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Free Expression and Censorship Through Design Protocols: A Misapplication of the ICANN UDRP

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This paper is a work in progress.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[Article 1, Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms]

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

[Article 10 Convention for the Protection of Human Rights and Fundamental Freedoms]

INTRODUCTION

The above two quotes define rights deemed to be fundamental moral rights by, among others, the United Nations, the Council of Europe and the Government of the United States of America.[1] The United Nations and the Council of Europe have further labelled these rights as "Human Rights", moral rights which are claimed, for whatever reason, to be due to all human beings. The existence of moral rights, are seen by many as an anachronism and have been particularly attacked by communitarian commentators as failing to take account of the culture of the community surrounding the individual which is, at least in part, constitutive, of that individual.[2] It is not the purpose of this paper to enter into the debate surrounding the philosophical foundation of moral or human rights. The author, cannot possibly hope within the limited scope of this paper to answer questions on the existence, legitimacy and ethics of human rights. These are questions which have filled volumes.[3] This paper, therefore, takes as its starting point the position put forward by Ralph Beddard in his book *Human Rights and Europe*[4] that such human rights exist in modern society at least by convention. Central to this analysis is the rivallous nature of these rights. Often the exercise of basic moral, or human, rights will bring the actor in direct conflict with the basic moral rights of another. Thus my right of property may interfere with your right to freedom of expression through peaceful protest. If you choose to occupy my building I may use my right to peaceful enjoyment of my possessions to curtail your right to free expression by having you removed from my property.[5] Conversely, my right to free expression may on occasion curtail your property right. Thus I may use portions of your copyright protected works for the purposes of criticism or review[6] or I may make use of your trade mark in a comparative advertisement.[7] These are applied examples of the recognition that these rights although having a basic moral foundation are not without qualification.

The treaties themselves are evidence of some of the more basic qualifications. To return to the two quotes given at the head of this paper, the right contained in Article 1 of the First Protocol to the European Convention on Human Rights, sometimes known colloquially as the right of free enjoyment of one's property, is qualified to allow the state to raise taxes and to protect the general interest of the state.[8] Similarly the right given in Article 10 of the Treaty, the right to free expression is qualified in a manner which allows the right to be abrogated for among others the interests of national security, the protection of public morals and the protection of the privacy of others, another human right.[9]

PART I - RIGHTS IN REAL SPACE

Throughout this paper the language of rights is used. It discusses property rights, rights in property and the right to free speech or free expression. It is important to bear in mind in the following discussion the words of Frederick Schauer, who suggested that our thinking about specific rights is "frequently muddled by the *words* we commonly use to describe these rights."[10] We use the term "right" as a collective term for a complex intermix of liberties, privileges and immunities. As Schauer points out this makes the discussion and analysis of such complex conceptions simpler, but at the risk of obscuring the subject at hand. The author here subscribes to the shorthand terminology but accepts this may be at the risk losing the subtleties of the analysis. The reader is hereby put on warning.

PROPERTY RIGHTS AND RIGHTS IN PROPERTY

The nature of property rights have been discussed at some length by both legal and philosophical commentators.[11] Such commentaries usually discuss property as an abstract and individual concept or discuss property rights as an independent, and often absolute, right. There is little debate about the distinction between property rights and rights in property.[12] This is because the debate has traditionally centred around land as the pre-eminent example of property. When looking at land it is easy to discuss property rights as an abstract family of rights. Land is though an exceptional form of property with its own unique body of law. Discussing property rights against the background of land, and therefore Land Law, leads to the centring of concepts which are inapplicable to the majority of rights *in* property. Clear examples of this false centring include the theory of absolute property rights as advocated by among others Blackstone and the contemporary commentator Richard Epstein,[13] and the theory of original appropriation as discussed at length by John Locke.[14] These models are clearly land specific models. One would not claim absolute property in money for example. We all recognise the right of the state to raise taxation and thus to expropriate part of our property. Similarly a copyright holder recognises that his or her property is restricted by fair use provisions contained within the Copyright, Designs and Patents Act. This means, for example, they cannot prevent use of their property for purposes of criticism or review or for the purpose of research or private study.[15] Intellectual Property Rights also demonstrate the weakness of a Lockean analysis when applied to intangible properties. Most Intellectual Property Rights are awarded for a finite, and relatively short period.[16] Thus the original appropriator of the property will eventually see his or her property turned over to the public domain against their wishes. Thus valuable patents expire allowing generic drugs to be produced, and copyrights expire allowing endless productions of Shakespeare or Wagner. There are temporal limitations imposed on the original appropriator's property right not recognised by those who ascribe to the Lockean model. This essay will look at the nature of both property rights and rights in property, with the aim of determining a modern property definition which may be applied to intangible, and restricted property rights as equally as to land.

PROPERTY RIGHTS

The Lockean Model

The classic starting point for any analysis of property rights is an examination of the Lockean model.

John Locke's theories of property and ownership have been a staple for property theorists for 300 years. The Lockean model is one which encompasses natural rights, occupancy theory and liberal self-ownership. Locke ascribed to what is now referred to as the historical-entitlement theory. This provides that property is held by natural right if the current owner derives his or her title by successive transfers from the individual who originally appropriated the un-owned property in a just manner. Original appropriation requires not just occupation but also the injection of labour,[17] which is seen by most commentators as an application of liberal self-ownership theory.[18] More importantly for Locke though is that the application of labour provides an observable pattern of possession. These patterns of possession allow for the development of a observable standard prior to the embodiment of positive legal rules. Those who ascribe to the Lockean school of property rights believe property rights derived in this manner are based upon natural law and they may therefore exist prior to property rights established by positive law. In Lockean theory legal rules relating to property are only valid insofar as they recognise and uphold the property rights which have been established by individuals.

The Lockean theory of natural property requires the current owner of property to be able to demonstrate an unbroken chain of title from the original party who appropriated the property. The majority of land in the United Kingdom was, in Lockean terms, illegally appropriated by acts of invading armies. The Monarch of the day would often give title to land to successful generals following victories and vast areas of land would be illegally appropriated such as during the Highland Clearances which occurred between 1785-1854.[19] To apply a Lockean analysis therefore we would be required to accept that most land in the United Kingdom is not in fact owned by the current natural possessor of the land. Additionally, a Lockean approach has difficulty dealing with property passed on in intestacy. If the current owner has dies without leaving a will may it be assumed that he or she intended title to pass according to the laws on intestacy or should it be assumed that they did not intend to pass the property on to anyone, thus should it be rendered ownerless and open for appropriation by the first person who takes possession in a Lockean manner? These are simple examples which demonstrate the weakness of the Lockean analysis when applied to real property. The analysis shows its real weaknesses when applied to moveable property. If we take as an example of moveable property cash in the form of banknotes a weakness immediately comes to light. Upon a Lockean analysis if Party A steals money from Party B and passes it on to Party C who accepts the money in good faith, the party with the title to that money is Party A as Party B misappropriated that money and Party C therefore cannot derive good title to it. Banknotes are though a promissory note and assuming Party C has taken the banknotes in good faith and for value then he will qualify as a "holder in due course" under the Bills of Exchange Act 1882[20] and under s.38(2) of the same Act, "holds the bill free from any defect of title of prior parties". Party C has good title to the stolen banknotes. Those who ascribe to a Lockean position would suggest that the Act is wrong. The Act is positive law and should be deferential to the natural law property rules. As a philosophical exercise the author would be sympathetic to such an argument as the Act legitimises the illegal gains of the thief. As a practical exercise though given the high proportion of banknotes in circulation which have been stolen, or simply lost and found, at any point in their life cycle to apply the Lockean notion of property would in effect render them non-negotiable. Lockean principles are impractical in modern property systems.[21] The Lockean/self-ownership theory is for the reasons given therefore an unsuitable foundation upon which to build a modern theory of property rights.

