

Protecting Legitimate Speech Online: Does the Net work?

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I Introduction

The Internet has profoundly enhanced citizens' abilities to seek, impart and receive information.¹ Jack de la Rue, the United Nations Special Rapporteur on Freedom of Expression, recently observed that "few, if any developments in information technologies have had such a revolutionary effect as the creation of the Internet."² The New Zealand Law Commission has recently considered whether the law sufficiently protects against new communication technologies' ability to cause harm.³ In focussing on whether the law satisfactorily addresses illegitimate online expression, the Commission has left unquestioned a complementary issue: whether the law adequately protects legitimate online expression. This dissertation addresses that question with a view to balance the contemporary legal understanding of expression on the Internet.

First, I consider the contemporary state of legitimate expression online: how the Internet has enhanced expressive abilities and the technological and legal framework that enables those abilities. The focus is upon the private nature of the Internet's infrastructure, entities, relationships and legal rights, and how this insulates online expression from the constitutional protections that citizens' legitimate expression enjoys in 'real space'. Particularly troubling is the power that the largest online service providers possess to curb legitimate expression in a manner that, thankfully, the state cannot.

Picking up on this particular concern, the second chapter explores how lawmakers might protect legitimate expression which is dependent upon the most dominant online service providers. It analyses the American jurisprudence on two related concepts: the protection of government-owned public forums as socially important venues for discussion and debate, and the imposition of quasi-public duties on some private property owners to protect citizens' expression. It suggests that such concepts could appropriately guide legislators' thinking regarding the regulation of the dominant social media service Facebook, while noting the practical limitations of achieving such regulation.

¹ Abilities guaranteed by New Zealand Bill of Rights Act 1990, s 14 and International Covenant on
² Frank La Rue *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* A/HRC/17/27 (2011) at 6.

³ New Zealand Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MBP, 2012); New Zealand Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011).

The final chapter adopts the concepts from the second chapter and makes two concrete suggestions to improve the protection and value of speech online. It advocates firstly the development of government-owned social media sites as modern day public forums for robust, legally protected debate, and secondly a retooling of intermediary defamation liability in order to protect the legitimate speech of citizens.

II The Internet: private framework, private censorship

The Internet empowered citizens with an unparalleled ability to express and receive information. All expression through the medium of the Internet relies on private entities. These two facts entail a number of legal and normative consequences. The private landscape of the Internet poses potential problems to citizens' freedom of expression, even while the architecture of the Internet offers an unparalleled ability to seek, impart and receive expression. In this chapter, I explain firstly how the Internet has enhanced citizens' expressive abilities. Secondly, I describe the physical and legal framework underpinning the Internet. Thirdly, I analyse the ramifications of this framework for the degree of legal protection afforded to citizens' expressive abilities by addressing how private entities can limit speech, and how courts have strongly affirmed these entities' rights to do so.

A. Comparing Expressive Abilities

To appreciate the enhancement of expressive ability that the Internet offers, one must consider the limitations of that ability in the 'offline' world. Offline, unmediated speech to listeners is possible only through a one-to-one or one-to-several dynamic. The voice is capable of reaching only so many listeners, and besides, large, receptive audiences are scarce. Only print or broadcast media enable one to reach a mass, public audience. For most, access to these traditional media is limited by established publishers and broadcasters who act as 'gatekeepers' of the information that they disseminate to the public.⁴ A publisher only transmits without charge information deemed sufficiently noteworthy, and even individuals who can afford to purchase print or broadcast advertising require the agreement of a publisher or broadcaster. The alternative, to establish one's own publishing or broadcasting function to reach the public, is prohibitively expensive. The increasing concentration of media ownership in New Zealand

⁴ For information on 'gatekeeper' information theory, see Emily L Laidlaw "A framework for identifying Internet information gatekeepers" (2010) 24(3) *International Review of Law, Computers & Technology* 263 ; Kurt Lewin "Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research" (1947) 1(1) *Human Relations* 143

perhaps demonstrates this: two companies dominate 90 per cent of the newspaper market and a single company has a monopoly on the paid television market.⁵

The information one can receive offline is limited largely to what is derived directly from others and what the publishing and broadcasting gatekeepers choose to publish. Indeed, concentration of media ownership limits what information individuals received. In New Zealand today “[n]ews stories are informed by fewer sources meaning that fewer voices are heard. Broadly speaking there are fewer mainstream content providers and less choice for consumer-citizens.”⁶ Jerome Barron noted the constraining effect of concentrated ownership of traditional communications media on expressive abilities half a century ago, noting that “ideas reach the millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion.”⁷

Fortunately then, we need no longer rely on the soap box; the Internet offers the public a powerful expressive medium. Online, one can impart information without traditional media’s prohibitive market constraints—for the cost of a broadband connection, any individual can establish a website, blog or social media page in order to reach a potentially massive audience. Online speech is quantitatively and qualitatively different from offline speech. Quantitatively, there is far more online speech and it can be disseminated instantaneously to a numerically greater and geographically wider audience. Qualitatively, it is more searchable and in many online forums it invites audiences to engage with and contribute to information actively, rather than merely passively receive it. Speakers can bypass traditional media’s gatekeepers to some extent online where geography does not constrain the individual. Clearly then, the Internet has advanced citizens’ abilities to seek, receive and impart information.

⁵ John Fairfax Holdings Ltd and APN News and Media Ltd, and SKY Network Television Limited respectively; see Bill Rosenberg "News Media Ownership in New Zealand" (Auckland 2008) available at <<http://bit.ly/vpFc0A>> at 1.

⁶ Merja Myllylahti "The New Zealand Media Ownership Report 2011" AUT University Journalism, Media and Democracy Research Centre (Auckland September 2011) available at <https://dev.aut.ac.nz/__data/assets/pdf_file/0009/234468/JMAD-Interim-Report-2011.pdf> at 22.

⁷ Jerome A Barron "Access to the Press - A New First Amendment Right" (1967) 80 HLR 1641 at 1656.

B. The Internet's Physical Architecture

The architecture underpinning online communication is complex, and it defines the legal framework enabling and regulating all online expression. The 'Internet' is a global 'internetwork'. A network is a collection of computers⁸ connected together by transmission media to share information. The Internet is a "network of networks",⁹ the sum total of thousands of smaller networks, all connected to exchange data packets between one another.

Consider the New Zealand example of a connection to the Internet. Individual client computers may interconnect in a local network, which is connected to a private Internet Service Provider's (ISP's) network, which will be connected to the networks of other private, domestic ISPs and online bodies through one of seven national Internet exchanges.¹⁰ This describes the domestic New Zealand internetwork, one part of the wider Internet. A 'backbone' of submarine fibre-optic communications cables connect New Zealand's network to Australian and American networks, and so ultimately to the whole Internet.¹¹ When an Internet user wishes to send and receive data, for example to an online service provider (OSP) such as Google or Facebook, the data is routed from her 'client' device to a 'host' device located elsewhere in the network. This relies on a number of different intermediaries, such as her ISP, other network operators, and the operator of the host device.

C. The Internet's Legal Architecture

No one owns the Internet, but the Internet is owned. No single entity could ever own such a decentralised, international and disparate network.¹² However, every network component is the property of some entity: from client computers, to network

⁸ Or more broadly and circuitously, electronic network-capable devices – devices which are not computers, such as cell phones, MP3 players and Voice over IP (VOIP) phones, too may be constituent parts of a 'computer' network.

⁹ Chris Reed *Internet Law: Text and Materials* (2 ed, Cambridge University Press, Cambridge, 2004) at 10.

¹⁰ All internet exchanges in New Zealand are part of the ExchangeNET system, run by CityLink Ltd; see Citylink "New Zealand Internet Exchanges" (2012) <<http://nzix.net/>>.

¹¹ World Bank "Telecommunications in the Pacific" (Background Paper for the Pacific Economic Survey, 2008) available at <<http://www.theprif.org/sites/theprif.org/files/WB%20BackgroundPaper-Telecommunications.pdf>> at 8.

¹² Reed, above n 9 at 18.

infrastructure such as cables and satellites, to servers which host online information and facilitate online applications. Government owns and controls¹³ some few segments of the Internet.¹⁴ For the most part, however, the private entities own the Internet's constituent parts. Yochai Benkler accurately describes the Internet as a "public sphere built entirely of privately-owned infrastructure."¹⁵

Private law therefore generally defines the legal relationships between the myriad private entities who own the Internet's constituent parts. Private owners of the network infrastructure possess the right to exclude, manage and set limitations on others' use of their property. An individual's use of the Internet then depends upon implied licenses and contractual agreements to use that property: private internet users enter contracts with ISPs in order to gain access; ISPs reach 'peering' and 'transit' agreements with one another to carry each other's traffic over their sections of the network;¹⁶ online service providers (OSPs) such as websites, email and Voice Over Internet Protocol (VOIP) providers form contracts with their users in the form of terms and conditions of use.

This poses an issue for citizens' expressive abilities online. Although the Internet enables unparalleled expression, the law does not afford that expression the same constitutional protections that it does in the context of offline, unmediated speech. As Balkin puts it, "[t]he digital revolution offers unprecedented opportunities for creating a vibrant system of free expression [b]ut it also presents new dangers for freedom of speech."¹⁷ Everyday speech has never been so materially unrestricted, nor so legally unprotected. To understand why, we must consider how the law protects freedom of expression in New Zealand, and how—and whether—this protection extends to Internet users.

D. The Limits of Public Protection of Expression Online

Section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA) affirms that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive,

¹³ See below IVA.

¹⁴ For example, all websites with the second level domain .govt.nz are held and managed by the New Zealand Crown via individual government organisations; Department of Internal Affairs "Department of Internal Affairs Policy for Moderation and Registration of .govt.nz Internet domain names" (2012) govt.nz registrar <<https://www.dns.govt.nz/moderation-policy.php>>.

¹⁵ Yochai Benkler "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate" (2011) 46(1) Harv Civ Rights-Civ Liberties Law Rev 311 at 340.

¹⁶ Graham JH Smith *Internet Law and Regulation* (4th ed, Brookers, Wellington, 2007) at 9-033.

¹⁷ JM Balkin "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society" (2004) 79 NYU L Rev 1 at 3.

and impart information and opinions of any kind in any form.”¹⁸ The Act applies to actions done by the legislative, executive or judicial branches of the New Zealand government¹⁹ or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.²⁰ Thus, the NZBORA protects citizens’ rights to freedom of expression against governmental or public acts that might limit that right,²¹ such as if a police officer attempted to prevent a person from speaking at a lawful protest in a public space. In the online context, the NZBORA protects citizens’ freedom of expression from governmental interference; it would prevent state agents from limiting citizens’ lawful expression by unilaterally disconnecting individuals from the Internet, or blocking access to websites, as has occurred in for example Tunisia, China and Vietnam.²²

The NZBORA does not, however, protect speech from private interference. This is the corollary of s 3; the NZBORA applies to the exercise of powers which are “governmental in nature”²³, so conversely it does not apply to private acts, which are “left to be controlled by the general law of the land”.²⁴ Thus when a private entity performing a private function acts to limit citizens’ expression, the NZBORA does not apply, and offers no remedy. In an online context where overwhelmingly the facilitators of speech are private entities, the NZBORA offers no direct protection.

This is illustrated by the example of an ISP, which provides the vital link between an individual and the Internet, severing an individual’s connection. Whether this abridges the individual’s freedom of expression is perhaps contentious. Arguably that disconnection does not limit expressive ability because one’s ability to receive and impart information is the same as if the ISP had never offered access initially. In *Ransfield v Radio Network*, however, the Court held in obiter that, had the NZBORA applied, a ban from

¹⁸ Section 14.

¹⁹ Section 3(a).

²⁰ Section 3(b).

²¹ Except in those cases where the act in question is authorised by an Act of Parliament (s 4) and no rights consistent interpretation is possible (s 6), or where the act effects a reasonable limit on the right which is prescribed by law and can be demonstrably justified in a free and democratic society (s 5).

²² Ethan Zuckerman "Intermediary Censorship" in John Palfrey Ronald Deibert, Rafal Rohozinski, Jonathan Zittrain (ed) *Access Controlled: The Shaping of Power, Rights and Rule in Cyberspace* (The MIT Press, Cambridge, 2010) at 71.

²³ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 at [69].

²⁴ *R v N* [1999] 1 NZLR 713 at 718.

participation in a talkback radio show would *prima facie* breach the right to freedom of expression, despite the ban limiting expression no more than if the show had never been offered.²⁵ This rests on s 14 protecting expression “of any kind and in any form”; making a medium of speech unavailable is sufficient to limit that right. This conclusion is consistent with the Attorney-General’s report on the consistency of the Copyright (Infringing File Sharing) Amendment Bill, which considered that “temporary suspension of internet access will limit an account holder’s freedom of expression.”²⁶

Only ‘governmental’ acts may abridge the s 14 right. A private ISP is not part of the New Zealand government under s 3(a). While there is much debate over the line between public and private ‘functions, powers or duties’,²⁷ following the remarks and indicia of New Zealand’s case, *Ransfield*, ISPs’ provision of internet access to individuals is clearly not a public function. While the government has invested in much of ISPs’ telecommunications infrastructure,²⁸ the ISPs themselves are private entities providing for-profit services. Those services’ public benefit is insufficient to make the function itself public.²⁹ The relevant regulatory framework indicates that Parliament considers ISPs to perform a private function: Parliament has forced the demerger of New Zealand’s largest retail and network Internet providers, Telecom New Zealand Limited and Chorus Limited, in order to promote private competition and private investment in telecommunications infrastructure.³⁰ This result coincides with the American position, where an ISP is not a state actor under First Amendment jurisprudence because “[an ISP] is a private company, its ... servers are ... private property and because neither the Internet nor and ISP’s accessway to the Internet are public systems within the meaning of the First

²⁵ *Ransfield v The Radio Network Ltd*, above n 23 at [41].

²⁶ Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Copyright (Infringing File Sharing) Amendment Bill* (11 February 2010) at 5.

