberty*, London: Oxford University Press. New ed. in Berlin 2002) and freedom of expression as a negative right which is defined against state interference rather than as a positive right which can be claimed in itself.

[28] McManis, Ch. R (1999) 'The Privatization (or "Shrink Wrapping") of American Copyright Law' 87 Cal. L. Rev. 173.

[29] Lessig, L (1999) *Code and other laws of cyberspace*, Basic Books: New York, at p. 99. See also, by the same author: (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin Press Available free for non-commercial use under a Creative Commons licence on http://cyberlaw-temp.stanford.edu/freeculture.pdf

[30] Lessig, L *Code…* op. cit, at p. 136.

[31] See the discussion on the conflict between contract law and free speech rights as regards contracts of silence vis-à-vis the First Amendment in the United States, Garfield, A. E (1997-1998) 'Promises of Silence: Contract Law and Freedom of Speech' 83 Cornell L. Rev. 261, at pp. 343 – 360.

[32] Campbell, A.J. (1999) 'Self-Regulation and the Media' 51 Federal Communications Law Journal 711, at p. 717.

[33] Weinberg, J (1996-97) 'Rating the Net' 19 Hastings Communications & Ent. L. J. 453, at p. 454. The software may of course filter too much or too little, see for example: Birnhack, M. D and Rowbottom, J. H (2004) Symposium: Do Children Have the Same First Amendment Rights as Adults?: Shielding Children: The European Way, 79 Chi.-Kent. L. Rev. 175, at p. 213.

[34] http://www.edri.org/edrigram/number3.18/censorshipFinland Home EDRI-gram - Number 3.18, 8 September 2005 Finnish ISPs must voluntarily block access 8 September, 2005

[35] Kerr, R.L summer 2002 'Impartial Spectator in the Marketplace of Ideas: The Principles of Adam Smith as an Ethical Basis for Regulation of Corporate Speech' Journalism and Mass Communications Quarterly, vol. 79, number 2, 394-415, at p. 407.

[36] Silber, J. Judgement *R (on the application of Ford) v The Press Complaints Commission* [2001] EWHC Admin 683, CO/1143/2001. 31 July 2001.

[37] Pinker, R. (2002) 'Press Freedom and Press Regulation – current trends in their European context' in Communications Law, vol. 7, no. 4, 102-7, at p. 104 and Pinker, R. (1999) 'Human Rights and Self-regulation of the press', in Communications Law, vol. 4, no. 2, 51-4, at p. 53.

[38] Silber, J. expressed in the judgment that 'the Commission correctly in my view accepts for the purposes of the present permission application, that it is arguable whether it is a Public Authority for the purposes of s 6 of the Human Rights Act 1998 and is amenable to judicial review'.in: *R (on the application of Ford) v The Press Complaints Commission* [2001] EWHC Admin 683, CO/1143/2001. 31 July 2001.

[39] Bradley, A. W and Ewing, K. D (2003) *Constitutional and Administrative Law*, 13 ed. Pearson Longman: Harlow, p. 523.

[40] Voorhoof, D 'European Court of Human Rights: Banning of blasphemous video not in breach of freedom of (artistic) expression' IRIS 1997-1/8.

[41] *Case of Peck v. The United Kingdom*, application 44647/98, 28 January 2003.

[42] *Case of Peck v. The United Kingdom,* para. 109.

[43] *R. v. ASA, ex p. The Insurance Service* [1990] 2 Admin. L. R. 77, per Glidewell L.J.

[44] Craig, P and De Burca, G (2003) *EU Law Text, Cases and Materials*, Oxford University Press, p. 211

[45]http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=selisto%20%7C%20finland&sessionid=3810400&skin=hudoc-en at para. 54

[46] Thorgeirsdottir, H (2004) 'Self-censorship among journalists: A (Moral) Wrong or a Violation of ECHR law' EHRLR 4, 383-399 at pp. 397 and 398.

[47] Thorgeirsdottir, H op. cit., at pp. 398 and 399.

[48] Frydman, B and Rorive, I *Racism, Xenophobia and Incitement Online: European Law and Policy* http://www.selfregulation.info/iapcoda/rxio-background-020923.htm

[49] Birnhack, M. D and Rowbottom, J. H (2004) Symposium: 'Do Children Have the Same First Amendment Rights as Adults? Shielding Children: The European Way' 79 Chi.-Kent L. Rev. 175, at pp. 205-207

[50] Similary, as regards how the conflict between the private law of contract and the fundamental human rights set out in ECHR may work out in English law, see: McKendrick, E (2000) *Contract Law*, 4th ed., Palgrave: Basingstoke, at pp. 13-16.

[51] Ahlert, C, Marsden, C and Yung C (2004) How 'Liberty' Disappeared in Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation

[52] Voorhoof, D (1998) 'Guaranteeing the freedom and independence of the media', in: *Media and Democracy*, Strasbourg: Council of Europe Publishing, at p. 35.

[53](1979-80) 2 EHRR 245, para. 47. Relevant for the study of this case are: Teff, H and Munro (1976) C. R *Thalidomide the legal aftermath*, and Duffy, P. J (1980) 'The Sunday Times Case: Freedom of Expression, Contempt of Court and the European Convention on Human Rights' 5 HR Rev. 17.

[54] Cremona, J. J (1990) 'The interpretation of the word 'law' in the jurisprudence of the European Court of Human Rights' *Selected Papers 1946-1989*, 188, lists various cases where the word 'law' occurs.

[55] Birnhack, M. D and Rowbottom, J. H op. cit., at p. 193.

[56] Birnhack, M. D and Rowbottom, J. H (2004) 'Symposium: Do Children Have the Same First Amendment Rights as Adults? Shielding Children: The European Way' in 79 Chi.-Kent L. Rev. 175, at pp. 213-214. The PICS system is a rating system that content providers and third parties can use to rate materials: in theory it allows user control of material suitable for children in a way that is flexible and not imposed by a centralised source, but as with any filtering software it might become dominated by the big businesses that have the ability to self-regulate and if it does not fulfill expectations might lead to further calls for statutory regulation (or censorship).

[57] The committee included the UK six network operators and virtual operators (3, Vodafone, Orange, T-Mobile, Virgin Mobile, O2) and the consultant Hamish McLeod, who acted as spokesman for the group.

[58] The distinction between positive and negative rights will be familiar to many. It is attributed to Isaiah Berlin. In his 1958 lecture 'Two Concepts of Liberty' he distinguished between freedom from outside interference and freedom to which entailed the liberation of the human. Berlin, I., (1969) 'Two Concepts of Liberty', in I. Berlin, *Four Essays on Liberty*, London: Oxford University Press. New ed. in Berlin 2002.

[59] Hosein, I. (Gus) (2004) 'Open Society and the Internet: Future Prospects and Aspirations', in Möller, Ch. and Amouroux, A. *The Media Freedom Internet Cookbook*, Vienna: OSCE at p. 250
http://www.osce.org/publications/rfm/2004/12/12239_89_en.pdf