The Economic Model

The economic model of property could be characterised as being at the opposite end of the spectrum from the Lockean notion of property. Whereas Lockean notions may be attacked for being too wedded to the concept of property as land and as a result leading to an under-inclusive definition of property rights, the economic model, which describes property as, "anything which cannot be divested without the holders consent"[22] may be attacked as over-inclusive. In applying this definition all rights are potentially property rights. The most widely cited example of the effect of the economic model of property is a woman's right not to be raped is a property right.[23] By taking

such an expansive approach to property rights we lose sight of the division between personal rights and property rights. In effect the economic model allows for the internalisation of almost anything, including rights which would normally not be classified as property rights, such as rights in the person as described above and personal rights, or obligations.

A variant on the conservative economic approach offers the possibility of a working definition of property rights within the economic model. This is Jules Coleman's socio-economic approach. In his book *Risks and Wrongs*,[24] Coleman suggests a model which fuses social decision-making and market paradigms. His suggestion is that for an economic model to function, which requires an element of competition, there must be a pre-existing system of property. In Coleman's words, "[c]ompetition presupposes a stable, enforceable scheme of property rights."[25] Without these pre-existing rights to secure marketable resources, the idea of the market makes little sense. What Coleman emphasises with this analysis is that property rights necessarily predate the development of the market. The economic analysis must be wrong, property rights are not based on market transactions and maximisation of value, they are necessarily determined by social order before the market arises. Without such social ordering of property rights prior to the development of the market individuals would enter into a Hobbesian war over property.[26] Although those who subscribe to the economic model of property would dispute this rather mechanical analysis, the author suggests that Coleman's analysis demonstrates ably that property rights are necessarily social not economic in nature. Markets can only come into being where there is a marketable commodity and the market itself cannot create such commodities. The economic approach is, therefore, equally unsuited to providing a foundation upon which a modern theory of property rights may be built.

RIGHTS IN PROPERTY

For the purposes of the following analysis the author prefers to take a more Hohfeldian approach.[27] This approach sees the nature of property not as a universal concept but rather as a vehicle for a set of collective, yet detachable rights. Such an approach has several advantages. Firstly, it follows the Civilian ideology of actions *in rem*.[28] Actions *in rem*, which may be widely equated with modern property rights, were not an individual or unitary right. Instead ownership awarded a basket of actions which could be taken over one's property interest. These included the *rei vindicatio,* the *ius utendi fruendi abutendi* and the acquisition of fruits (*fructus naturales*).[29] Secondly, such an approach allows for the severance of some property rights while ensuring others remain intact. This allows the accommodation of expropriation rules which divest some property rights in favour of the state[30] or individuals[31] while preserving core proprietary rights.

Most importantly, such an approach allows us to recognise there is in fact variety in property rights. By taking a unitary approach such a possibility is precluded and therefore one is forced to assume rights such as the one contained in Article 1 of Protocol 1 to the European Convention on Human Rights must apply to all property. Property rights are in fact a spectrum of individual rights in property which may or may not be applied depending upon on the type of property, and ownership, in issue. Thus the owner of a banknote has a very basic rights package. He has the right to possess his banknote and, to a limited extent to control the disposal of his property. He may save it, spend it or give it away. He has the right not to have it stolen or taken from him by deception. He does not though have the right, as discussed, to retake possession of his property from someone who has taken it in good faith even if their title is tainted by theft. Similarly he cannot deface his property, and he cannot object to the state claiming an interest in his banknote (or rather his total fund of banknotes) through systems of taxation. His rights package in the banknote is restricted for two reasons. Firstly, the banknote is fungible property and therefore unlike personal property such as jewellery or land it is easily replaced. Such property is not as highly valued by society as a whole than personal property and therefore it receives a lesser package of rights. Secondly, the "owner" of a banknote does not take full ownership, part of the package of ownership rights in the note remains with the issuing bank. Thus the owner of a banknote is in a position analogous with a tenant of real property. He is not the absolute owner and as such his property rights are less than that of the real owner. The

position of an owner of a banknote compares unfavourably with the absolute title given to an owner of real property. Because of the high social value of real property within our society such an owner is given an absolute rights package. Thus the owner of land may do everything our owner of a banknote may do, but in addition he has the right to reclaim his property if misappropriated, whatever the circumstances. He may use or abuse his property in any manner,[32] and may object to anything which interferes with his right of enjoyment, including government action.[33]

By recognising that all property rights are made up of rights in property we can create a functioning model of modern property rights. It is equally important to recognise that not all rights in property are moral or human rights. Only a small percentage of rights in property, those which are necessary to allow you the quiet enjoyment of your property, are moral rights. All other rights in property may be restricted or rescinded in the interests of society. This explains why taxation raised on fungible goods is acceptable where a tax which required the delivery up of personal property would not. It also explains the fair use provisions found in intellectual property rights. As a commercial property right, the bundle of rights given to intellectual property holders is restricted. Fair use provisions merely reflect the restricted bundle of rights given to the owners of intellectual property.

Recognising that property rights are not unitary is of vital importance when courts and tribunals are asked to adjudicate between two competing rightholders. Too often judges and arbiters have taken a unitary "home-as-castle" approach to all property claims and in competing rights claims have allowed property rights to "trump" almost all other rights.[34] This paper will examine whether the developing jurisprudence of Cyberspace, which has the advantage of starting with a completely clean slate, is compounding this error by exporting the concept of unitary property rights into this new jurisdiction.[35]

FREEDOM OF EXPRESSION

As with rights in property the right to free speech or freedom of expression[36] has been subjected to intense legal and philosophical scrutiny.[37] These analyses may usually be categorised into one of two approaches. The first is the democratic approach, characterised by Scanlon as the artificial approach.[38] This requires the acceptance of democratic principles as the proper system for the governance of the state. It presupposes the existence of the autonomous decision maker seen in the works of Hobbes, Kant and Mill *and* that individuals perform duties as self-governing citizens within a democratic state. Not surprisingly the democratic approach has developed in liberal democracies and is most clearly set out in the works of American scholars, in particular Alexander Meiklejohn. The second methodology is the moral approach, referred to by Frederick Schauer as the "truth argument".[39] This is based upon Chapter Two of John Stuart Mill's seminal work *On Liberty*.[40] This approach, like the democratic approach presupposes the existence of the autonomous decision maker. It does not though require the existence of democratic sovereignty and as such is characterised by Scanlon as the natural approach. This paper will examine both approaches with a view to determining which is more suited to a modern, technologically advanced society.