²⁷ For a collection of works on this debate, see Alex Latu *A Public/Private Power Play: How to Approach the Question of the New Zealand Bill of Rights Act 1990’s Direct Application Under Section 3(b)?* (LLB Hons, University of Otago, 2009).

²⁸ Such as the copper cables of what was the New Zealand Post Office’s telephony network (Sean Mosby, Jerome Purre "Towards Universal Broadband Access in New Zealand" International Telecommunications Union (New York, 2010) available at <http://www.itu.int/ITU-D/asp/CMS/Docs/NZ_broadband_case.pdf> at 14) and Crown Fibre Holdings Limited’s \$1.5 billion fibre-optic Ultra-Fast Broadband scheme ("About Us" (2012) Crown Fibre Holdings Ltd <<http://www.crownfibre.govt.nz/about/>>).

²⁹ *Ransfield v The Radio Network Ltd*, above n 23 at [69(a)] and [69(g)(vi)].

³⁰ Telecommunications Act 2001, part 2A, s 69A; (The demerger was aimed to facilitate “the promotion of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand” and “efficient investment in telecommunications infrastructure and services.”)

Amendment.”³¹ An ISP performs a private function, and so is “entitled to manage its business as it sees fit ... the only constraints upon its freedoms [being] those imposed by the general law.”³² This applies equally to other key internet entities such as other network service providers and OSPs. When their decisions limit individuals’ expressive abilities, the NZBORA will not provide a remedy.

This result should give us pause as to the legal meaning of the term ‘a right to freedom of expression’, as opposed to its popular understanding. W N Hohfeld famously posited an analytical jurisprudential theory explicating the nature of jural relations between legal actors.³³ In doing so he sought to exhibit the logical structure of legal claims and to reveal and refine conceptual distinctions.³⁴ Hohfeld explains that a legal ‘right’ is a legal claim of a person (A) to do something which necessarily entails a correlative duty on another person (B) regarding person A; a right and a duty are each other’s jural correlatives. A right is contrasted with a ‘privilege’, which establishes the general permissibility of person A’s actions while imposing no correlative duty on other parties.³⁵ A ‘freedom’ is synonymous with a ‘privilege’.³⁶ Thus an individual’s ‘freedom of speech’ is that person’s legal ability to speak to the extent that they do not possess duty not to speak. One’s ‘right’ to ‘freedom’ of speech exists against the state. It establishes a duty on the state not to interfere with a person’s permissible speech. The NZBORA does not prohibit person B, acting privately, from interfering with person A’s expression; therefore person A has no right to expression *vis* person B.

The legal privilege of speech is heavily context-dependent. While in the abstract one may have the legal freedom to speak, as Murray Rothbard puts it, “the neglected question is: where?”³⁷ Since A’s legal privilege to speak exists only in the absence of B’s correlative right to prevent speech, freedom of expression cannot exist where another person has a right to restrict speech. For example, there is no freedom to shout irreligious polemics in a church, as one is subject to the occupier’s possessory right to evict the speaker. This

³¹ *Cyber Promotions v America Online* 948 F Supp 436 (ED Pa 1996).

³² *Ransfield v The Radio Network Ltd*, above n at [70].

³³ Wesley Newcomb Hohfeld *Fundamental legal conceptions as applied in judicial reasoning: and other legal essays* (Yale University Press, New Haven, 1919).

³⁴ Nigel E Simmonds *Central issues in jurisprudence: Justice, Law and Rights* (3rd ed, Sweet & Maxwell, London, 2008) at 275.

³⁵ Hohfeld, above n 33 at 39.

³⁶ At 47.

³⁷ Murray Rothbard *Power and Market: Government and the Economy* (4th ed, Ludwig von Mises Institute, Auburn, 2006) at 292.

answers Rothbard's 'where' question; one enjoys the legal privilege to speak only where one is entitled to speak. Online, we should add the question: 'how?' If speech is mediated, as online speech necessarily is, one's privilege to speak exists only if one is entitled to use a medium, either by virtue of a property right or a voluntary agreement with the person who controls the property. Thus Rothbard argues (while collapsing Hohfeld's careful jural distinctions) that there is no such thing as a "right to free speech; there is only a man's property right: the right to do as he wills with his own or to make voluntary agreements with other property owners."³⁸

E. How Private Entities Can Regulate Expression

The Internet's privatised nature and the NZBORA's state focus mean that the general 'law of the land' is the legal protector of legitimate online expression. Contract defines relationships between entities online; the contractual terms offered by different ISPs and OSPs and accepted by their users define legal speaking rights. The market, social norms and the Internet's architecture define the extent of expressive rights—not any minimum requirement in the legal framework defining these relationships.³⁹ If this is a threat to expressive interests, it is not a new one; access to the media has a history of private control.⁴⁰ However, the Internet's advent as a mainstream communicative medium should force us to re-evaluate whether it is appropriate to leave the facilitation of the fundamental human good of freedom of expression to the will of private market players. This requires a consideration of the hazards involved in eschewing any public law oversight of online intermediaries.

Two sources pose threats to speech interests online. The state alone is not one of them, because the NZBORA prevents non-statutory government actions from unjustifiably using coercive power to limit speech. These sources are private entities acting alone, and private entities acting voluntarily in compliance with the state's wishes. The former threat can be called 'private censorship', the latter "public private partnerships",⁴¹ "the Invisible Handshake",⁴² or "the privatisation of censorship."⁴³

³⁸ At 292.

³⁹ Lawrence Lessig *Code Version 2.0* (Basic Books, New York, 2006) at 234-6.

⁴⁰ See Barron, above n 7.

⁴¹ Benkler, above n 15 at 342.

⁴² Michael D Birnhack and Niva Elkin-Koren "The Invisible Handshake: The Reemergence of the State in the Digital Environment" (2003) 8 VA J L & Tech 6.

1. Examples of private censorship online

Private censorship online occurs at several levels. The Internet's networked nature means that information exchanges are dependent on numerous players who may act as 'chokepoints' or 'gatekeepers'. ISPs are obvious chokepoints; these network operators enable users to access online content, and thus may filter content en route to a user's device, effecting censorship of speech. For example, in 2005, Telus, then Canada's second largest ISP, blocked its 1 million subscribers from accessing a website belonging to the Telecommunications Workers Union, which was embroiled in a labour dispute with Telus. Telus blocked the website's IP address,⁴⁴ incidentally filtering 766 unrelated websites sharing the same IP address.⁴⁵ Telus claimed that its user contract entitled it to block websites. It faced no court action.

State actors too may motivate private ISPs and OSPs to limit individuals' expression. While the NZBORA prevents the state from coercing private entities to censor legitimate expression, government may nevertheless be influential in private decisions to censor speech. Censorship by 'public-private partnership' eludes constitutional protections against state censorship by insulating the state behind a private speaker, making the familiar bilateral relationship of State vs. Citizen triangular: State-[OSP]-Citizen.⁴⁶ The experience of the controversial journalistic organisation WikiLeaks illustrates this. It faced publicly-motivated private censorship after it released 250 000 American diplomatic cables in the 2010 'Cablegate' affair.⁴⁷

First Amendment protections probably immunise WikiLeaks from criminal prosecution in the United States;⁴⁸ the publication's legality is contentious, as no court has ruled it illegal. Despite this, after receiving calls from Senate Committee on Homeland Security staff on December 1 2010, Amazon Web Services, the server host for WikiLeaks website,

⁴³ Julian Assange, quoted in Charles Arthur and Josh Halliday "WikiLeaks fights to stay online after US company withdraws domain name" (3 December 2010) *The Guardian* <<http://www.guardian.co.uk/media/blog/2010/dec/03/wikileaks-knocked-off-net-dns-everydns>>.

⁴⁴ An Internet Protocol (IP) address is a unique 32 bit number allocated to a device on the Internet, which serves to identify that device on the network; Smith, above n 16 at 1-001.

⁴⁵ OpenNet Initiative "Bulletin 010: Telus Blocks Consumer Access to Labour Union Web Site and Filters an Additional 766 Unrelated Sites" (2 August 2005) OpenNet Initiative <<http://www.opennetinitiative.net/bulletins/010/>>.

⁴⁶ Elkin-Koren, above n 42 at 122.

⁴⁷ Benkler, above n 15 at 326 – 330.

⁴⁸ At 362.

terminated its service to WikiLeaks, claiming that WikiLeaks had breached its terms of service. Amazon disclaimed allegations of government pressure.⁴⁹ Shortly afterwards, however, Senator Joseph Lieberman, Chairman of the Committee, publicly “call[ed] on any other company or organization that is hosting WikiLeaks to immediately terminate its relationship with them.”⁵⁰ Subsequently, WikiLeaks’ domain name system (DNS) provider EveryDNS stopped directing American internet users’ requests for WikiLeaks.org to the website’s IP address;⁵¹ the French Industry Minister warned that hosting WikiLeaks’ content was unacceptable and would have consequences for French companies, following which a French server hosting the cables went offline;⁵² Apple Inc removed a WikiLeaks app from its App Store, and banks and payment facilitation companies such as MasterCard, Visa, PayPal, Western Union and Bank of America, which WikiLeaks relied upon to transfer vital donations, terminated their services.⁵³ WikiLeaks then moved its content to servers in Iceland and Sweden, established a new Swiss domain name and servers in fourteen countries to facilitate domain searches, and adopted alternate (although less effective) payment systems.⁵⁴

A New Zealand analogue to WikiLeaks’ experience involves the site Greencross.org.nz, which advocates drug law reform. The Greencross website belongs to the Medicinal Cannabis Support Group of New Zealand Inc., and is administered by Billy McKee, a medicinal marijuana advocate. In July 2011, a police officer arrested Billy McKee on drug charges. Following this, a police sergeant contacted Openhost Ltd, which provided Greencross with DNS services, requesting Openhost to close down the website on the basis that it facilitated the alleged offences.⁵⁵ However, McKee’s charges did not relate to the use of the Greencross website, which merely offered information about medicinal

⁴⁹ Amazon Web Services "Message" (2010) Amazon.com
<<http://aws.amazon.com/message/65348/>>

⁵⁰ Joseph Lieberman "Amazon severs ties with Wikileaks" (1 December 2010) Senator Joseph Lieberman <<http://www.lieberman.senate.gov/index.cfm/news-events/news/2010/12/amazon-severs-ties-with-wikileaks>>

⁵¹ A DNS provider acts to respond to queries for human-readable domain names with the machine-readable IP address of the server, which denotes the precise location on the exact web hosting server where that domain name, and so that website, is located.

⁵² Josh Halliday and Angelique Chrisafis "WikiLeaks: France adds to US pressure to ban website" (3 December 2010) The Guardian
<<http://www.guardian.co.uk/media/2010/dec/03/wikileaks-france-ban-website>>

⁵³ Benkler, above n 15 at 338 – 342.

⁵⁴ At 348.

⁵⁵ Email from Sarn Paroli (Detective Sergeant of the New Zealand Police) to OpenHost Ltd requesting Greencross.org.nz to be taken down (11 July 2011).

marijuana and arguments for law reform. Openhost complied, disabling access to Greencross.org.nz. The site administrators then moved the Greencross domain name and content to an American host.⁵⁶

These cases show how government may influence private entities to limit expression without the constitutional constraints that prevent direct censorship.⁵⁷ Suppression by informal public-private partnership is not a phenomenon contingent upon new communications technology. For instance, Benkler compares the WikiLeaks case with the McCarthy-era practice of government blacklisting American citizens with suspected Communist Party affiliations, who private employers then refused to hire.⁵⁸ If the means of such censorship are not new, however, the effectiveness of its end in the online context is.

The WikiLeaks and Greencross examples show that the Internet's decentralised nature, with myriad platforms and pathways from which information can flow, diminishes the private censorship's traditional effectiveness on a determined speaker's communicative ability. With traditional media, a few publishers and broadcasters' decisions may deny speakers access to the marketplace of ideas. The entities capable of facilitating online speech are so many, however, that the probability that they all deny access falls close to zero.⁵⁹ However, even if alternative providers are eventually found, when an intermediary denies a speaker service, this will deny some of online expression's most valuable features: that it is continuous, reliable and instantaneous. Additionally, "rigging the marketplace of ideas" by making access to information inconvenient, if not inaccessible, will nevertheless

⁵⁶ See NZ Council for Civil Liberties "Police censor political website" (2011) NZ Council for Civil Liberties <<http://nzcl.org.nz/content/current-issues/police-censor-political-website>>; NZ Council for Civil Liberties "Police defend censorship of website" (2011) NZ Council for Civil Liberties <<http://nzcl.org.nz/content/current-issues/police-defend-censorship-website>>.

⁵⁷ This should not be overstated - importantly, private intermediaries may rely upon their own constitutional protections to deny governments' requests to remove legal, if distasteful, material. For example, Google refused to remove a trailer to the trailer for the film "Innocence of Muslims", which was linked to religious protestors' attacks on United States embassies in several Arab nations. Gerry Shih "Google rejects White House request to pull Mohammad film clip" (14 September 2012) Reuters <<http://www.reuters.com/article/2012/09/14/us-protests-google-idUSBRE88D1MD20120914>>.

⁵⁸ Benkler, above n 15 at 366.

⁵⁹ In the case of WikiLeaks, the most effective censorial action proved to those of financial institutions rather than of any particular online entity; while various alternative OSPs could extend services to WikiLeaks, a lack of alternative payment providers for donations meant that WikiLeaks lost 95 per cent of its revenue, and in October 2011 was forced to suspend its operations in order to invest its resources in overturning the 'banking blockade'. See WikiLeaks "Banking Blockade" (31 July 2012) Wikileaks <<http://wikileaks.org/Banking-Blockade.html>>.

detriment that information's public impact.⁶⁰ Finally, some online intermediaries may indeed be so integral to the public marketplace of ideas that when they deny service, this produces a speech deficit that cannot be wholly alleviated through alternative pathways for speech.