The Democratic Approach

The democratic approach is premised on the view that freedom of expression is a necessary component of a society based upon the belief that the population at large is sovereign. Freedom of expression is seen as a necessary component of the democratic process and fulfils two necessary requirements: (1) providing the sovereign electorate with the information it needs to exercise its sovereign power, and (2) making government officials and public servants accountable to the population at large.[41] The democracy principle was championed most eloquently by Alexander Meiklejohn in his extended essay *Free Speech and its Relation to Self-government*.[42] Meikeljohn's argument is though not particularly compelling. His argument is presented as a theory of interpretation of the US constitution, but later scholars including Frederick Schauer have rejected his analysis finding his distinction between public and private speech to be `unworkable'[43] and that

there is no indication `the First Amendment was ever intended to or could in fact be given the absolute force he ascribes to it.'[44] Meiklejohn failed to recognise the complexity of the modern democratic state. He based his views on democracy upon town hall democracy he witnessed in action in small towns on the Eastern Seaboard. He imagined all democracies no matter how large or how complex could be seen as simply extensions of this town hall principle in which free expression ensured all members of the sovereign electorate had all relevant information available to them when exercising their sovereign power.[45] Meiklejohn's thesis turns upon the concept of a sovereign electorate. As Schauer demonstrates though, the very basis of Meiklejohn's argument is also its Achilles Heel:

`If the people collectively are in fact sovereign, and if that sovereign has the unlimited powers normally associated with sovereignty, the acceptance of this view of democracy compels acceptance of the power of the sovereign to restrict the liberty of speech just as the sovereign may restrict any other liberty.'[46]

Moreover, support for Meiklejohn's argument would entail allowing individuals freedom to speak when the majority in the democracy wished to restrict that speech. This entails restricting the right to self-government by restricting the power of the majority. This suggests the effect of Meiklejohn's argument is in effect anti-democratic as it would restrict the ability of the sovereign population at large to govern within the state.

Frederick Schauer in Chapter Three of his text, *Free Speech: A Philosophical Enquiry*, manages to fully debunk the democratic approach when analysed from the viewpoint of a democratic society. In addition to the arguments contained therein, which the author does not intend to repeat, there are additional arguments against the democratic approach. The first is that the democratic approach tends to value particular types of expression over others. As the value of free speech in the democratic thesis is premised upon the provision of information to the electorate and the accountability of officials non-political expression is devalued at the expense of political expression. The democratic principle cannot adequately explain the first amendment protection given to pornographic materials,[47] nor why purely artistic expression should be protected. Secondly, based as it is upon principles of democracy it cannot adequately explain the value of the free expression principle in other systems of governance such a monarchies, oligarchies or meritocracies. When dealing with Cybercommunities and Cyberspace in general the discovery of a democracy is an unusual occurrence. Most Cybercommunities are oligarchies, or constitutional monarchies, while a few are meritocracies. Very rarely is democracy encountered in Cyberspace. For this reason the democratic approach is rejected as incapable of providing a philosophical foundation for an analysis of free speech in Cyberspace.

The Morality Approach

Mill's approach is based on the quest for truth and enlightenment. Like the democratic approach, Mill's morality approach finds its basis in the relationship between the state and the individual, and like the democratic approach it developed out of the often held fear in liberal democracies that the preferences of the majority may achieve absolute status stifling the thoughts and opinions of the minority.[48] At first glance this seems to be a rejection of the utilitarian principles set forth by Jeremy Bentham, a scholar whom the young Mill had held in the highest regard.[49] In fact Mill's analysis is rather sophisticated and his morality approach manages somehow to balance the interests of utilitarianism and the individual.[50] Mill introduces a macro-utilitarianism where freedom of thought and expression are the cornerstones of man's search for knowledge and truth, or in Mill's own words, `utility in the largest sense, grounded on the permanent interests of man as a progressive being.'[51] Mill saw the free and unfettered exchange of ideas between men as the driving force behind the intellectual development of society. Mill developed the arguments he so expertly rehearsed in *On Liberty* to allow individuals the liberty to develop, *qua individuals*, through the exchange of ideas and views among those whose minds have been developed to the point that they

were capable of being improved by argument and discussion with others. This may be seen to be analogous to Adam Smith's `invisible hand' theory in Economics which states that the best products derive from free competition. In Mill free expression theory the best ideas will emerge from a market in competitive thinking, in effect one which has unfettered expression.[52] The resultant ideas will be to the benefit of society as a whole and thus Mill's utilitarian credentials are demonstrated, despite what at first sight seems a wholly un-utilitarian stance.

The Mill theory of free expression is not without its critics, yet it has stood up rather well to the many critiques it has endured over the years. One of the first, and most enduring, critiques was that made by Edward Lucas in 1869.[53] This critique is that for free expression to function in a macro-utilitarian sense Mill concedes the society or nation in question must have reached the position of being `capable of improvement by free and equal discussion'. This, according to Mill's critics injects a level of subjectivity into the debate. Who decides when this has occurred? And how do they decide? This criticism is though one of the easiest to deal with as O'Rourke demonstrates:

`[T]here is an answer within the confines of *On Liberty* itself. The overall argument concerns the tyranny of the majority within evolving democracies, so it is evident that societies which have not arrived at a point of maturity where `self-government' can be successfully achieved have not evolved to the requisite stage.'[54]

Other more incisive critiques of Mill followed. These include the critique that granting a special liberty for expression does not necessarily provide the means to achieve Mill's end of increased knowledge in a society, but may equally provide for greater ignorance, error or folly; that truth once articulated cannot be clearly identified even when unearthed;[55] and that Mill's argument that the silencing of discussion is a claim to infallibility is based on the false assumption that independent verification of a truth may only come from free discussion.[56] Despite these critiques, and others, the Mill theory has weathered the assaults made against it extremely well and was declared by Thomas Scanlon to be, `the only plausible principle of freedom of expression I can think of which applies to expression in general and makes no appeal to special rights (e.g. political rights) or to the value to be attached to expression in some particular domain.'[57] The current author agrees with Professor Scanlon's assessment and suggests an application of the Mill theory is the most apt when analysing modern free speech/free expression rights.

Mill in the Modern World

The modern information society is quite different to the Victorian society inhabited by John Stuart Mill. If we are to apply Millian principles today we must identify how Mill's model fits our society. Modern free speech principles recognise that there are occasions when it is in the interests of society as a whole that speech be restricted or even suppressed. In his analysis of Scanlon identifies six different cases where the exercise of free expression may cause harm to others and should therefore be restricted in the interests of the wider society.[58] Scanlon's six categories could be generically defined as cases where the risk to society caused by free expression outweighs the risks of suppressing free expression. Once again a Mills style macro-utilitarian test may be applied to determine whether expression should be curtailed. As a society we balance the competing benefits of the right to free expression against the wider interests of society. Thus in times of war we accept that media reports may be censored or otherwise restricted in the interests of national security much more readily than we do during times of peace and stability. We measure the interest of the privacy of the individual against the interest of expression to develop a law of defamation which should protect both sides, and we restrict the freedom of certain groups such a those who preach racial disharmony and hatred to encourage harmony and peace within the community at large. How as a society do we decide when such restrictions on free expression are justified? According to Mill's macro-utilitarian principles once a community has have reached the position of being `capable of improvement by free and equal discussion', that community must protect freedom of expression as autonomous individuals within that community will be unable to accept the judgement of others without

independent consideration. These autonomous members of the community may though believe that the state has a distinctive right to command him within certain limits and may agree to allow the state to override his right to make independent consideration within these limited respects. In this manner individuals may agree to restrictions being placed upon their freedom of expression in their wider interests. When an adequate amount of individuals within a society agree to allow the state (or other authority) to command them on a certain issue tolerance of a restriction on the free expression right may emerge leading to the development of laws such as the Official Secrets Act, which was developed during the period before the First World War against a background of mistrust and introspection. If individuals do not accept the command of the state, according the Mill's theory they will throw off this command and ensure free expression remains.

If we accept that virtual communities may exist in Cyberspace[59] and that such communities are capable of improvement by free and equal discussion. Then according to Millian theory freedom of expression should be protected within such Cybercommunities and within the community of Cyberspace itself unless and until an adequate amount of individuals within such communities accept the command of an identifiable regulator (the concept of the state does not `fit' in Cyberspace). In the absence of evidence of such an acceptance freedom of expression must be protected in the macro-utilitarian interests of the wider community. In the course of this paper it will be demonstrated that this is not occurring in Cyberspace. Rather regulators within Cyberspace have imported restrictions on freedom of expression from the `real' or physical world which have no place in Cybercommunities.

PART II - RIGHTS IN CYBERSPACE

REGULATING CYBERSPACE - LAWRENCE LESSIG'S CONTROL MODEL

There can be little doubt the Internet has had profound effect upon the ability of individuals to communicate with a large audience. With low barriers to entry and easy-to- use technology it represents the most fundamental change in the technology of publishing since the development of moveable type by Gutenberg. As with Gutenberg's invention, the value of the Internet is empowerment through technology.[60] Prior to the development of the Internet, the widespread dissemination of information in developed nations was overwhelmingly in the hands of a few multinational publishing and broadcasting houses. Our view of the world would be developed within a framework of information provided by among others; The News Corporation, Disney, The British Broadcasting Corporation, Verlagsgruppe Georg von Holtzbrinck GmbH and Time Warner.[61] The Internet allowed, more successfully than previous technologies such as citizen's band radio, for self-publication. It provides an attractive alternative source of information not edited by the traditional publishing/broadcasting houses. Whether the Internet will provide greater freedom of expression in the longer term is as yet unclear.

Currently there are two competing schools of thought on the issue of regulability of Internet content; these are the Cyberlibertarian school and the Cyber-paternalist school. The Cyberlibertarian/Cyber-paternalist debate has been at the heart of recent analyses in the United States on the application of the first amendment to Cyberspace. The Cyberlibertarian school was the first to fully form their position in the early 1990s.[62] The school links enthusiasm for electronically mediated forms of living with right wing libertarian ideas on freedom, society and markets. Cyberlibertarians believed free expression was inherently protected in Cyberspace. They refuse to recognise the intervention of "old world" governments in "sovereign" Cyberspace,[63] and more importantly stated that any such attempts at intervention would prove futile as a result of the inherent design features of the Internet.[64] This position was most famously set out from a legal perspective by David Johnson and David Post in their seminal paper *Law and Borders - The Rise of Law in Cyberspace*.[65] In this paper they laid out the Cyberlibertarian contention that traditional state sovereignty, based as it is upon notions

of physical borders, cannot function effectively in Cyberspace.[66] In Cyberspace the notion of physicality is lost, and individuals may move seamlessly from areas regulated by one regulatory regime to areas regulated by another. This allows these individuals to choose the regulatory regime which best suits their requirements. A system of regulatory arbitrage quickly develops which means, for classical Cyberlibertarians, that Cyberspace is inherently unregulable by traditional hierarchical control systems. For classical Cyberlibertarians the only possible regulatory system is one which develops organically with the consent of the majority of the citizens of Cyberspace.[67] The classical Cyberlibertarian school thus follows a neo-Lockean approach. The regulators which emerge in Cyberspace will act as the agent of the individual and group interests. Those who do not will be dismissed by the action of regulatory arbitrage. Regulators will be unable to impose their will on the people of Cyberspace without at least the tacit consent of the regulated, and the people will choose the level of regulation best suited to their needs. Thus parents concerned about the availability of indecent or offensive materials may freely choose a more regulated area of Cyberspace, perhaps a Cybercommunity such as America Online which is heavily regulated or monitored. Alternatively an individual who values freedom of expression may choose to join a less regulated Cybercommunity such are common on the USENET system. As there will always be some individuals who value free expression above all else, according to classical Cyberlibertarianism there will always be areas in Cyberspace where there will be complete and unrestricted freedom of expression.

The Cyberlibertarian school quickly came under attack. Several commentators felt it over-simplified social and political theories and that it took a particularly right-wing view in analysing regulatory systems. These early critics included Langdon Winner of the Rensselaer Polytechnic Institute,[68] Reilly Jones of the Extropy Institute,[69] and most tellingly Joel Reidenberg of Fordham Law School. Reidenberg introduced to the debate the idea of the *Lex Informatica*, a form of regulation built into the code of Cyberspace.[70] The development of the Cyberlibertarian/Cyber-paternalist debate encouraged the University of Indiana to hold a symposium on Internet sovereignty in Summer 1998. At this symposium Henry H. Perritt Jr. of Chicago-Kent College of Law outlined a revised version of Cyberlibertarianism.[71]

Perritt's revised position was somewhat between the classical Cyberlibertarian view and the developing Cyber-paternalist position. He suggested that the effect the Internet would have on state sovereignty would depend upon the kind of state in question. Liberal democracies would benefit from and be strengthened by the development of Cyberspace as, "[t]he sovereignty of liberal democracies...[is] enhanced by freedom of speech and freedom of the press in all communications media."[72] For states based on absolute or autocratic powers though the Internet is a threat as, "for non-liberal governments, the Internet probably does seem like a unique threat to their abilities to control the politics, economics and culture within their territories."[73] Perritt's middle way was quickly attacked by both sides. The Cyberlibertarian camp attacked the Perritt position on the basis that his reliance upon the liberal theory of sovereignty left design flaws in his argument. David Post for the Cyberlibertarians said, "Liberal theory itself contains a set of often unacknowledged normative premises that pose a deeper peril for the institution of statehood than Perritt suggests. These premises require us to ask not whether a world of Realist or Liberal states comports better with the new realities of the Internet, but rather how these new conditions affect our normative justifications for the existence of the state itself."[74]

From the developing Cyber-paternalist point of view Keith Aoki attacked Perrit's argument on the basis that, "[t]here is no single monolithic concept of sovereignty to be threatened - we already live in a world of multiple, overlapping, contradictory and oftentimes intensely contested sovereignties."[75]

For Aoki this leads to the conclusion that, "if we are to develop an equitable global...economy of information, we must find a representational (political and otherwise) grid that manages to describe these heretofore largely invisible and plural sovereignties."[76]