Some OSPs do offer such forums, and they hold very effective powers of censorship. In general, OSPs which host social networking services, blogs, and websites are in a position of power to regulate or censor speech. These OSPs provide services to hundreds of millions of users, most of whom lack the money and technical ability to disseminate their own content.⁶¹ These users' dependency on OSPs to publish and receive content makes them vulnerable to OSP censorship. Some OSPs are so dominant that there exists no satisfactory alternative for users who seek the communicative end that they provide. When such OSPs deny access, they consign the speaker to relying upon alternative pathways whose reach is incomparable; equally a denial prevents all other users from receiving the censored user's speech. By providing media which allow for incomparably wide-reaching speech, these OSPs hold extraordinary power to curtail that speech.

A recent example of this power involves Twitter, the popular micro-blogging service, suspending journalist Guy Adams' account after he 'tweeted' complaints about broadcaster NBC Universal's Olympic Games coverage, including NBC Universal executive Gary Zenkel's corporate email address.⁶² NBC Universal and Twitter were strategic partners during the Olympic Games, so Twitter's employees alerted NBC Universal to the tweet, advising them to lay a complaint. Twitter justified the suspension based on a breach of their terms of service, which forbid the 'tweeting' of private, personal email addresses,⁶³ despite Adams publishing an already publicly available, generic work address. Twitter reversed the suspension after 48 hours following a raft of critic online.⁶⁴

⁶⁰ Seth F Kreimer "Censorship by Proxy: The First Amendment, Internet Intermediaries and the Problem of the Weakest Link" (2006) 155 UPLR 11 at 40.

⁶¹ Zuckerman, above n 22 at 72.

⁶² *Guy Adams "Twitter backs down at last - but why did I get banned?" (01 August 2012) The Independent* <<http://www.independent.co.uk/opinion/commentators/guy-adams-twitter-backs-down-at-last-but-why-did-i-get-banned-7994947.html>> (The tweet read: "The man responsible for NBC pretending the Olympics haven't started yet is Gary Zenkel. Tell him what u think! Email: Gary.zenkel@nbcuni.com.")

⁶³ Twitter Inc "Terms of Service" Twitter <<https://twitter.com/tos>>.

⁶⁴ Alex Macgillivray "Our approach to Trust & Safety and private information" (31 July 2012) Twitter <<http://blog.twitter.com/2012/07/our-approach-to-trust-safety-and.html>>.

This episode reminds us firstly that, even in Twitter's pro-free speech community, when we publish on the platform of a private entity, we do so "at their sufferance."⁶⁵ Secondly, that social pressure currently protects online expression more effectively than the law; it was not a legal right but rather social pressure that made Twitter reverse its censure. The caveat is that this pressure relied upon Guy Adams' ability, as a journalist for British newspaper *The Independent*, to reach a mass audience effectively through other means; this will clearly not usually be the case if a 'regular' user's account is suspended.

Determining precisely which OSPs hold such dominant positions in the marketplace of ideas involves a difficult, or perhaps insoluble,⁶⁶ empirical question. Some other academic writers have sought to answer that question.⁶⁷ This dissertation does not, and instead focuses on the most obvious examples. Twitter is one such example. It allows users to convey information to potentially massive numbers of users, and no similarly popular 'broadcast' micro-blogging forums for speech exist. Google provides another: the search engine which over 90 per cent of New Zealanders and just fewer than 70 per cent of Americans use to search for information on the World Wide Web.⁶⁸ The social networking OSP Facebook is the example that this dissertation will particularly focus upon. In New Zealand, of the 64 per cent of Internet users who use social networking sites, 96 per cent say they use Facebook the most.⁶⁹

2. The legal response to pivotal intermediaries restricting speech

Recent decisions indicate that courts will take an orthodox view as to the lawfulness of an OSP censoring speech by denying access to or 'blacklisting' content. The courts resolve such issues by reference to the terms of contract between intermediary and speaker, or in the absence of such a contract, to the property rights of the intermediaries concerned.

⁶⁵ Dan Gilmour "If Twitter doesn't reinstate Guy Adams, it's a defining moment" (2 August 2012) *The Guardian* <<http://www.guardian.co.uk/commentisfree/2012/jul/30/twitter-suspends-guy-adams-independent>>.

⁶⁶ John Blevins "The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms" (2012) 79 *Tenn L Rev* 353 at 398 ("many of these questions ... are inherently unanswerable, because the Internet's architecture allows applications to evolve so quickly.")

⁶⁷ See Laidlaw, above n 4.

⁶⁸ Chris Keall "Microsoft's Bing 'gains' on Google in US; barely on radar in NZ" (13 April 2011) *The National Business Review* <<http://www.nbr.co.nz/article/microsofts-bing-gains-google-us-barely-radar-nz-ck-90621>>.

⁶⁹ Philippa Smith et al *The Internet in New Zealand 2011* World Internet Project (Auckland University of Technology, 2011) at 13.

A contract exists between Facebook and its website's users. To create a Facebook account, one must click a button that reads "Sign Up".⁷⁰ Underneath this button appears the text "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." The words "Terms of Service" are a hyperlink, which sends the user to Facebook's "Statement of Rights and Responsibilities", a document purporting to govern Facebook's relationship with its users.⁷¹ In *Fteja v Facebook*,⁷² the Court applied orthodox rules of contract formation in the online context to find a binding contract existed between Facebook and the plaintiff, a Facebook user, because he "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences."⁷³ A New Zealand court would come to the same result. Facebook's hyperlink is "reasonably sufficient to give [a user] notice" of the terms to which the offeree signifies her assent and so to which her use of the service is subject.⁷⁴

Courts will enforce this user contract. In *Young v Facebook*,⁷⁵ Facebook had disabled the plaintiff's account for behaviour that it believed was harassing or threatening to other users. This behaviour violated Facebook's 'Statement of Rights and Responsibilities' which the Court accepted formed a binding contract. Clause 15 of the contract stated that should a user "violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, [we] can stop providing all or part of Facebook to [the user]."⁷⁶ The Court held that the plaintiff had failed to show that Facebook had breached its contract, and so no remedy could lie for her denial of access.

The judge held in obiter that some relief may be possible if Facebook capriciously terminated an account. Because Facebook does not expressly reserve all rights to terminate accounts, it was "at least conceivable that arbitrary or bad faith termination of user

⁷⁰ This is an example of a 'click-wrap' contract, where the use of the offeror's service is conditional on an offeree signifying their acceptance of the offeror's terms by clicking on a button, hypertext link or by entering a particular symbol or code in a box on a web form; David Harvey *Internet.law.nz* (LexisNexis, Wellington, 2011) at 664. Click-wrap terms can be distinguished from a 'browse-wrap' terms, which are displayed for viewing and claim to bind users accessing the site, but do not call for any explicit manifestation of assent; at 667.

⁷¹ "Statement of Rights and Responsibilities" (8 June 2012) Facebook <<http://www.facebook.com/legal/terms>>.

⁷² *Fteja v Facebook Inc* 841 F Supp 2d 829 (SD NY 2011).

⁷³ At 840.

⁷⁴ *Thornton v Shoelane Parking* [1971] 2 QB 163 (CA) at 170.

⁷⁵ *Young v Facebook Inc* US Dist LEXIS 116530 (ND Cal 2010).

⁷⁶ Facebook "Statement of Rights and Responsibilities" (8 June 2012) Facebook <<http://www.facebook.com/legal/terms>>, above n 71.

accounts ... could implicate the implied covenant of good faith and fair dealing.”⁷⁷ However, such implied obligations are not regarded as part of New Zealand’s common law.⁷⁸ Furthermore, Facebook’s terms allow the company to amend its agreement, so this is slight protection.⁷⁹ Other social media OSPs expressly reserve the right to remove content and to terminate users at any time, in which cases no implied duty to maintain a connection is arguable.⁸⁰

In the absence of contracts, courts defer to private property rights in online platforms to permit speech regulation. In *Kinderstart v Google*, the plaintiff sued Google for demoting its search ranking, alleging that this effectively blocked access to its website.⁸¹ The Court dismissed all nine causes of action,⁸² refusing to entertain the notion of Google owing any legal obligation to the plaintiff. The Court was not prepared to take into account the facts that the plaintiff’s business and ability to communicate were reliant on Google, and that Google performed a publicly beneficial function. The decision rested fundamentally on property rights. What Google did with its property was its business and “merely opening a space to the public does not dedicate the space to public use.”⁸³

Expression online could be better. Online speech is vulnerable to privately imposed speech restrictions, especially those of the largest OSPs. But courts have met aggrieved parties’ non-orthodox legal claims against these OSPs without sympathy, and even with contempt.⁸⁴ This is understandable. A judge’s role is to apply traditional rules in the face of novel situations. We cannot expect judges to balance the different interests involved in

⁷⁷ *Young v Facebook Inc*, above n 75 at 14.

⁷⁸ Jeremy Finn and Stephen Todd John Burrows *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2011) at 215.

⁷⁹ Facebook Inc above n 71 at cl 14. Note that Facebook must give users seven days’ notice and the opportunity to comment, and if more than 7000 users comment on a proposed amendment, Facebook will hold a vote, offering alternative amendments. The result of that vote will be binding if more than 30% of active registered users participate – this quorum is unlikely to be established, as 300 million of its 1 billion active users would be required to vote.

⁸⁰ For example, see Twitter Inc “Terms of Service” Twitter <<https://twitter.com/tos>>, above n 63, cl 8.

⁸¹ *Kinderstart.com LLC v Google Inc* 2007 U.S. Dist. LEXIS 22637 (ND Cal 2007).

⁸² The plaintiff’s allegations included a violation of the right to free speech, unfair competition and practices, breach of the implied covenant of good faith and fair dealing; defamation and negligent interference with prospective economic advantage.

⁸³ *Kinderstart.com LLC v Google Inc*, above n 81 at 16.

⁸⁴ *Fteja v Facebook Inc*, above n 72 at 838 (“it is tempting to infer from the power with which the social network has revolutionized how we interact that Facebook has done the same to the law of contract that has been so critical to managing that interaction in a free society. But not even Facebook is so powerful”).

shaping citizens' expressive ability in cyberspace. As Lawrence Lessig argues, "[i]f there are decisions about where we should go, and choices about the values this space will include, then these are choices we can't expect our courts to make."⁸⁵ These choices are for legislatures, not the judiciary. Certain jurisprudential doctrines may help guide the legislature; this is the focus of the following chapter.

⁸⁵ Lessig, above n 39 at 319.

III Public Forums, Corporate Towns and Social Media

In this chapter, I evaluate the argument that certain online actors, despite not performing public functions sufficient for direct NZBORA application,⁸⁶ inhabit a type of quasi-public role sufficient to merit the oversight of state regulation. I do not argue that the networked public sphere's private ownership threatens expression more than traditional media's private ownership, or in a novel way: the Internet enables unprecedented expressive opportunities. These opportunities are so great that they warrant careful regulation in order to ensure their continued existence and continued enhancement; "any argument for a deviation from these gains must be justified against this background; it is not enough simply to say that such things are utopian."⁸⁷

Firstly, I explain the American 'public forum' doctrine, and argue that Facebook acts as a modern public forum for speech. This involves analogising Facebook's platform with the physical spaces that have provided public forums historically. Next, I address the American jurisprudence on quasi-public property held by private actors. Lastly, I apply the reasoning of those cases to the social media OSP Facebook, as an example of how regulators may analyse the issue.

A. The Public Forum Doctrine

The 'public forum' doctrine affirmatively obliges government to dedicate some property, such as sidewalks and parks, to the public's expressive use. The courts subject government speech restrictions on these public forums to the highest First Amendment scrutiny, so on these sites speech receives its most robust protection.⁸⁸ The underlying concerns of the doctrine inform our s 14 NZBORA jurisprudence at the s 5 stage of deciding whether a right's limit is demonstrably justified.⁸⁹ Those underlying concerns are the following. Firstly, public forums implicate distributive justice concerns, subsidising speakers who

⁸⁶ See below IID.

⁸⁷ Jennifer A. Chandler "A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet" (2007) 35 Hofstra L Rev 1095 at 1097.

⁸⁸ Dawn C. Nunziato "The Death of the Public Forum in Cyberspace" (2005) 20 Berkeley Technology Law Journal 1115 at 1117.

⁸⁹ Grant Huscroft Paul Rishworth, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 347; *Police v Beggs* [1999] 3 NZLR 615 at 630; see below at IVA.

would otherwise lack access to property from which to speak.⁹⁰ Secondly, the adjacency of some public forums to private properties gives speakers access to specific audiences, enhancing their expression's effectiveness of speech.⁹¹ Examples include picketing on sidewalks by unions outside non-union workplaces⁹² or by radical church groups outside military funerals.⁹³ Thirdly, public forums are crucial to social cohesion. As Stephen Gey puts it, "every culture must have venues in which citizens can confront each other's ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized into factions that ... cannot come to agreement about the Common Good, [nor] ... engage effectively in ... democratic government."⁹⁴

Inexpensive modern communications technology renders the first justification less salient. However, facilitating pluralistic discussion and access to specific audiences is increasingly important.⁹⁵ The Internet's decentralised nature encourages the public's fragmentation into smaller interest groups operating in separate spaces.⁹⁶ Internet users largely control what speech they encounter, unlike in real space where one may be confronted by a diverse range of speech, which makes reaching a particular online audience difficult for the speaker.⁹⁷ Furthermore, there is a danger that like-minded speakers congregating in online 'echo chambers' merely reinforce each other's beliefs in the absence of opposing ideas; this "entrenches existing views, spreads falsehood, promotes extremism and makes people less

⁹⁰ JM Balkin "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment" (1990) *Duke LJ* 375 at 400.

⁹¹ Noah Zatz "Note, Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment" (1998) *12 Harv J L & Tech* 149 at 165 – 170.

⁹² *Thornhill v Alabama* 310 US 88 (1940); *Venetian Casino Resort v Local Joint Executive Board of Las Vegas* 257 F 3d 937 (9th Cir 2001).

⁹³ *Snyder v Phelps* 131 SCt 1207 (2011) at 1218 ("Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a special position in terms of First Amendment protection... [W]e have repeatedly referred to public streets as the archetype of a traditional public forum noting that time out of mind public streets and sidewalks have been used for public assembly and debate." Internal citations omitted.)