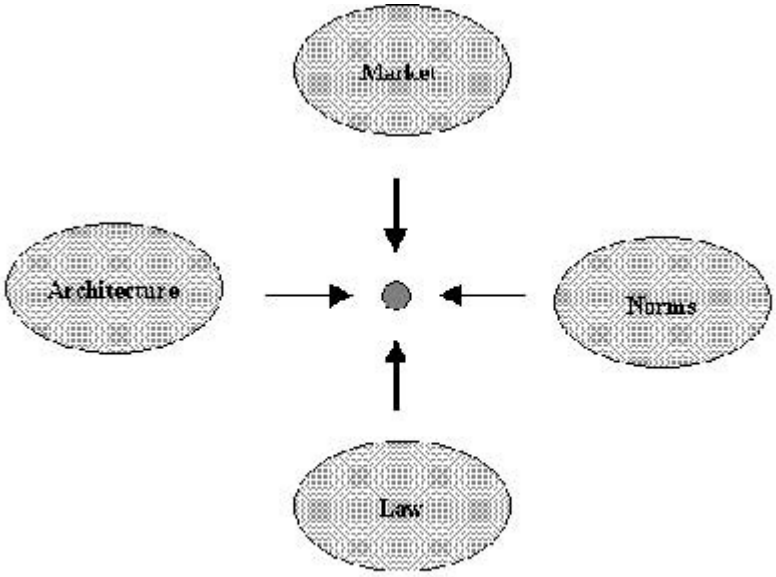
The Cyber-paternalist view matured quickly following the University of Indiana symposium and was quickly fully formed. The leading exponent of this view is Professor Lawrence Lessig of Stanford University. In his extended essay, *Code and Other Laws of Cyberspace*[77] Lessig sets out the Cyber-paternalist thesis. He argues that the Internet rather than being inherently unregulable due to its design or architecture, is in fact regulated by its architecture. Thus whereas Cyberlibertarians argued the design of the Internet facilitates regulatory arbitrage which makes traditional hierarchical or imposed regulatory schemes impossible, Cyber-paternalists argue that this design is in itself a vehicle for hierarchical regulatory controls.[78] Lessig believes the underlying code of Cyberspace, the protocols which drive the network,[79] function as a constitution. In his words, "*Code is Law*."[80] Cyber-paternalists find no inherent freedoms in the design of Cyberspace, rather they find inbuilt control features. For Cyber-paternalists the key question is who regulates? Traditional regulators are not regulating Cyberspace, and it is this lack of involvement which led Cyberlibertarians to wrongly conclude Cyberspace was unregulated.[81] If traditional regulatory bodies are not regulating Cyberspace, this raises the question who is? Lessig refers to regulation by the "the invisible hand, through commerce".[82] Lessig's thesis is that code is the regulator, therefore the commercial proprietors of code set the regulatory standards. It is clear that software developers who control code play a role in the regulation of Cyberspace, but they are only part of a network of regulators. A wider network is described by Keith Aoki, and includes a greater role for the private sector. Aoki believes the private sector is playing an increasing role in the regulation of Cyberspace. [83] This he suggests is to be expected in that it reflects events in other sectors such as advertising, telecommunications and housing development. Public/private regulatory hybrids such as Non-governmental Organisations have expanded greatly in the last twenty years and increasingly private regulation is used to supplement or replace of public regulation. This hybrid model of regulation is now clearly being applied to Cyberspace. Public partners include the World Intellectual Property Organisation and the United States government through the National Telecommunications and Information Administration, while private partners include the International Telecommunications Union.

Commentators from both sides of the Cyberlibertarian/Cyber-paternalist divide agree Lawrence Lessig's anthropological analysis of systems of regulation contained in his extended essay *Code and Other Laws of Cyberspace* provides an exemplary model of current systems.[84] In this section of the paper these systems of regulation will be explained, developed and their potential effects on basic moral rights such freedom of expression in Cyberspace will be set out.

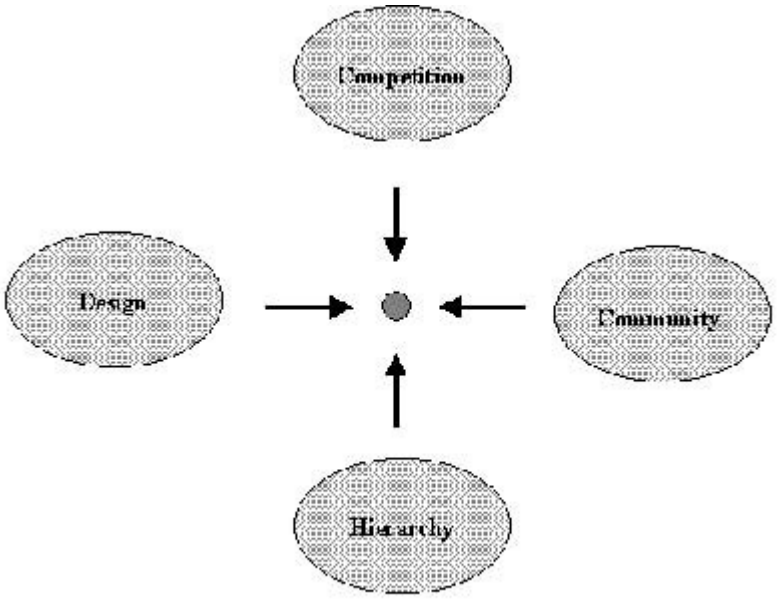
In chapter seven, *What Things Regulate*, Lessig sets out four modalities of regulation, these are: law, markets, norms and architecture (see Figure 1).[85] In Lessig's model these

four modalities function as effective regulators as they take the form of constraints on action. Law constrains through the threat of punishment, markets use pricing and price related signals to constrain, norms constrain through social sanctions such as exclusion or ostracism and architecture uses physical constraints (such as a locked door).[86] These modalities of regulation may effectively explain systems of regulation both in the physical world and in Cyberspace. As mentioned above criticisms of Lessig's work have to date been restricted to the normative analysis in his text. The anthropological design of his modalities of regulation have not been challenged by his critics. A recent paper has, though, examined the anthropology of Lessig's modalities.[87] This paper suggests that the modalities identified by Lessig may be criticised as being either under or over-inclusive. The authors suggest the labels "Law" and "Norms" used by Lessig are over-inclusive. Law refers only to a standard or director and is therefore missing the other essential elements of a control system.[88] Similarly, norms refer only to the director and are similarly over-inclusive. On this basis the authors re-label these two modalities of control hierarchical control and community-based controls.[89] The authors go on to find Lessig's two other modalities to be under-inclusive. They find that rivalry and competition can provide regulatory control in environments where there are no markets and that architecture fails to take account of other design-based elements such as contrived randomness. They therefore suggest re-labelling markets as competition-based control and architecture as design-based

control (see Figure 2).[90] Although not changing Lessig's substantive analysis of regulation in Cyberspace and the importance of code (architecture) as a modality of regulation, the new terminology introduced by this recent paper is substantively more accurate than that introduced by Lessig and will be used in this paper. These modalities can function either independently or together in regulating all forms of conduct. All conduct may, therefore, be regulated by one of fifteen pure or hybrid forms of regulation.[91] Lessig sees these hybrids as particularly important in Cyberspace, in particular hybrids involving design-based systems of control. Lessig sees design-based controls taking the lead role in regulation in Cyberspace. This is due to our ability to uniquely control the design of the physical infrastructure of the environment, something impossible to completely control in a natural environment. It is this belief this leads to his oft-quoted statement that in Cyberspace "code is law". To give an example the current system of regulation of the domain name system as applied by ICANN is a hierarchy/design hybrid form of regulation. The hierarchical input may be found in the ICANN Rules for the Allocation of Domains and Sub-domains and in the Uniform Domain Name Dispute Resolution Policy (UDRP), while the design element is found in the limited category of top level domains available[92] and the design restrictions of the current system which limits domain names to 61 characters in length.[93] There are further examples of design-led hybrids achieving a high level of success in regulating access to and the content of the Internet. Filterware used by parents to ensure their children are not exposed to the more prurient content of the Internet may be classified as a design/community hybrid while design/competition hybrids are used to control the market in and distribution of media files such as MP3 music files.