⁹⁴ Steven G Gey "Reopening the Public Forum-From Sidewalks to Cyberspace" (1998) *58 Ohio St LJ* 1535 at 1539.

⁹⁵ Zatz, above n 91 at 202.

⁹⁶ At 202 ("[T]here is important social value simply in seeing that other kinds of people exist and in retaining some degree of familiarity through ... passing by on the sidewalk or waiting in line together at the post office. These sorts of very casual encounters are the ones most distant from the current structure of cyberspace...").

⁹⁷ Lawrence Lessig compares the owners of 19th Century estates, whose personal butlers stood as gatekeepers deciding what speech might trouble their masters, to modern Internet users, and asks (in the context of filtration technology) whether the ability to exercise perfect choice over what speech they receive is consistent with the values underlying constitutional free speech protections; Lessig, above n 39 at 259.

able to work cooperatively on shared problems.”⁹⁸ Public forums retain their significance online because “for a healthy democracy, shared public spaces, virtual or not, are a lot better than echo chambers.”⁹⁹

There are three types of government-owned forum: traditional public forums, such as sidewalks and public park; properties which government designates for either general public use, use by certain speakers, or the discussion of certain subjects, and non-public forums, which government owns but does not designate for public expression, such as military bases.¹⁰⁰ Courts apply strict scrutiny when government impinges upon citizens’ rights to speak in the former two types of forums, striking down speech restrictions unless they are narrowly tailored to serve compelling government interests.¹⁰¹ The doctrine can apply to facilities or services which constitute a forum “more in a metaphysical than in a spatial or geographic sense”,¹⁰² so its application to websites is appropriate.¹⁰³

If the doctrine were applicable, a social media website like Facebook could fit this trifurcated analysis as a ‘designated’ public forum, which requires that a property owner makes “an affirmative choice to open up its property for use as a public forum.”¹⁰⁴ Facebook invites the public to use its service as a platform for speech; indeed, affirmatively welcoming users’ speech is the company’s *modus operandi*, and so classification as a designated public forum would be appropriate.

B. The American treatment of privately-owned public forums

The fact that Facebook is a privately owned company, not a government body, is fatal to the claim that it operates a public forum in the American constitutional sense.¹⁰⁵ However historically American courts have imposed quasi-public duties upon private entities which

⁹⁸ Cass Sunstein *Republic.com 2.0* (Princeton University Press, Princeton, 2007) 253 at 94.

⁹⁹ At 95.

¹⁰⁰ *Cornelius v NAACP Legal Defense & Education Fund Inc* 473 US 788 (1985) at 802.

¹⁰¹ Nunziato, above n 88 at 1149.

¹⁰² *Rosenberger v Rector and Visitors of the University of Virginia* 515 US 819 (1995) at 830. In that case, the forum consisted of access to an interschool mail system and teacher mailboxes.

¹⁰³ See *Putnam Pit v City of Cookeville* 23 F Supp 2d 822 (MD Tenn 1998), where the Court indicates public forum analysis would have applied to a city’s website, had the city designated it for the facilitation of speech.

¹⁰⁴ *American Library Association Inc v United States* 539 US 194 (2003) at 206.

¹⁰⁵ See for example *Kamango v Facebook* 2011 US Dist LEXIS 53980 (ND NY 2011) at 5 (“Plaintiff’s claim under the First Amendment is futile because the First Amendment applies only to governmental action (and he has alleged no facts plausibly suggesting such governmental action.”)

control properties functionally equivalent to public forums. The reasoning in these cases is instructive for how lawmakers might consider imposing duties on pivotal OSPs.

In *Marsh v Alabama*, the Supreme Court overturned the conviction for trespass of a Jehovah's Witness who was arrested for proselytising on the streets of Chickasaw, Alabama; a privately-owned town.¹⁰⁶ Despite the streets being private property, the Court held that "[t]he managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees."¹⁰⁷ The Court's decision relied on a wider principle that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."¹⁰⁸ The private nature of the town's corporate owner was unimportant because a private town was functionally equivalent to a public town: "[w]hether a corporation or a municipality owns or possesses a town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."¹⁰⁹

Increasingly since *Marsh* was decided, the places that communities use as public forums are private; Americans today congregate more in private shopping malls than public streets or parks. The Supreme Court initially extended the principle from *Marsh* to such malls, considering them basically similar social entities, merely functioning in different eras.¹¹⁰ In *Amalgamated Food Employees Union v Logan Valley Plaza*, the Court held that a publicly accessible shopping centre operated like a community business block and so was "the functional equivalent of the business district ... involved in *Marsh*."¹¹¹ The First Amendment restricted the centre owner's right to exclude union protestors picketing against a business within the centre.

The Supreme Court later reversed the trend of recognising quasi-public duties of private owners to allow citizens' speech. In *Lloyd Corp v Tanner*, the Court upheld a shopping

¹⁰⁶ *Marsh v Alabama* 326 U.S. 501 (1946).

¹⁰⁷ At 508.

¹⁰⁸ At 506.

¹⁰⁹ At 507.

¹¹⁰ Stephen G Opperwall "Shopping for a Public Forum: Pruneyard Shopping Center v Robins, Publicly used Private Property, and Constitutionally Protected Speech" (1981) 21(3) Santa Clara L Rev 801 at 808.

¹¹¹ *Amalgamated Food Employees Union v Logan Valley Plaza* 391 US 308 (1968) at 318.

centre owner's right to exclude protests unrelated to the centre's businesses;¹¹² and later the Court rolled back *Marsb* to allow the exclusion of any protest.¹¹³ These decisions effectively restricted *Marsb* to its facts; only private property owners "performing the full spectrum of municipal powers and [standing] in the shoes of the State" will owe quasi-public duties to respect First Amendment rights.¹¹⁴ A focus on performance of municipal powers such as control over sewers and postal services misconstrues *Marsb*'s rationale: that those opening their property for use as a public forum allow users' constitutional speech rights to limit their own property rights.¹¹⁵ As such, the Court's shift from protecting public forums for speech in *Marsb* and *Logan Valley* to recognising private property owners' rights to exclude speakers in *Lloyd* appears to be based on a "deliberate doctrinal shift to insulate private speech regulation from First Amendment scrutiny."¹¹⁶

Some individual American state constitutions grant citizens positive speaking rights, and thus provide more robust speech protection when speaking on private property than the federal constitution. Cases from these states indicate how, once a private actor opens up a forum to the public, lawmakers might balance rights to speak on private property against an owner's property and speaking rights. In *Robins v Pruneyard Shopping Center*,¹¹⁷ the Californian Supreme Court held that art I, §§ 2 and 3¹¹⁸ of the state's constitution gave citizens an affirmative right to speak, and thus protected reasonable petitioning and speech in a private shopping centre. It did so by following *Marsb*'s underpinning rationale, that private rights must defer to public needs. The Court held that "ownership [must] be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others."¹¹⁹

¹¹² *Lloyd Corp v Tanner* 407 U.S. 551 (1972) at 562.

¹¹³ *Hudgens v National Labor Relations Board* 424 U.S. 507 (1976) at 518.

¹¹⁴ *Lloyd Corp v Tanner*, above n 112 at 569.

¹¹⁵ Opperwall, above n 110 at 812.

¹¹⁶ Nunziato, above n 88 at 1135.

¹¹⁷ *Robins v Pruneyard Shopping Center* 23 Cal 3d 899 (Cal Sup Ct 1979).

¹¹⁸ The provisions read "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press" and "[People] have the right to . . . petition government for redress of grievances", respectively; Constitution of the State of California 1879 (US). Compare United States Constitution, Amendment I ("Congress shall make no law . . . abridging the freedom of speech.")

¹¹⁹ *Robins v Pruneyard Shopping Center*, above n 117 at 907.

The federal Supreme Court held that by recognising a positive right to speak on private property, the state Court did not restrict the property owner's rights under the federal Constitution's First, Fifth and Fourteenth Amendments.¹²⁰ The state Court's ruling did not effect a 'taking' of property under the Fifth Amendment because it did not impair the value or use of the property. Despite denying the owner his right to exclude others, an "essential stick in the bundle of property rights," the Court found that the owner could still implement 'time, place, and manner' regulations that would minimise any interference with its commercial functions.¹²¹ Similarly, the owner was not denied his property without due process of law contrary to the Fourteenth Amendment.¹²² Neither did the decision abridge the appellant's First Amendment right not to be forced to use its property for others' speech.¹²³ First, the centre welcomed a diverse public, so observers would not identify the speech of its users with that of its owner.¹²⁴ Second, because the state was not dictating that the centre carried a particular message, there was no fear of forced discrimination for or against speech content. Finally, the owner could use signs expressly to disavow any connection with the speech of the centre's users.

Pruneyard's scope is potentially massive. All private owners of malls, shops and restaurants necessarily allow the public to access their properties so that they may do business. Should the *Pruneyard* decision require them all to protect users' speech, this would greatly restrict their freedom to control their property. Therefore, the courts have clarified that if an owner gives the public access only in order to buy goods, the owner's private interest in exclusive control outweighs the public interest in using the property as a forum.¹²⁵ The private right to exclude remains unless the property is generally open to the public and

¹²⁰ *Pruneyard Shopping Center v Robins* 447 US 74 (1980).

¹²¹ At 83.

¹²² At 84.

¹²³ At 87.

¹²⁴ Note the circularity of the Court's reasoning here, however. Although the shopping centre welcomed all comers initially, it sought to reserve the right to exclude users. If the centre could exclude some people and not others on the basis of their speech, then an observer could identify the speech of protestors within the centre with the centre. Only if the right to exclude is denied, so that the centre must bear protestors' speech, will the centre not be affiliated with the content of the protestors' speech. The Court's reasoning then amounts to: the shopping centre owner must bear the presence of protestors because the shopping centre must bear the presence of the protestors.

¹²⁵ *Trader Joe's Co v Progressive Campaigns* 73 Cal App 4th 425 (1999) at 434.

functions as the equivalent of a traditional public forum: a place where people choose to come, meet, talk and spend time.¹²⁶

C. Application to Social Media OSPs

1. Appropriateness of Fit

New Zealand courts have addressed the public forum doctrine only minimally, and have not considered the American jurisprudence on privately-owned public forums. However, these concepts are not contingent upon the American social setting. New Zealand lawmakers too should balance the public's interest in maintaining useful sites for congregation and speech and private property owners' interests in liberty and control over their property. The courts based their recognition of quasi-public duties in *Logan Valley* and *Pruneyard* on societal developments; shopping malls had become functionally equivalent to the traditionally important public forums of public parks and city streets.¹²⁷ In the past few years, a similarly important societal development has taken place: the rise of social media websites as platforms that bring citizens together for speech and discourse.¹²⁸ One American Supreme Court judge has noted that today “[m]inds are not changed in streets and parks as they once were,” instead, “the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”¹²⁹ The *Pruneyard* analysis is then appropriate for social media websites, which should perhaps owe quasi-public duties to respect the expression of their users.

The Facebook website is not a physical place. This should not deter regulators from imposing the similar quasi-public duties as have been imposed on privately-owned physical places which are functionally equivalent to public parks and sidewalks. Facebook exists in ‘cyberspace’.¹³⁰ The American Supreme Court recognised the spatial characteristics of

¹²⁶ *Albertsons Inc v Young* 107 Cal App 4th 106 (2003) at 121.

¹²⁷ *Amalgamated Food Employees Union v Logan Valley Plaza*, above n 111 at 325; *Robins v Pruneyard Shopping Center*, above n 117 at 907.

¹²⁸ Jillian C York "Policing Content in the Quasi-Public Sphere" (Report prepared for the Open Net Initiative, September 2010) available at <<http://opennet.net/policing-content-quasi-public-sphere>> at 28.

¹²⁹ *Denver Area Education Telecommunications Consortium v FCC* 518 US 727 (1996) per Kennedy J at 802-03.

¹³⁰ For discussion of the idea of cyberspace as a metaphorical and legal ‘place’ see Dan Hunter "Cyberspace as Place and the Tragedy of the Anticommons" (2003) 91 Cal L Review 439 (“Judges, legislators, practitioners, and lay people treat cyberspace as if it were a physical place... This place may be inchoate and virtual, but no less real in our minds”), Mark Lemley

cyberspace as early as in 1997, referring to the “entire universe of cyberspace” and stating that “[c]yberspace undeniably reflects some form of geography; chat rooms and websites, for example, exist at fixed ‘locations’ on the Internet.”¹³¹ Importantly, courts have applied the public forum doctrine to ‘metaphysical’ as well as physical places.¹³² The pertinent factor is not physical, spatial existence but rather whether a website offers citizens facilities ‘functionally equivalent’ to those of traditional public forums.

The question of whether a forum owner performs the “full spectrum of municipal powers” and “stands in the shoes of the state”¹³³ should not foreclose the policy question entirely. The state has never controlled cyberspace.¹³⁴ This fact should not obfuscate whether large social media forums are analogous to the public forums that the state has historically provided. In a sense, city parks and town squares were society’s original social media forums.¹³⁵ The *Marsh* decision suggests that sometimes constitutional speaking rights should trump property interests. A focus exclusively upon historical state functions precludes examining when this should be the case. The merits of recognising such duties and a balancing of competing rights and interests should guide policy, not a lone inquiry as to whether websites perform municipal functions: “the correct outcome of these cases is surely not controlled by the absence of sewers in cyberspace.”¹³⁶

"Place and Cyberspace" (2003) 91 Cal L Review 521 (“As a technical matter, of course, the idea that the Internet is literally a place in which people travel is not only wrong but faintly ludicrous. No one is ‘in’ cyberspace... At most, the Internet is like the physical world except in certain respects in which it is different”) and Diane Rowland "Slippery Slope or Solid Ground? Living with the cyberspace is place metaphor" (paper presented to 21st BILETA Conference, Malta, April 2006) available at <<http://bit.ly/W75wyK>> (“The meaning of the cyberspace is place metaphor, although originally used to denote the other-worldliness of the internet has metamorphosed and has come to denote the fact that cyberspace is merely a place within the real world.”)

¹³¹ *Reno v ACLU* 521 US 844 (1997) at 890.

¹³² *Rosenberger v Rector and Visitors of the University of Virginia*, above n 102 at 830.

¹³³ *Lloyd Corp v Tanner*, above n 112 at 569.

¹³⁴ Although the Internet was initially created as a state initiative as the US Department of Defence’s Advanced Research Projects Agency Network (ARPANET), the World Wide Web has always consisted of mainly private intermediaries; see Barry M Leiner et al "A Brief History of the Internet" Internet Society (21 February 2011) <<http://www.isoc.org/internet/history/brief.shtml>>; see above IIB - IIC.

¹³⁵ Stacey D Schesser "A New Domain for Public Speech: Opening Public Spaces Online" (2006) 94 Cal L Review 1791 at 1799.

¹³⁶ Molly S van Houweling "Sidewalks, Sewers and State Action in Cyberspace" Unpublished Draft - June 2000 available at <<http://cyber.law.harvard.edu/is02/readings/stateaction-shaffer-van-houweling.html>>.

Today, Facebook and other large social media OSPs provide services that mirror traditional public forums. Facebook is the paradigmatic example. As of October 2012, it provided a platform for over one billion active speakers to seek, impart and receive information.¹³⁷ The platform that Facebook provides is arguably a more obvious public forum than the malls featured in *Logan Valley* and *Pruneyard*. When shopping centre owners provide public access to property facilitating speech, this provision is a necessary but incidental consequence of the owners' business purpose: to allow commercial tenants to do business with customers. Facebook, however, principally provides the public with a facility for speech,¹³⁸ and its business motive—displaying advertising alongside that speech—is contingent upon the facilitation of speech.¹³⁹ Unlike a shopping mall, providing a platform for speech is central, not incidental, to Facebook's service.

A final important difference between real property forums and OSP forums is how rules are enforced. Exclusion from a real property forum usually requires state enforcement of trespass laws, so the real property forum cases directly implicate state action in a way that OSP exclusion does not. The use of software enforces the OSP's will, not state police or a court order; on an OSP's platform, "code is law."¹⁴⁰ Thus one can distinguish an OSP directly disabling a user's account, as in the Guy Adams scenario,¹⁴¹ and an OSP pleading that a Court enjoins users from creating accounts.¹⁴² The latter case is more amenable to traditional constitutional scrutiny, as it involves government restricting speech via enforcement of statutory or common law rules, even though the restriction is operating to protect private property.¹⁴³

¹³⁷ Liana B Baker and Gerry Shih "Facebook crosses billion threshold, on quest for growth" (5 October 2012) Reuters <<http://www.reuters.com/article/2012/10/04/facebook-billion-users-idINDEE89307P20121004>>.

¹³⁸ JM Balkin "Media Access: A Question of Design" (2008) 76 *Geo Wash L Rev* 933 at 937 ("a key element of [social media OSPs'] business models is providing widespread access to media and encouraging mass participation.")

¹³⁹ Blevins, above n 66 at 393.

¹⁴⁰ Lessig, above n 39 at 5.

¹⁴¹ See text accompanying n 62.

¹⁴² *Twitter Inc v Skootle Corp* 2012 US Dist LEXIS 87029 (ND Cal, 22 June 2012); ("Twitter seeks preliminary and permanent injunctive relief restraining Harris from creating Twitter accounts for purposes that violate the TOS, including "bot" accounts.")

¹⁴³ *Intel v Hamidi* 30 Cal 4th 1342 (Cal Sup Ct 2003) at 1364 ("the use of government power, whether in enforcement of a statute or ordinance or by an award of damages or an injunction in a private lawsuit, is state action that must comply with First Amendment limits."); see also van Howeling above n 136.

This difference is less important for our purposes of considering whether private entities should owe positive duties to protect their users' speech. The protestors in *Pruneyard* did not assert a negative right against state interference of speech. Instead, the Californian Constitution granted them positive speaking rights, enjoining the property owner from excluding them, and the Californian Supreme Court distinguished the case from *Lloyd* on this basis.¹⁴⁴ The consequences for users' speech interests are the same whether a private actor or the state denies access to an OSP's service. An approach focusing on the user's positive right to speak should not place emphasis on this difference. Instead it should appropriately balance the interests of the parties involved: those of OSPs in controlling their platforms, and users in speaking on them. .

2. Balancing Interests

Facebook users have an interest in speaking and receiving information. The strength of that interest depends on the value of the speech involved. Critics have argued that speech on Facebook is "extremely rapid, very shallow communication,"¹⁴⁵ and can too often be malicious and harmful.¹⁴⁶ If the normative values that freedom of speech underpins are the derivation of truth produced through competition in the 'marketplace of ideas',¹⁴⁷ or the provision of information necessary for democratic self-government and deliberation,¹⁴⁸ such speech is not valuable. Certainly, the mundane status updates, memes,¹⁴⁹ and chatter that Facebook features prominently are a far cry in importance from the religious and political speech involved in *Marsh* and subsequent quasi-public forum cases.

¹⁴⁴ *Robins v Pruneyard Shopping Center*, above n 117 at 904.

¹⁴⁵ Noam Chomsky quoted in Jurgenson, Nathan "Why Chomsky is wrong about Twitter" (24 October 2011) Salon
<http://www.salon.com/2011/10/23/why_chomsky_is_wrong_about_twitter/>.

¹⁴⁶ New Zealand Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011), above n 3.

¹⁴⁷ See *Abrams v United States* 250 US 616 (1919) at 630 per Holmes J (dissenting): ("[T]he ultimate good desired is better reached by free trade in ideas ... [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market... That at any rate is the theory of our Constitution.")

¹⁴⁸ See Alexander Meiklejohn *Political Freedom: The Constitutional Powers of the People* (Harper, New York, 1960) at 26, 55: ("What is essential is not that everyone shall speak, but that everything worth saying shall be said." "[The First Amendment has no concern about the needs of many men to express their opinions [but rather concerns] the common needs of all the members of the body politic.")

¹⁴⁹ Oxford Dictionaries "Definition of Meme" (2012) Oxford University Press
<<http://oxforddictionaries.com/definition/english/meme>> ("An image, video, piece of text, etc., typically humorous in nature, that is copied and spread rapidly by Internet users, often with slight variations").

However, Facebook provides a forum for all speech, both idiosyncratic and trivial speech as well as political and religious speech. For example, every major New Zealand political party has its own Facebook ‘page’ on which political information is disseminated and discussed,¹⁵⁰ and the use of Facebook and Twitter at least in part facilitated the ‘Arab Spring’ political uprisings.¹⁵¹ Additionally, some writers argue that as expression has moved online, the normative values underpinning freedom of speech have shifted. Jack Balkin suggests that the Internet has made salient the “populist nature of freedom of speech, its creativity, its interactivity, its importance for community and self-formation [which] suggest that a theory of freedom of speech centred around [only] government and democratic deliberation ... is far too limited” and has revealed that purpose of online speech is the promotion and development of a democratic culture.¹⁵² Democratic culture goes beyond the deliberations of state; it encapsulates the processes of meaning-making that constitute us as individuals. In the shift from mass media to social media, citizens can now participate directly in that democratic culture through appropriation and alteration rather than merely consumption, and thereby engage in a constant definitional exercise that has broad and profound social effects.¹⁵³ Discounting speech as ‘trivial’ merely because it does not concern governance or self-determination ignores the semiotic importance of non-political speech. However, Balkin’s thinking runs counter to commentators and judges’ conventional view that political speech sits atop the “value pyramid” with commercial, casual and gratuitously offensive speech lying underneath it.¹⁵⁴ Given that important political speech does take place on Facebook, and moreover that non-political speech could arguably be ascribed greater importance in the online context, both speakers and receivers of information have strong interests in open platforms for communication online.

¹⁵⁰ For example: New Zealand National Party <<http://www.facebook.com/NZNATS>>, New Zealand Labour Party <<http://www.facebook.com/NZLabourParty>>, Green Party of Aotearoa New Zealand <<http://www.facebook.com/nzgreenparty>> and Association of Consumers and Taxpayers <<http://www.facebook.com/actparty>>.

¹⁵¹ See Rachel MacKinnon *Consent of the Networked: The World-wide Struggle for Internet Freedom* (Basic Books, New York, 2012).

¹⁵² Balkin, above n 17 at 32. See also Laidlaw, above n 4.

¹⁵³ Balkin, above n 17 at 37.

¹⁵⁴ New Zealand Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MBP, 2012), above n 3 at [4.12]; Jacob H Rowbottom and 355. "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 CLJ 355; *Campbell v MGN* [2004] UKHL 22 at [148] (of all the speech that is “deserving of protection in a democratic society”, “[t]op of the list is political speech”).

The existence of alternative avenues for communication also affects the interests that Facebook users have in the platform. If an alternative to Facebook offers the same communicative possibilities to users, then regulators should not impose new duties upon Facebook; this amounts to an “unwarranted infringement of property rights ... under circumstances where adequate alternative avenues of communication exist.”¹⁵⁵ In *Cyber Promotions v AOL*, the Court held that email was not such a unique communicative medium that the plaintiff had no alternative avenues for communication after the defendant barred the plaintiff from sending emails to its users. The Court held that ‘alternative’ does not mean ‘identical’, and so slower, more expensive media like postal mail, television or leafleting provided sufficient alternatives.¹⁵⁶ Sixteen years later, offline communications media cannot be considered sufficient alternatives to Internet-enabled media. The qualitative and quantitative advantages to online speech are too great to find a satisfactory offline substitute.¹⁵⁷ The American Supreme Court’s conclusion only a year later that the Internet is “the most participatory form of mass speech yet developed” tends to support this conclusion.¹⁵⁸

Any proposed alternative avenues for speech must be found online. It is suggested that the ability to create one’s own website or blog is not a sufficient alternative due to the difficulty of finding an audience online. Benkler notes that “there is a tiny probability that any given website will be linked to by a huge number of people and a very large probability that for a given website only one other site, or even no site, will link to it.”¹⁵⁹ The alternatives that other OSPs currently offer too may be insufficient. For example, New Zealand’s Facebook users outnumber Twitter users seven to one.¹⁶⁰ Nadine Wahab, a member of the Cairo Institute for Human Rights Studies who was involved in the Egyptian ‘Arab Spring’ movement, has commented that “there are no other alternatives now. If you want to organise a movement the only place to do it effectively is on

¹⁵⁵ *Lloyd Corp v Tanner*, above n 112 at 567.

¹⁵⁶ *Cyber Promotions v America Online*, above n 31 at 453.

¹⁵⁷ See IIA above.

¹⁵⁸ *Reno v ACLU*, above n 131 at 863.

¹⁵⁹ Yochai Benkler *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, New Haven, 2006) at 212.

¹⁶⁰ Government Information Services *Social Media in Government: Hands-on Toolbox Version 1* (Department of Internal Affairs, November 2011) available at <<http://webtoolkit.govt.nz/files/Social-Media-in-Government-Hands-on-Toolbox-final.pdf>>; *Social Media in Government: High-level Guidance Version 1* (Department of Internal Affairs, November 2011).

Facebook, because you have to go where the people are.”¹⁶¹ Furthermore, as sectors of government increasingly adopt Facebook as a mechanism for improving public consultation, termination of access from the platform has worrying incidental consequences for democratic participation.¹⁶² Facebook appears to be an increasingly crucial channel for the very types of speech that the right to freedom of speech unarguably serves to protect.

We must also consider Facebook’s rights and interests in maintaining full control over its platform. Editorial control determines a person’s interests in conveying others’ speech. One can contrast the speech interests of publishers who exercise editorial discretion over what they disseminate, for example newspapers and broadcast media, with ‘common carriers’, who merely act as neutral conduits in conveying others’ information, such as postal and telephone carriers.¹⁶³ Publishers exercising positive editorial control act like speakers in enabling particular communications. They clearly have strong interests in the speech that they convey, so editorial judgement is traditionally granted strong constitutional protection.¹⁶⁴ In contrast, common carriers exercise no editorial control, so are not ‘speakers’ in any meaningful sense, and therefore their speech interests are relatively weak.¹⁶⁵

OSPs like Facebook have a level of editorial control somewhere between these two extremes. They do not, and could not,¹⁶⁶ positively authorise every communication over the medium, and so have weaker speech interests than newspaper or broadcast editors. However, in choosing to delete content or restrict particular users’ access, they can exercise more editorial control and have stronger speech interests than neutral conduit owners. John Blevins claims that social media sites exercised strong editorial functions in deciding to accommodate Arab Spring democratic uprising movements while appearing neutral and maintaining the practices and policies that made these services popular in the first place. He states that this involves a “subjective editorial decisions that would be very

¹⁶¹ MacKinnon, above n 151 at 207.

¹⁶² See below IVA1.

¹⁶³ Nicholas P Dickerson "What Makes the Internet so Special? And Why, Where, How and by Whom Should its Content be Regulated?" (2009) 46 HousLR 61 at 88.

¹⁶⁴ *Miami Herald Publication Co v Tornillo* 418 US 241 (1974).

¹⁶⁵ *Denver Area Education Telecommunications Consortium v FCC*, above n 165 at 739.

¹⁶⁶ Each day, Facebook’s users post over 2.5 billion pieces of content; Josh Constine "How Big Is Facebook’s Data? 2.5 Billion Pieces Of Content And 500+ Terabytes Ingested Every Day" (22 August 2012) TechCrunch <<http://techcrunch.com/2012/08/22/how-big-is-facebooks-data-2-5-billion-pieces-of-content-and-500-terabytes-ingested-every-day/>>.

difficult to regulate in a content or viewpoint-neutral manner.”¹⁶⁷ This assertion is questionable, however. A requirement that an OSP must remain neutral and not restrict access to legitimate content based on its content or viewpoint is, by definition, content- and viewpoint-neutral.