[Figure 1: Lessig's `Modalities of Regulation']



[Figure 2: Lessig's `Modalities of Regulation' Restated]

As well as such commendable design solutions, design-based controls may also be used to restrict basic freedoms. Manufacturers of DVDs for example use design-based controls to partition markets. This allows the manufacturer to stagger release dates between different regions, but it also allows for price fixing as it reduces the possibility of arbitrage in the DVD market. This practice has recently been put under investigation by the European Commission[94] but illustrates the practicality of commercial use of the modes of regulation to protect markets and commercial practices. The following section of this paper will analyse the use made of the ICANN UDRP by commercial entities to restrict commercially damaging speech. It asks whether the UDRP as applied has struck the right balance between the interests of commerce to protect trade marks and other commercial assets and the interests in the wider sphere for freedom of expression.

IMPLEMENTING DESIGN BASED CONTROLS - ICANN AND THE UDRP

ICANN is a non-governmental regulatory authority which: (1) Manages the development of the Internet Protocols, the technical interface standard that enables computers to interact with each; (2) Oversees the assignment of numerical IP addresses, unique numerical identifiers of all computers on the network; (3) Manages the root zone (or legacy) file servers, these are the core servers which match IP addresses to domain names; and (4) Manages and oversees the development of the domain name system. It is the third and fourth of these roles which provides ICANN with its regulatory power. With control of the domain name system you can effect the ultimate Cyber-sanction of banishment.[95] ICANN may at any time, following a complaint in accordance with their domain name dispute resolution policy[96] and subsequent arbitration hearing, remove your domain from the legacy root network. As all Internet users rely upon domain names for navigation, and as domain name servers invariably rely upon the legacy root to overlay an IP address on a domain name, the removal of the right to a name removes that content from the easily navigable section of the network. It is the most elegant and efficient method of censorship on the Internet.

The UDRP gains legitimacy from ICANN's *de facto* control of the legacy root. As ICANN controls who may write to the root, this means that anyone who wishes to have a domain name visible to the Internet at large must acquire it from a registrar who has the right to inscribe names in an ICANN approved domain name registry. ICANN also determines which registries are authoritative. These controls over registries allows ICANN to require they subject all registrants to a mandatory

arbitration clause in the registration agreement which requires every registrant to agree to submit to ICANN's UDRP upon the request of aggrieved third parties who believe they have a superior claim to the registrant's domain name.

ICANN is a unique experiment into the globalisation and privatisation of intellectual property protection. Through the UDRP it attempts to substitute uniform global rules for what was once a largely territorial system of rights and dispute resolution. The rules were defined and implemented not by governments but by a private, California not for profit public benefit corporation which purportedly acts as a self-governing institution for the Internet.[97]

The UDRP had three main objectives:

(1) to create global uniformity

(2) to reduce the cost of resolving disputes

(3) because of the sensitivity of replacing national laws with global law it was to be restricted to the most egregious types of cybersquatting, leaving all other disputes to national courts.

It is my contention the policy has only fulfilled the second of these objectives. Its greatest failure lies with the third objective. The Dispute Resolution Providers appointed under the UDRP dealt with two thousand four hundred and fifty-eight (2458) claims in the first year of the policy, compared to thirty cases filed under the Anticybersquatting Consumer Protection Act 1999.[98] It seems inconceivable that these two and a half thousand claims involving over four thousand domain names could all be described as egregious. And an analysis of the claims reveals that Dispute Resolution Panellists, who are often not legally qualified (and overwhelmingly are untrained in the art of adjudication) are having to deal with complex cases involving competing rights in commercially valuable properties without the benefit of a hearing, the opportunity to examine parties or to call for further evidence to be led. This has led to panellists on often making extremely naïve, and occasionally clearly incorrect decisions.

This paper examines the role of ICANN has inadvertently played in the suppression of free speech on the Internet. It takes a Cyber-paternalist approach and examines issues of corporate protectionism and agency capture. It questions whether the traditional view of the Internet as a place of unrestricted free speech is in fact correct and suggests that although the Internet may allow greater freedom of expression than that allowed in totalitarian states the level of effective expression allowed on the Internet may be considerably less than we expect in libertarian states in the physical world.

COMPETING RIGHTS - FREE EXPRESSION AND RIGHTS IN PROPERTY

Conflicts between rights occur in all spheres. In the realspace we are adept at recognising the nexus between rights and have developed a sophisticated jurisprudence for dealing with conflicting rights from a variety of sources including, but not limited to primary legislation, judicial precedent, jurisprudential works and sophisticated rules of procedure.

As individuals we recognise the limits of our rights and we do so in the wider interests of society. I know I have a basic right of free expression, but equally I know it doesn't extend to the making of "snuff" films. In a conflict between my right of free expression and my victim's right to life, society has deemed the right to life to be of greater import and it would therefore tale precedence. Rights are "fuzzy": There are no absolute rights (excepting perhaps the right to life, but even it is restricted in societies which allow capital punishment). When rights such a free expression rights and property rights come into conflict in realspace we (very broadly) make a decision on which is the right of greatest import based upon the reflected views of our society. The ICANN UDRP, as applied by the Dispute Resolution Panellists is failing to adequate reconcile cases of free expression and rights in

property and are giving too great a protection to property rights, a hang-over from the often seen realworld phenonomen of the "home as castle", and are failing to take account of the different dynamic of cybercommunities as compared to realworld communities. Cybercommunities as a general rule value free expression much more highly than realworld communities and as almost no-one in cyberspace has voluntarily accepted the rule of ICANN, in Mill's theory have not accepted the command of the state in the restriction of their free expression rights.

DEALING WITH CONFLICT - THE UDRP AND THE PANELS

The primary legislation, the UDRP, provides for a fair balance between the competing interests of the parties. The rights in property of the trade mark holder is protected by Paragraph 2:

"*By applying to register a domain name, or by asking us to renew or maintain a domain name registration you hereby represent and warrant to us that...(b) to your knowledge the registration of the domain name will not infringe upon or otherwise violate the rights of any third party...it is your responsibility to determine whether your domain name registration infringes or violates someone else's right."*

Thus rights in property are protected.