An analogy with the shopping centre owner in *Pruneyard* is appropriate. In terms of speech rights, owners of both OSPs and shopping centres invite any and all speakers to their platforms, so a reasonable observer is unlikely to identify users’ speech with the company itself. This reasoning applies particularly strongly to large OSPs, as an observer cannot expect Facebook to be aware of all of the content that it hosts, unlike a shopping centre owner. OSPs like Facebook can and do publicly disclaim any responsibility for the conduct of its users, which strengthens this argument.¹⁶⁸

Some of the considerations that apply in the case of an editor of a newspaper being forced to carry speech do not have the same effect in the case of obliging OSPs to host content. In *Miami Herald Publication Co v Tornillo*, the American Supreme Court held that a statute obliging newspapers to offer a right of reply to political figures criticised in editorial features would limit newspapers’ First Amendment rights.¹⁶⁹ Such a reply would take up a limited column space, displacing the newspaper’s ability to feature other speech. This could have a chilling effect on the publication of content critical of political figures. Such concerns are immaterial in the case of an OSP. Data is cheap and space is unlimited. Because Facebook does not publish its own viewpoints, but merely facilitates the publication of others’, obligating Facebook to carry all opinions would only increase the robustness of debate, rather than chilling it as in *Tornillo*.

Facebook and other OSPs hold themselves out as services which will act even-handedly in conveying the speech of their users to one another,¹⁷⁰ and those users reliant upon them

¹⁶⁷ Blevins, above n 66 at 401.

¹⁶⁸ Facebook Inc "Statement of Rights and Responsibilities" (8 June 2012) Facebook <<http://www.facebook.com/legal/terms>>, above n 71 at cl 16.2 (“Although we provide rules for user conduct, we do not control or direct users’ actions on Facebook and are not responsible for the content or information users transmit or share on Facebook. We are not responsible for any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook. We are not responsible for the conduct, whether online or offline, or any user of Facebook.”)

¹⁶⁹ *Miami Herald Publication Co v Tornillo*, above n 164.

¹⁷⁰ Facebook Inc "Facebook Principles" (2012) Facebook <<http://www.facebook.com/principles.php>> (“1. Freedom to share and connect: People should have the freedom to share whatever information they want, in any medium and any

for conveying valuable speech. On balance, Facebook's users have a stronger interest in imparting and receiving information over the service than Facebook has in reserving the ability to restrict the flow of that information.

3. The Sufficiency of the Market to Protect Speech

The most obvious response to the argument that the protection of users' legitimate speech requires Facebook to owe quasi-public duties is that market pressures already regulate against the possibility of censorial decisions. OSPs are free to censor their users, but do so at the risk that those users will move elsewhere, taking the revenue that they generate for the OSP with them. The sufficiency of the market protecting speech relies upon two claims. Firstly, that users want fewer, not more speech restrictions, and so will avoid services that unduly restrict speech.¹⁷¹ Alexander Macgillivray, Twitter's General Counsel, claims that Twitter must establish a reputation for defending and respecting users' speech because it is important to "the way users think about whether to use Twitter, as compared to other services."¹⁷² The second claim is that the market should be highly competitive and thus responsive to users' free speech concerns because users face low switching costs in changing to other OSPs, as most charge no sign-up or account termination fees.¹⁷³

The validity of these claims must be considered. Firstly, the types of speech that the market favours through the fulfilment of individual consumers' preferences do not necessarily coincide with the types of speech which the law considers legitimate and gives constitutional protection. Cass Sunstein argues that a distribution of speech rights determined by a market pricing system would disregard constitutional speech values, and would foreclose disfavoured or unpopular speech.¹⁷⁴ Each individual decision of an OSP to limit access affects two groups' interests: the speech interests of the single speaker, and the interest in receiving that speech of the members of the speaker's audience. Relying on the market to protect speech interests makes the protection of a speaker's interests

format, and have the right to connect online with anyone - any person, organization or service - as long as they both consent to the connection.")

¹⁷¹ Brian W Esler "Filtering, Blocking and Rating: Chaperones or Censorship" in Mathias Klang and Andrew Murray (ed) *Human Rights in the Digital Age* (Routledge-Cavendish, London, 2004) at 103.

¹⁷² Jim Wilson "Twitter's Free Speech Defender" *The New York Times* (New York, 24 August 2012) at B1.

¹⁷³ Blevins, above n 66 at 390.

¹⁷⁴ Cass Sunstein *Democracy and the Problem of Free Speech* (The Free Press, Ann Arbor, 1993) at 57 – 58.

contingent upon the interests of the audience—for example, when Twitter excluded Guy Adams, it was only once the journalist’s audience discovered this and objected that Twitter reversed its decision. However, the interests of speaker and audience will not necessarily align. If the speaker is unpopular, and her audience uninterested, there will be no commercial pressure to prevent an OSP’s censorial decision-making if the OSP is met with incentives to remove content or access either from Government, commercial partners or its own self-interest.¹⁷⁵

Relying upon the interests of a speaker’s audience to control OSPs’ conduct through the threat of exodus poses a further problem. OSPs establish their services precisely so that users will find it difficult to switch to competitors, even when faced with OSP conduct which they disagree with. Contrary to Blevin’s assertion that rival OSPs can provide services that “consumers can switch to ... at virtually no cost,”¹⁷⁶ there is a real cost in switching from one social media OSP to another, even if it is not in monetary form. Eli Pariser describes the phenomenon of ‘lock-in’, whereby an OSP’s service is designed so that users will become “so invested in their technology that even if competitors make better services, it is not worth making the switch.”¹⁷⁷ The value of a social media network to its users is in the size of its membership. Tim Wu notes that “with size, comes convenience”, and so users are attracted to OSPs like Facebook which have become the ‘new monopolists’.¹⁷⁸ For ‘locked-in’ users, the convenience that these networks provide outweighs the dissatisfaction of individual users at particular OSP policies or actions. For example, a public apparently frustrated by Facebook’s inconsistent and often concerning privacy practices¹⁷⁹ have overwhelmingly decided against moving to Google+, the alternative social media network that Google offers which features stricter privacy controls. This perhaps confirms Frank Pasquale’s doubts as to whether the “uncoordinated preferences of millions of web users for low-cost convenience are likely to address the cultural and political concerns” which underlie the dominant position of

¹⁷⁵ See above IIE.

¹⁷⁶ Blevins, above n 66 at 393.

¹⁷⁷ Eli Pariser *The Filter Bubble* (Penguin Press, New York, 2011) at 40.

¹⁷⁸ Tim Wu "In the Grip of the New Monopolists" *The Wall Street Journal* (online ed, New York, 13 November 2010).

¹⁷⁹ See for example Bradley R Johnson "Untagging Ourselves: Facebook and the Law in the Virtual Panopticon" (2011) 13 *TM Cooley J Prac & Clinical L* 185.

OSPs.¹⁸⁰ This is not to say that individuals cannot and will not leave Facebook, or that its popularity will not wane over time, but rather that the convenience and ‘lock in’ established by its business model make a wide-scale exodus in response to any particular OSP action unlikely, and so this possibility will not act as an effective market restraint on censorial action.

4. The Upshot

Lawmakers ought to impose some positive legal obligation upon Facebook and similar pivotal OSPs, as the private owners of today’s networked public sphere, to respect and protect the speech interests of their users.¹⁸¹ Views which are unpopular or against the forum owners’ interests require particular protection because market forces alone may not defend unprofitable speech sufficient protection. This is not to suggest such OSPs must allow their platforms to devolve into ‘cyber-cesspools’ of harmful content.¹⁸² Rather, the OSPs’ ability to restrict access to and information on such important public forums should be determined by democratically accountable rules, subject only to such limits as may be demonstrably justified in a free and democratic society, and the enforcement of those rules should be judicially accountable.

D. Limitations

Having analysed whether regulators should impose quasi-public duties on the owners of some online public forums, I now address the feasibility of imposing such duties through regulation. Essentially, an attempt by New Zealand regulators to impose such regulations on OSPs directly would fail for a number of reasons, including the extra-jurisdictional effect such regulation would have and the constitutional protections against state regulation of speech afforded to OSPs in some jurisdictions, notably the United States.

¹⁸⁰ Frank Pasquale "Dominant Search Engines: An Essential Cultural & Political Facility" in Berin Szoka and Adam Marcus (ed) *The Next Digital Decade: Essays on the Future of the Internet* (TechFreedom, Washington, 2010) at 402.

¹⁸¹ Other writers have propounded the accountability of the dominant search engine OSP, Google, to specific democratically created law, which raises a host of similar concerns in the context of a different OSP function; see Oren Bracha and Frank Pasquale "Federal Search Commission? Access, Fairness and Accountability in the Law of Search" (2008) 93 Cornell L Rev 1149.

¹⁸² Brian Leiter "Cleaning Cyber-Cesspools: Google and Free Speech" in Saul Levmore and Martha C Nussbaum (ed) *The Offensive Internet* (Harvard University Press, Cambridge, 2010).

While the New Zealand Parliament is a sovereign lawmaker, the practical scope of that sovereignty has limits. Parliament can pass any law, but whether that law will be effective and enforceable is a matter of political sovereignty, not legal sovereignty. Parliament may pass legislation imposing legal duties on foreign entities, but where those entities have no formal presence within New Zealand, that law will be unenforceable and so will have no effect. The OSPs of significant size and importance considered in the last chapter are all located outside of New Zealand's sovereign jurisdiction. Any law that Parliament passed which purported to directly regulate those entities would be unenforceable.

Equally, any law which incidentally captured offshore entities would be unenforceable in their jurisdictions. Take the example of Facebook once more. Suppose that Parliament were to pass a law giving individuals speaking rights enforceable against large OSPs who provide public forums for speech, and that a New Zealand citizen relied on this law to obtain a judgment in New Zealand requiring Facebook as a defendant to resume that citizen's access. Facebook is based in the United States. An American court would be bound legally to refuse to enforce the New Zealand court's judgment. This is shown in the American case *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisemitisme*.¹⁸³

In that case, the Californian District Court refused to enforce the judgment of the French Tribunal de Grande Instance on the grounds that to do so would violate Yahoo Inc's First Amendment rights. Yahoo! Inc operated an online auction site that was accessible in France, and which featured third parties' auctions for Nazi propaganda and memorabilia. Two French anti-Semitism organisations had successfully brought an action against Yahoo! Inc in France for violation of the French Criminal Code, which prohibits the exhibition of Nazi propaganda and artefacts for sale. The French Court issued an order to "take all necessary measures to ... render impossible any access via Yahoo.com to the Nazi artefact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."¹⁸⁴ That order constituted a non-content neutral, state-enforced restraint on speech, and so fell afoul of the First Amendment; stating that "[a]lthough France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs

¹⁸³ *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisemitisme* 169 F Supp 2d 1181 (ND Cal 2001).

¹⁸⁴ At 1185.

simultaneously within our borders.”¹⁸⁵ The American court therefore declared the French Order unenforceable.

A United States court would apply analogous reasoning if called upon to enforce a foreign court’s order that an American company reverse either an account termination or the censorship of information. Arguably an order forcing a public forum owner to use its forum for the speech of others does not breach the owner’s First Amendment rights because observers will not identify the owner with the speech, the state does not compel the owner to display any particular message, and the owner could expressly disavow any connection with the speech through notification.¹⁸⁶ It is more likely, however, that an American court would regard such an order as a state compulsion to speak, and given that an OSP operates a communicative medium, not a physical space, this would violate the OSP’s First Amendment rights as an editor. In this vein, courts have, on the First Amendment ground of protecting editorial discretion, refused to apply statutes requiring newspapers to provide a right of reply to political candidates¹⁸⁷ and ordinances requiring favourable-term access for all Internet service providers to a cable company’s services.¹⁸⁸ A American court would then be blocked from enforcing a foreign court’s order, as it would amount to the court, a state body, forcing the entity to speak.

For these reasons, attempts by a legislature to create positive obligations upon foreign OSPs will fail. The inability of lawmakers to force foreign OSPs to respect users’ interests is perhaps best represented by the pleas of German Federal Minister of Consumer Protection, Ilse Aigner, to Facebook CEO Mark Zuckerberg for Facebook to change its privacy policy. Concluding that she felt that Facebook’s policies were in breach of Germany’s privacy laws, she warned that “[s]hould Facebook not be willing to alter its business policy and eliminate the glaring shortcomings, I will feel obliged to terminate my membership.”¹⁸⁹ New Zealand lacks both the legal jurisdiction and the political clout to mandate how Facebook and other OSPs regulate their users’ speech.

¹⁸⁵ At 1192.

¹⁸⁶ *Pruneyard Shopping Center v Robins* above n 120 at 87.

¹⁸⁷ *Miami Herald Publication Co v Tornillo*, above n 164.

¹⁸⁸ *Comcast Cablevision of Broward County v Broward County* 124 F Supp 2d 685 (SD Fla 2000).

¹⁸⁹ Letter from Ilse Aigner (German Federal Minister of Consumer Protection) to Mark Zuckerberg (Founder and CEO, Facebook Inc) (Apr. 5, 2010) available at <<http://www.spiegel.de/international/germany/0,1518,687285,00.html>>.

Ideally, we should require pivotal OSPs to protect the speech of the users who rely upon them to speak, but any direct attempts at enforcing such rules will be futile. Therefore, we should consider methods by which regulators might incentivise corporate social responsibility on the part of OSPs in order to protect citizens' freedom of speech online.

IV Suggestions

In this chapter I consider two proposals that move towards protecting online speech from the censoring decisions of private intermediaries. The first involves identifying truly ‘public’, governmental spaces that already exist within the private framework of the Internet. The second involves considering the potentially chilling effects of the New Zealand Law Commission’s Internet regulation proposals, and tailoring the liability of intermediaries for the illegal speech of their New Zealand users in order to prevent over-censorship in marginal cases.

A. Public Forums within Private Spaces

While private entities own the sites of public discussion in cyberspace, government-owned public forums can still be found within those sites. As citizens have embraced the Internet and spent more of their time on privately-owned social media sites, governments have followed. The New Zealand Government is no exception; as early as 2001 it set out to establish itself as a “world leader in e-government.”¹⁹⁰ The existence of government-owned and government-controlled spaces online gives hope that there may be at least some locations in cyberspace where citizens can assert their rights to free expression without fear of censorship from private intermediaries. This section considers this claim, examining how and why the New Zealand government uses social media, and how public law protections apply to citizens’ speech within those public forums.