Free speech is also fairly dealt with under the policy. Under Paragraph 4 a legitimate interest is defined as including:

"*a legitimate non-commercial or fair use of the domain name without intent for commercial gain, to misleadingly divert customers or to tarnish the trade mark or service mark at issue.*"[99]

This positive defence is a strange mix of incompatible concepts. Under current UK trade mark law, commercial use is a clear pre-requisite to a claim of infringement.[100] Thus, in the UK at least, a purely non-commercial use is an extremely strong defence against a claim of trademark infringement. ICANN's legitimate interest defence, however, fails to reflect this. Having noted the non-commercial use defence as applying to any "legitimate noncommercial or fair use of the domain name, without intent for commercial gain" at the eleventh hour ICANN added the limiting clause "to misleadingly divert consumers or to tarnish the trademark or service mark at issue." This importation of the tarnishment concept as a limit on non-commercial uses of domain names seems wholly inappropriate as it undermines a substantial part of the free speech value of the non-commercial and fair use defenses. In particular, this language easily could be used to deny protection to legitimate criticism sites. A site designed to attack a company's employment practices or its environmental record might be considered to have the requisite intent to tarnish a mark. This goes far beyond current UK law in protecting trademark holders.[101]

As many observers noted at the time, the natural effect of this language blunts the protection of free speech that noncommercial users are entitled to. ICANN was sufficiently concerned about the appearance of restricting free speech that its Second Staff Report included a footnote stating:

"In view of the comments, one detail of the policy's language should be emphasized. Several commentators indicated that the concept of `tarnishment' in paragraph 4(c)(iii) might be misunderstood by those not familiar with United States law or might otherwise be applied inappropriately to noncommercial uses of parody names and the like. Staff is not convinced this is the case, but in any event wishes to point out that `tarnishment' in paragraph 4(c)(iii) is limited to acts done with intent to commercially gain. Staff intends to take steps to publicize this point."[102]

In the two years since that statement was penned, however, the only visible publicity has been the posting of the report on ICANN's web site. And indeed, a surprisingly large number of UDRP decisions have found that non-commercial "sucks" sites violate the UDRP and have ordered domain

name transfers.

A curtailed survey of 26 so-called "sucks" or free speech cases reveals that a transfer of the disputed name was ordered in 20 of the 26 cases (see figure 3).

Of these only seven cases are clearly ones where the respondents were acting in bad faith. To pick out some of the worst decisions:

The two *Quirkmotors* cases are actually based upon the same facts but were brought separately and were heard by different panellists. In both a disgruntled customer ran a complaints site about an auto-trader. The first panellist found this to be a legitimate fair use, the second felt this was not legitimate as it tarnished the trade mark in question. *Saint-Globain.net*, here use by shareholders of the company name to put in place a website critical of management was stopped. The panel recognised their right to free expression but said they should have used a non-identical name. The UDRP does not though distinguish between identical and similar names when applying the legitimate

Case Number	Resolution Provider	Domain Name Disputed	Outcome
FA0094964	National Arbitration Forum	Quirkmotors.com	Dismissed
FA0094959	National Arbitration Forum	Quirknissan.com	Name Transfer
D2000-0020	WIPO	Saint-Globain.net	Name Transfer
D2000-0868	WIPO	Skipkendell.com	Dismissed
D2000-0071	WIPO	CSA-Canada.com	Name Transfer
FA0094306	National Arbitration Forum	Lobofootball.com	Name Transfer
D2000-0190	WIPO	Bridgestone-Firestone.net	Dismissed
D2000-1455	WIPO	Mclanenortheast.com	Dismissed
D2000-0584	WIPO	Dixonssucks.com	Name Transfer
D2000-0996	WIPO	Guinessreallysucks.com	Name Transfer
D2000-1015	WIPO	Lockheedsucks.com	Dismissed
D2000-0662	WIPO	Wal-martsucks.com	Name Transfer
D2000-0477	WIPO	Walmartcanadasucks.com	Name Transfer
D2001-0843	WIPO	Dixons-online.com	Name Transfer
D2000-1472	WIPO	Autotraderonline.com	Name Transfer
D2001-0007	WIPO	Accorsucks.com	Name Transfer
FA00102247	National Arbitration Forum	Kendallhuntsucks.com	Name Transfer
FA0097077	National Arbitration Forum	Michaelbloombergsucks.com	Dismissed
FA0097750	National Arbitration Forum	Misscleosucks.com	Name Transfer
D2000-0636	WIPO	Natwestsucks.com	Name Transfer
D2001-1195	WIPO	Philipssucks.com	Name Transfer
D2001-0463	WIPO	Salvationarmysucks.com	Name Transfer
D2001-0213	WIPO	ADTsucks.com	Name Transfer
D2000-0681	WIPO	Standardcharteredsucks.com	Name Transfer
D2000-0583	WIPO	Directlinesucks.com	Name Transfer
D2001-1121	WIPO	Vivendiuniversalsucks.com	Name Transfer

[Figure 3: Free speech decisions under the UDRP]

interest defence. *Dixons-Online.com* is though the clearest indication to date of the terrible misapplication of the UDRP by panel members. In this case an individual (Mr. Abu Abdullah) used the Dixons-online.com domain name to run a consumer complaints service for which no charge was made. The panel found that "there was no evidence to conclude the respondent is offering services or goods for any kind of commercial gain". Despite this the still found Mr. Abdullah's use of the domain name to be illegitimate as:

"he is using the domain name primarily for the purpose of disrupting the business of a competitor. While it may be that the respondent is not using its domain name for commercial gain, it has been held in several panel decisions that `competitor' has a wider meaning and is not confined to those who are selling or providing competing products. In this wider context it means, `one who acts in opposition to another and the context does not demand any restricted meaning such as commercial or business competitor'. In the present case, the Respondent is competing with the Complainant for the attention of Internet users which it hopes to attract to its site. Given also its purpose of acting as a complaint site, this seems evidence of both the Respondent's intention to acquire and use the disputed domain name in bad faith. While the interests of free speech and consumer protection may be advanced to justify the Respondent's acquisition and use of the disputed domain name, this is a .com domain name and clearly has the potential to disrupt the complainants business. This is not the same as *Bridgestone-firestone.net* in which the Respondent had only registered the `net' domain for its complaints site."

Decisions such as this clearly draw a coach and horses through the legitimate use exception. If this were a unique or even unusual decision it could be accepted as simply a "bad" decision. Such decisions are though regularly found in the ICANN panel decisions, others on our list include *Lobofootball.com* and *Csa-Canada.com*. As I mentioned at the start of this presentation panel members are being asked to adjudicate on quite complex cases involving a conflict of fundamental rights. Often these panel members are not legally qualified and most have no training or experience of adjudication.

Design - Code is Law

Why though should any of this matter? Surely you just move the content of your website to another domain name? As we have seen with the migration from Napster to Audiogalaxy and Gnutella, you cannot suppress information on the Net. If Dixons closes down your *dixons-online.com* website just move it somewhere else. The decisions of the ICANN UDRP Panels do matter though as in the words of Laurence Lessig, in Cyberspace *Code is Law*. By this he simply means design controls are the pre-eminent mode of regulation in Cyberspace. Domain names are the road signs of Cyberspace and by removing the signs it becomes harder for people to find you. If you're trying to find Hemel Hempstead on the roads network without any road signs you will find it difficult, perhaps so difficult you may give up altogether. Alternatively you may refer to a map (search engine). Here businesses such as Dixons may "buy" top level returns through adverting and other commercial routes. They may also "stuff" returns ensuring your criticism site is returned much lower in the listings. In effect they remove your site from the map as well. A transfer of a domain name can effectively gag a criticism site. The content may still exist on the web but with over 1 billion other pages vying for the attention of the user it will probably never be found.

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[1] The quotes selected come from the European Convention on Human Rights but the author could have selected similar quotes, giving similar rights, from the Universal Declaration of Human Rights (Articles 17 and 19 respectively) or the Constitution of the United States of America (Amendments 4 & 5 and 1 respectively).

[2] See Buchanan, "Assessing the Communitarian Critique of Liberalism", (1989) 94 *Ethics* 852; Gardbaum, "Law, Politics and the Claims of Community", 90 *Mich. LR 685* (1992); Avineri & De-Shalit (eds.), *Communitarianism and Individualism*, Oxford University Press, Oxford, 1992.