1. Government social media use

The New Zealand Government has engaged with the Internet in a variety of different ways. Initially the major focus for New Zealand e-government was on efficiency and convenience in the delivery of services.¹⁹¹ Increasingly, however, the Government has embraced social media in order to create “greater transparency, an interactive relationship with the public, a stronger sense of ownership of government policy and services, and thus a greater public trust in government.”¹⁹² Social media platforms allow government to deliver information directly to interested citizens and conversely enable citizens to gain

¹⁹⁰ New Zealand State Services Commission “Government.nz@your.service: e-government, www.e-government.govt.nz” (Wellington 2001) at 3.

¹⁹¹ At 5.

¹⁹² Government Information Services, above n 160.

direct access to government officials (or at least their staff)—they foster on-going dialogue between governors and governed.¹⁹³ Branches of New Zealand’s central and local government interact with citizens in a myriad of different social media forums including Twitter and Facebook; the Government’s approach to social media has been described as world-beating.¹⁹⁴

Government-controlled sites on privately-owned social media platforms are important in the context of this essay in two ways. Firstly, they provide easily accessible spaces from which citizens may speak publicly, and those spaces are publicly controlled. Recall Elkin-Koren and Birnhack’s description of censorship by “invisible handshake”, based on a triangular relationship of State-[OSP]-Citizen.¹⁹⁵ On government-controlled social media sites, these relationships are rearranged to become OSP-[State]-Citizen. Citizens and government interface directly with one another, and so an OSP no longer insulates government actions from citizens who may potentially seek public law remedies.¹⁹⁶ Secondly, these spaces exist upon platforms that citizens actually use, thus providing useful forums for speakers. Forums for communication are only as useful as the audience they provide a speaker, whether that speaker is a government body or a citizen. So, the Government has recognised the utility in delivering information through the online channels people are already using.¹⁹⁷

Spaces for comment on the social media sites of particular government agencies also enhance the effectiveness of citizens’ communications by providing speakers with specific, interested audiences.¹⁹⁸ For example, if a citizen wishes to complain about the Coast Guard’s efforts to clean up an oil spill, rather than establishing a low-visibility website and hoping for an audience, the Coast Guard’s Facebook page provides access to a receptive

¹⁹³ Lyrisa Barnett Lidsky "Public Forum 2.0" (2010) 91 BULRev 1975 at 2022.

¹⁹⁴ Andrea Di Maio "The Best Government Social Media Guidelines So Far Come from New Zealand" (1 December 2011) Gartner Research <http://blogs.gartner.com/andrea_dimaio/2011/12/01/best-government-social-media-guidelines-so-far/>.

¹⁹⁵ See text accompanying n 46.

¹⁹⁶ Of course, the whole interaction is still reliant upon the private entity that controls the social media platform; the danger then still remains that government may influence the underlying platform owner to restrict the user’s access, in which case again a private intermediary will stand between government and the aggrieved citizen, preventing public law remedies.

¹⁹⁷ Government Information Services *Rethink Online: A new approach for government use of and investment in online channels* (Department of Internal Affairs report, July 2011) available at <<http://webtoolkit.govt.nz/files/Social-Media-in-Government-Rethink-Online>>.

¹⁹⁸ Zatz, above n 91 at 166.

audience already interested in the Coast Guard and its performance, increasing the effectiveness of the speaker's communication and the likelihood of united political action.¹⁹⁹ Furthermore, public forums based around government bodies can help prevent the Balkanisation of the public into partisan factions, as those government bodies and their functions represent the sites of contestation between groups with different political, social and cultural understandings of the common good.²⁰⁰ If healthy public forums are established within social media sites, the citizen who visits such sites in search of information or government services must leave her 'echo chamber' to be confronted with speech that she might otherwise never receive.²⁰¹

2. NZBORA restrictions

When a Ministry of the Crown or a government department invites public participation and speech in an online space, this is an act of the executive branch of the Government, and so the NZBORA applies to it.²⁰² The NZBORA also applies to local government actions under s 3,²⁰³ so their actions regarding social media sites will also be captured. While private entities own and exercise ultimate control over the platforms upon which many government-controlled social media spaces exist, government too has control over the speech of citizens in those forums, and so the NZBORA applies to government actions that abridge citizens' speech within those forums. The Department of Internal Affairs does not seem to have considered this fact, as their 'Hands-On Toolbox' for government social media use includes legal advice on a range of issues, including liability for defamation, breaches of confidence and copyright infringement, but analysis of NZBORA obligations is conspicuous only by its absence.²⁰⁴

The NZBORA generally does not confer citizens with positive rights. Specifically, s 14 does not obligate the Government to provide citizens with forums on which they can

¹⁹⁹ Lidsky, above n 193 at 2009.

²⁰⁰ See Gey, above n 94.

²⁰¹ See for example Pariser, above n 177 (describing how the personalisation of search engine results, social media sites, online advertising and Internet content generally skews the information that an Internet user is likely to come across to conform to and reconfirm her own pre-existing beliefs and biases.)

²⁰² Section 3(a); Paul Rishworth, above n 89 at 82.

²⁰³ *Auckland Council v Occupiers of Aotea Square* HC Auckland CIV-2011-404-002492, 21 December 2011 at 36 ("Clearly the Auckland Council is a body to which subsection (b) applies.")

²⁰⁴ Government Information Services, above n 160.

effectively speak, or to take any other speech facilitating measure.²⁰⁵ However, where the government has allowed or given the public the privilege of using government property for speech, government restrictions of that privilege must be considered against NZBORA freedoms.²⁰⁶ Actions such as deciding not to provide a public forum or closing a forum's use to the general public entirely do not infringe s 14 freedoms.²⁰⁷ However, the Government may not provide a forum and then exercise its right to exclude citizens in a discriminatory manner.²⁰⁸ Such an action would infringe the important liberal democratic principle of state viewpoint neutrality: that the state must be neutral in its treatment of the content of statements.²⁰⁹ Content neutrality is central to s 14, as it guarantees "the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community."²¹⁰

The reasoning in *Police v Beggs* is instructive in considering how the NZBORA applies to government action which restricts a user's access to a government social media site. In that case, the Speaker of the House, acting as the occupier of Parliament's grounds, used his power under the Trespass Act 1980 to warn student protestors to vacate Parliament's property. Police officers arrested and charged those who did not leave voluntarily. On appeal from the District Court, Gendall J held that while the Trespass Act gave the Speaker the power as occupier of Parliament to 'warn off' entrants, which had the effect of revoking the implied licence that the protestors had to be on the land, the exercise of that power in these circumstances was a public function, so the NZBORA applied to it under s 3(b).²¹¹ Consequently, s 6 required his Honour to construe the Trespass Act consistently with the protestors' s 16 right to freedom of peaceful assembly; taking into account s 5, the exercise of the statutory power could only be exercised when reasonably necessary.²¹²

²⁰⁵ *Mendelssohn v Attorney General* [1999] 2 NZLR 268 at [14]. Keith J goes on to note, however, that some provisions do impose positive obligations to act, particularly those rights in respect of the criminal justice system; at [15].

²⁰⁶ *Police v Beggs*, above n 89 at 627.

²⁰⁷ At 628.

²⁰⁸ At 629 (Otherwise an official could "permit ... groups sympathetic to the Government ... whilst excluding those who wished to protest against the actions or policy of the Government.")

²⁰⁹ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 358.

²¹⁰ *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 at 59.

²¹¹ *Police v Beggs*, above n 89 at 626.

²¹² At 627. For the most recent exposition of the s 5 test, see *R v Hansen* [2007] 3 NZLR 1 at [92].

The NZBORA similarly limits the Government's ability to restrict speech within the online public forums it controls. There are three main differences between *Beggs* and the untested case of government restricting access or censoring comments on a social media site.

First, a social media site does not exist in real space. However, the NZBORA should apply consistently in cases where the government provides a facility which enables public speech, whether through a broadcast,²¹³ physical, electronic or print medium, so this difference is immaterial.

Second, the administrator of a social media site requires no statutory power to exclude users from the site. The Speaker in *Beggs* relied upon a statutory instrument to evict protestors lawfully, whereas an online administrator requires only code to suspend or revoke a citizen's ability to use the site. The s 6 route for importing a standard of reasonableness onto the Speaker's action is therefore unavailable online. It is also unnecessary, however. In the absence of an authorising statute, as on a social media forum, any government action which limits a s 14 right will be illegal unless that limit is a reasonable one, prescribed by law, and demonstrably justifiable in a free and democratic society.²¹⁴

Third, the protestors in *Beggs* had not been granted permission to use Parliament's grounds, and so the Speaker's standard conditions for use of the grounds were not contractually binding on the protestors.²¹⁵ Administrators of government social media forums, however, condition access upon a user's agreement to abide by the site's terms of service, manifested through either a positive click-wrap agreement or acquiescence to displayed browse-wrap terms.²¹⁶ On the other hand, the act of setting and enforcing those rules is a government action which affects s 14 rights. If the rules are not viewpoint neutral, or are not enforced in a viewpoint neutral manner, the government will have breached its NZBORA obligations. It cannot short-circuit those obligations by claiming that contractual acceptance of those rules justifies their limiting effect on rights under s 5.

²¹³ *Ransfield v The Radio Network Ltd*, above n 23 at [41].

²¹⁴ *Ngan v R* [2007] NZSC 105; [2008] 2 NZLR 48 at [97] (“[T]he residual freedom of officials is constrained by the Bill of Rights Act. Residual freedom to act can never justify a breach of protected rights. Wherever residual freedom conflicts with a statutory or common law rule it must give way to that rule.”)

²¹⁵ *Police v Beggs*, above n 89 at 624.

²¹⁶ See above n 70.

The touchstone for the legality of the content and enforcement of a government actor's rules on a social media site, then, is reasonableness. *Beggs* offers some insight into the restrictions on speech in a public forum that a court will consider reasonable, and Gendall J rejected the District Court's view that government may not restrict speech unless it is "disorderly, unlawful or interferes with others in the exercise of their rights and freedoms."²¹⁷ Rather, the interests of the government 'occupier' and other users of the forum must be considered. These are difficult to consider in the abstract, but it is submitted that courts should more closely scrutinise government rules and action restricting speech on online forums because of the changed online dynamic. In real space, a justification for restrictions is that a limited number of speakers can inhabit the same limited space at the same time,²¹⁸ but those constraints do not operate in cyberspace. Government can "increase civic participation without the real space analogy of expanding the town hall or providing more chairs."²¹⁹ At the same time, speakers' expectations of a right to speak on any topic in such forums are not as strong as in traditional public forums, such as Parliament's grounds.²²⁰ Content-based restrictions may well be reasonable, so long as those restrictions are necessary to achieve justified, view-point neutral ends.²²¹ For example, if the Dunedin City Council establishes a forum for consultation on local government matters, the Council may legitimately exclude discussion of national politics. So long as such a restriction is enforced consistently and even-handedly, it is justifiable.

Within these government-controlled media sites, then, NZBORA protection is granted to citizens' speech against the administrator of the forum, subject to the demonstrably

²¹⁷ *Police v Beggs*, above n 89 at 629.

²¹⁸ *Auckland Council v Occupiers of Aotea Square*, above n 203 at [127] ("Nor does the Bill of Rights remove the obligation on all of us in this country to share our common urban space in a fair way.")

²¹⁹ Schesser, above n 135 at 1817.

²²⁰ The American jurisprudence draws sharp distinctions between 'traditional' and 'designated' government forums, the main difference being that Government may close the latter and prevent all access, but not the former. The United States Supreme Court has displayed total reluctance to designate online spaces as traditional public forums; in *American Library Association* (above n 104 at 205), the Court affirmed that only those spaces which had "immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions" could be considered traditional public forums.

²²¹ *Rosenberger v Rector and Visitors of the University of Virginia*, above n 102 at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."); *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983) at 49 ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.")

justifiable, reasonable actions of the administrator, the facilitation of an cooperative ISP and the ultimate, underlying control of the private OSP. These sites are then quite unique within cyberspace, and ought to be promoted. Two recommendations can be offered to government. Firstly, if government bodies are to establish such sites, they should make a greater effort to publicise them and encourage their use. Given their great potential utility, the underutilisation of some forums is inexcusable; for example, the Dunedin City Council's Facebook page has just over 500 likes at the time of writing; around 0.4 per cent of Dunedin's total population.²²² Secondly, the Government should consider establishing an online-equivalent to Parliament's grounds, where any subject is available for discussion and debate. Currently there is a risk that despite the variety of government forums, some important subject matters may not fall within the ambit of any of them, and so important citizen views on some matters will not be catered for on any particular forum.

B. Carrots and Sticks: Retooling Intermediary Liability

Online speakers are reliant upon private entities who act as intermediaries to convey speech. Lawmakers must pay close attention to the incentives and disincentives intermediaries have to allow users to speak on their systems. Legislators can structure these incentives in order to better promote the object of protecting speakers' expressive abilities.

One important disincentive for a private intermediary is vicarious liability for its users' actions. Intermediary liability can act as a 'stick' to encourage the rational, risk-averse intermediary to act in certain ways in relation to the speech it carries, while a legal system can hold out the carrot of immunity from liability as an equally effective inducement to behaviour.²²³ If an Internet intermediary is held vicariously liable upon notification for its users illegal speech, then it will be more likely to place restrictions its systems' use, and less likely to continue to display speech which a third party alleges is illegal.²²⁴ This fact, once compounded with the Law Commissions' newly envisaged disputes resolution regime for harmful communications, could result in a significant chilling effect on legitimate speech. This section argues that the Commission's proposed procedural framework should be

²²² See <<http://www.facebook.com/DunedinCityCouncil>>.

²²³ Paul Ehrlich "Communications Decency Act 230" (2002) 17 Berkeley Tech LJ 401 at 412; Kean J DeCarlo "Tilting at Windmills: Defamation and the Private Person in Cyberspace" (1997) 13 GaStULRev 547 at 579.

²²⁴ Kimberly Heitman "Free Speech Online: Still Shooting the Messenger" (2005) 28 UNSW Law Journal 928.

altered to give the carrot of a safe harbour from defamation liability to intermediaries who comply with the Commission's framework, while sparing the stick of liability until a judicial tribunal has found the relevant speech unlawful and notified the intermediary.

The Law Commission, in its 2011 report on the New Media, proposed a new disputes process and Communications Tribunal to facilitate and expedite the removal of illegal speech online.²²⁵ In August 2012 the Commission released a ministerial briefing paper making concrete the proposed framework.²²⁶ The Commission recommends establishing a statutorily-recognised 'Approved Agency' to triage harmful communication complaints and attempt to achieve resolutions by negotiation, mediation and persuasion,²²⁷ and a judicial body, the Communications Tribunal, to balance the legal merits of communications and to make enforceable orders when dispute resolution fails or is unsuitable.²²⁸ A common criticism of the Commission's proposals is that they pay no more than lip service to the importance of freedom of speech online, and would make illegal speech that would be legitimate offline.²²⁹ The appropriateness of the Commission's substantive proposals notwithstanding, the Commission's complaints procedure in its proposed form has the incidental effect of encouraging intermediaries to remove potentially legitimate speech.²³⁰ To understand why, we must briefly consider how defamation law applies to online intermediaries.

1. Defamation, online intermediaries and vicarious liability

Defamation's threshold question is whether a defendant assumes a general responsibility for 'publication' of defamatory material; ISPs which do no more than act as conduits of information, passively facilitating postings on the Internet, are not publishers at common

²²⁵ New Zealand Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011), above n 3.

²²⁶ New Zealand Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MBP, 2012), above n 3.

²²⁷ Communications (New Media) Bill 2012, s 8.

²²⁸ Communications (New Media) Bill 2012, s 12.

²²⁹ Thomas Beagle "What's wrong with the Communications (New Media) Bill and can it be fixed?" (2 September 2012) Tech Liberty NZ <<http://techliberty.org.nz/whats-wrong-with-the-communications-new-media-bill-and-can-it-be-fixed/>>; John Edwards "Worried about Hell Pizza? Help is on the way - the Law Commission's New Media Bill" (20 August 2012) National Business Review <<http://www.nbr.co.nz/article/worried-about-hell-pizza-ck-126148>>.

²³⁰ This essay is concerned with the private censorship of legitimate online speech, recognising that in any legal system there will be limits on what speech is considered legitimate and it is appropriate for a democratically elected legislature to decide where to place these limits.

law.²³¹ However, the position of ISPs which host information and OSPs is less certain. They act as more than conduits; they are responsible for the continuing presence and communicability of the material they host, and so are arguably “directly analogous to ... a bookseller or library, which is clearly a publisher at common law ... even though it has no idea of the contents of what it is distributing.”²³² This position was taken in early cases in England and the United States,²³³ although more recent authorities are conflicted. The English High Court suggested in a late 2011 decision that Google, owner of the blog-hosting site Blogger.com, arguably published defamatory material once it received notification of it. Blogger.com operated as a “gigantic virtual notice board”. So, following *Byrne v Deane*,²³⁴ Google took responsibility for its publication by allowing the information to remain available after notification.²³⁵ However, in early 2012 the same court held that Google was not responsible for defamatory publications on Blogger.com even following notification.²³⁶ Eady J emphasised Google’s passive, neutral function in relation to its site, comparing Blogger.com to a wall on which defamatory graffiti was sprayed; while an owner could technically take down the information, this did not necessarily entail that the owner would be classified as a publisher unless and until this has been accomplished.²³⁷ With respect, Eady J seems to root this decision in policy rather than reference to prior case law; it relies on *Bunt* to analogise an OSP with a neutral conduit ISP from *Bunt*, which delivers information transiently, rather than entities that are responsible for the continued presence of defamatory material in *Byrne* and *Godfrey*. The inconsistency of the cases creates uncertainty for online intermediaries regarding their liability for user’s defamatory publications, but it is likely that at common law an intermediary becomes a publisher once it receives sufficient notification of defamatory content but neglects to remove that content.

If an intermediary is a publisher, it will incur secondary liability for defamation unless it can prove an affirmative defence. The Defamation Act 1992 offers a defence of ‘innocent

²³¹ *Bunt v Tilley* [2006] EWHC 407 (QB) at [22] and [36].

²³² Patrick Milmo *Gatley on Libel and Slander* (11th edition ed, Thomson Reuters (Legal) Limited, London, 2008) at [6.18].

²³³ *Godfrey v Demon Internet Ltd* [2001] QB 201; *Stratton Oakmont Inc v Prodigy Services Inc* 23 MLR 1794 (NY Sup Ct 1995).

²³⁴ *Byrne v Deane* [1937] 1 KB 818 at 838 (“by not removing the defamatory matter the defendant really made himself responsible for its continued presence...”).

²³⁵ *Davison v Habeeb* [2011] EWHC 3031 (QB) at [38] – [41].

²³⁶ *Tamiz v Google Inc* [2012] EWHC 449 (QB).

²³⁷ At [38] – [39].

dissemination' to the defendant who publishes a matter as a 'processor or distributor' without knowledge that the material contains or is of a character likely to contain defamatory material and whose lack of knowledge is not attributable to negligence.²³⁸ A 'processor' includes booksellers and librarians.²³⁹ The requisite feature for a distributor appears to be a "lack of editorial (or effective) control over the publication"²⁴⁰ and thus online intermediaries who do not pre-moderate user generated content would qualify for the defence. Thus unless and until a complainant brings contentious material to an online intermediary's attention, an online intermediary is unlikely to be liable for its users' content.²⁴¹ Once notified, however, a hosting intermediary will find it difficult to argue that publication after that point occurs without negligence on their part, so the defence will be unavailable.²⁴²

The result is that intermediaries are probably publishers once they receive notification of available defamatory content, and once notified will have no defence to liability unless they remove that content. An intermediary then faces strong incentives to err on the side of caution and remove allegedly defamatory content immediately upon notification; it is unlikely to prefer the alternative of defending the claim, likely having "neither the means nor the inclination to prove each and every detailed allegation, which may involve lengthy, technical and contested proceedings", and thus "the practical application of defamation law to secondary publishers in general - and to ISPs in particular - bears ... harshly on freedom of expression."²⁴³

²³⁸ Section 21.

²³⁹ Section 2.

²⁴⁰ New Zealand Law Commission *Electronic Commerce Part One - A Basic Legal Framework* (NZLC R58, 1999) at 104.

²⁴¹ Some commentators have posited an 'innocent dissemination paradox' whereby in order for an intermediary to prove it took the reasonable care necessary to avail itself of the defence, it must operate as more than solely a 'distributor or processor' and so the defence is precluded (see Douglas Vick Linda Macpherson and Sarah Cooper "Universities, Defamation and the Internet" (1999) 62 MLR 58; Nathanael Starrenburg "Resolving the Paradox: ISP liability for defamation in NZ" (2002) 1 NZSLJ 159). However, s 21 does not necessarily obligate an intermediary to take positive action to acquire knowledge of defamatory information it hosts; promptly responding to complainants' requests to remove defamatory content once notified should be enough, as it is has been historically for library owners (see *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170).

²⁴² Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, Oxford, 2010) at [17.59].

²⁴³ British Law Commission *Defamation and the Internet - A Preliminary Investigation* (UKLC Scoping Study No 2, 2002) at [2.40] and [2.47].

2. The effects of the Law Commission's proposals

The Law Commission's proposed procedure to resolve online communications disputes does nothing to alleviate this situation. Indeed, concerns about intermediary liability will become only more salient if complaints to intermediaries are facilitated and encouraged by a government-backed Approved Agency and the creation of a Communications Tribunal. While the proposed Tribunal may only order intermediaries to remove content after a thorough judicial process, taking into account the importance of freedom of expression,²⁴⁴ the Bill does not alter an intermediary's parallel liability under the Defamation Act 1992.²⁴⁵ Under the Bill, intermediary liability only accrues if the intermediary fails to comply with the Communications Tribunal's orders after the Tribunal has determined the relevant speech was unlawful.²⁴⁶ However an intermediary will be liable for defamatory publication much earlier than this, from the moment that it was notified, either by the complainant or the Approved Agency. An intermediary has much to lose and little to gain from maintaining access to contentious material. Given the extraordinary volume of speech that Internet intermediaries host, and the potentially high number of complaints, the rational, risk-adverse intermediary would err on the side of caution and remove potentially defamatory material once a complaint is made, rather than waiting for a Tribunal to order its removal. This would greatly undermine the protection of legitimate speech online.

Foreign jurisdictions offer guidance on how to structure intermediary liability to strike an appropriate balance between protecting individuals' reputations and the safeguarding freedom of expression. Federal United States legislation resolves this balance firmly in favour of freedom of expression; s 230 of the Communications Decency Act removes the stick of liability altogether by providing that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Injustice often results, however, as s 230 retains no legal incentive for intermediaries to protect plaintiffs' reputations. For example, where the original author remains anonymous or pseudonymous, a harmed plaintiff has no

²⁴⁴ Sections 16(1)(a), (4).

²⁴⁵ New Zealand Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MBP, 2012), above n 3 at [5.136] ("[T]he new system will not compromise other legal sanctions ... [T]he right to sue in a court of law, for example for defamation, will still be an option.")

²⁴⁶ Section 22.

recourse against the intermediary who continues to host defamatory material,²⁴⁷ and an intermediary incurs no liability even where it fails to remove defamatory content at the original author's request.²⁴⁸

The British Defamation Bill, which had passed the House of Commons and was before the House of Lords at the time of writing, structures the legal incentives facing intermediaries more appropriately. The Bill creates a defence from liability for webhost intermediaries which host defamatory material if they can show that they did not post the material, and that they responded appropriately to complainants' notifications requiring identification of the original author of the statement.²⁴⁹ Thus the Bill extends a carrot to OSPs to help aggrieved plaintiffs pursue the original author of allegedly defamatory statements in the form of an immunity from liability for publishing the defamatory material. The state does not compel OSPs to reveal speakers' identities; but the threat of liability at common law will act as a stick to nudge OSPs in that direction. A transplantation of the British Bill's provisions to New Zealand law would be inappropriate given the wider framework of the Law Commission's Internet communications law framework, but the idea of structuring incentives to promote just outcomes ought to be considered.

The Law Commission's Communications (New Media) Bill should prompt our legislature to rethink online intermediary liability for defamatory publications. Currently, the possibility of liability incentivises intermediaries to remove questionable speech immediately upon notification, without the judicial oversight and balancing of interests required before the Communications Tribunal could authorise the censorship of content. Legislators ought to amend the Bill to remove the stick of vicarious liability for defamation by providing a defeasible immunity from defamation liability to hosts of allegedly

²⁴⁷ *Blumenthal v Drudge* 992 F Supp 44 (DDC 1998) at 52.

²⁴⁸ *Global Royalties v Xcentric Ventures* 2007 WL 2949002 (D Ariz 2007) at 2 – 4.

²⁴⁹ Defamation Bill 2012 (UK) as of 24 September 2012, s 5

Operators of Websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
 - (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

defamatory online material. The immunity could take the form of a provision deeming intermediaries not to be publishers of content they merely host. This immunity could be extinguished if the intermediary fails to comply with the Communication Tribunal's orders under s 16, for example an order to take down material²⁵⁰ or to identify the author of a communication.²⁵¹ This proposal is broadly consistent with the Bill's procedural framework, which does not envisage forcing intermediaries to remove content until the Tribunal finds it unlawful, as shown by an Approved Agency's power to 'request' but not 'require' intermediaries to remove posts that are clearly offensive.²⁵² This would have two benefits: firstly, providing an incentive for intermediaries to comply with the Tribunal's orders on top of the Bill's non-compliance offence section; and secondly, ensuring judicial oversight before intermediaries feel compelled to remove speech, avoiding the incidental chilling effect that the spectre of vicarious liability has on speakers' freedom of speech. This presents one small step our legislature could take towards better protecting legitimate online speech.

²⁵⁰ Under s 16(1)(a).

²⁵¹ Under s 16(1)(h).

²⁵² Section 9(d).

V Conclusion

Current discussion of expression on the Internet tends to focus upon preventing harm. This dissertation began with a different focus, questioning whether the law adequately protects legitimate online expression. The answer depends upon the level of protection that we deem adequate. The Internet has certainly enhanced citizens' abilities to impart and receive information, and this development has occurred under the minimum legal protections of the orthodox private law of contract and property. If we are satisfied with the freedom of expression online, then the law's protection is adequate.

If our treatment of the question of adequacy is aspirational, the answer is different. Sunstein argues that "the current situation is hardly worse than what preceded it; on the contrary, it is much better, if only because of the increase in the number and range of voices. The question is not, however, whether the present is better than the past, but whether we can make the present and the future better still."²⁵³ This dissertation has shown weaknesses in the Internet's current facilitation of freedom of expression that could be addressed. For example, the orthodox, private law framework can leave speakers vulnerable to the power of online intermediaries, and in particular pivotal OSPs such as Facebook, and the Internet's decentralised nature threatens the increased fragmentation of society into different speech groups.

We would then do well to structure our laws to aspire to a better Internet, remembering that "cyberspace has no intrinsic nature. It is as it is designed."²⁵⁴ I have suggested some limited ideas towards this goal. One is a reconceptualisation of dominant OSPs' roles using public forum doctrines; however, this thinking demonstrates the fruitlessness involved in legislating for strong-arm regulation of extra-jurisdictional Internet intermediaries. Thus smaller steps to bolster the protection of online expression, taken one at a time, may well be the best way forward. I have suggested two such steps: encouraging the utilisation of government-controlled spaces on social media forums as modern public forums in which speech is especially protected, and retooling defamation liability with the Communications Tribunal in mind, in order to incentivise intermediaries away from censoring reliant speakers' expression. More small steps will present themselves on the way forward; we

²⁵³ Sunstein, above n 98 at 117.

²⁵⁴ Lessig, above n 39 at 317.

should grab each foothold that we can in order to ensure that the Internet becomes an even stronger tool for legitimate expression in the future.

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