[3] See e.g. MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed.), University of Notre Dame Press, Notre Dame, 1984.; Nino, *The Ethics of Human Rights*, Clarendon Press. Oxford, 1991.

[4] Grotius Publications, Cambridge, 1993.

[5] As outlined in the celebrated Canadian case of *Harrison v Carswell* (1975) 62 DLR (3d) 68. Discussed at length by Litman in his essay "Freedom of Speech and Private Property: The Case of the Mall Owner" in Schneiderman, *Freedom of Expression and the Charter,* Thomson Professional Publishing Scarborough, Ontario, 1991.

[6] As allowed by s.30(1) of the Copyright, Designs and Patents Act 1988.

[7] As provided for under s.10(6) of the Trade Marks Act 1994.

[8] Art. 1 "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

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

[10] Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge University Press, Cambridge, 1982 at p.12 (original emphasis).

[11] A (non-exhaustive) list includes Locke, Hobbes, Hume, Kant, Hegel, Marx and more recently Reich, Posner and Ackerman.

[12] Hohfeld did discuss the idea of the multitital *in personam* rights. See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press, New Haven, 1919. See also Honoré's incidents of "the liberal concept of full individual ownership". Honoré, "Ownership" in Guest (ed) *Oxford Essays in Jurisprudence*, Oxford University Press, Oxford, 1961.

[13] See Blackstone, *Commentaries on the Laws of* England, (16th Ed) Butterworth & Son, London, 1825. At II, 1. Epstein, *Takings: Private Property and the Power of Eminent Domain*, Harvard University Press, Cambridge, 1985.

[14] See Locke, *Two Treatises of Government*, II, para.136, p.359, Laslett (ed), Cambridge University Press, Cambridge, 1988.

[15] Respectively Ss.30 and 29.

[16] The exception is of course the trade mark right which under the Trade Mark Act 1994 my be renewed every ten years for an indefinite period.

[17] "As much land as a Man Tills, Plants, Improves, Cultivates, and can use the product of, so much

is his Property. He by his Labour does, as it were, inclose it from the Common." Locke, *Two Treatises of Government*, II, *Supra* n.14 at para.32, pp.290-1.

[18] See Harris, "Is Property a Human Right" in McLean (ed) *Property and the Constitution*, Hart, Oxford, 1999, at p.83.

[19] For more information about this infamous event see Prebble, *The Highland Clearances*, Penguin Books, Harmondsworth, 1969.

[20] s.29

[21] In addition Lockean theories of occupation fail to take account of modern intangible properties. How does one occupy a intellectual property right?

[22] Calabresi & Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral ", 85 *Harv. L.Rev 1089* (1972)

[23] See Calabresi & Melamed, *Supra* pp.1125-7; Posner, "An Economic Theory of Criminal Law", 85 *Colum. L. Rev.* 1193 (1985)

[24] Cambridge University Press, Cambridge, 1992.

[25] *Ibid* p.61.

[26] "Before constitution of Sovereign Power...all men had right to all things; which necessarily causeth Warre:" Hobbes, *Leviathan* ch.18, p.125. Cambridge University Press, Cambridge, 1991.

[27] See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press, New Haven, 1919.

[28] Roman "actions" may be widely equated with modern "rights". The Romans thought of things in terms of actions rather than rights. In substance though in taking an action they were asserting a right over either a thing (*in rem*) or person (*in personam*). See further Nicholas, *An Introduction to Civil Law*, Clarendon Press. Oxford, 1962, at p.100*ff*.

[29] Respectively these are the right to claim ownership, the right of abuse (including alienation) and the right to the fruits of the property.

[30] Such as taxation and criminal forfeiture.

[31] Such as appropriation in divorce settlements or in insolvency.

[32] Excepting the impact of planning laws which reflect the collective right of others to enjoy their property free from interference.

[33] For further discussion of this see Harris, *Supra* n.18 at pp.67-72; Radin, *Reinterpreting Property* University of Chicago Press, Chicago, 1993 at pp.16-22.

[34] Examples include the case of *Harrison v Carswell*, *Supra* n.5 (Property v Expression).

[35] See below.

[36] For the remainder of this paper the right in question will be referred to as the right to freedom of

expression. This is because as Scanlon reminds us in his paper, "A Theory of Freedom of Expression" in Dworkin (ed) *The Philosophy of Law*, OUP, Oxford, 1977, at p.155. Freedom of expression protects not only speech but also "displays of symbols, failure to display them, demonstrations, many musical performances and some bombings, assassinations and self-immolations."

[37] Those who have examined the free expression right include Milton, Coleridge, Bentham, Smith, Mill and Holmes and more recently Meiklejohn and Schauer.

[38] This is because it is derived from and dependent upon one particular theory of government, which is not universally accepted. See: Scanlon, *Supra* n.36 at pp.154-5.

[39] See Schauer, *Free Speech: A Philosophical Enquiry*, *Supra* n.10 Chapter 2.

[40] Parker & Son, London, 1859.

[41] See Schauer, *supra* n.10 at p.36.

[42] Part II of *Political Freedom : The Constitutional Powers of the People*, Harper, New York, 1960.

[43] Schauer, *supra* n.10 at p.37.

[44] *Ibid*.

[45] Meiklejohn, *supra n.*42.

[46] Schauer, *supra* n.10 at p.40.

[47] See *Reno v ACLU* 521 U.S. 844 (1997)

[48] The first sentence of *On Liberty* states that the work is seeking to describe `the nature and limits of the power which can be legitimately exercised by society over the individual'. See further O'Rourke, *John Stuart Mill and Freedom of Expression: The Genesis of a Theory*, Routledge , London, 2001 at p.76.

[49] *Ibid* at pp.48-51.

[50] See O'Rourke, *Ibid* at p.76; Schauer *Supra* n.10 Chapter 2; Haworth *Free Speech*, Routledge, London, 1998 Chapter 4.

[51] *On Liberty*.

[52] Another analogy, drawn by Frederick Schauer, is that of the cross-examination process in the adversarial system of justice used in Anglo-American legal systems. By subjecting the idea to the maximum scrutiny the truth should emerge. See Schauer, *supra* n.10 at p.16.

[53] 1869 Dublin Review Vol.13 (n.s.)

[54] O'Rourke *Supra* n.48 at p.77.

[55] See Schauer *Supra* n.10 at pp.19-25. These critique is though based on the assumption of an objective truth, an assumption made by Mill himself. As Karl Popper later demonstrated though the

advance of knowledge may be characterised not as the search for truth but rather the continual process of exposing error.

[56] Thus you may forbid people from claiming the River Thames does not exist based on the observable fact of its existence. This is not a claim to infallibility. See O'Rourke *Supra* n.48 Chapter 6.

[57] Scanlon, *supra* n.36 at p.162.

[58] They are: Where the expression may bring about injury or damage; An (expressive) assault; defamation; causing alarm; contribution to another's harmful act and speech which increases the ability of citizens to harm one another. *Ibid* at pp.158-9.

[59] For discussion on the developments of Cybernorms and Cybercommunities see: Sunstein: R*epublic.com,* Princeton University Press, Princeton, 2001; Major, *Norm Origin And Development In Cyberspace: Models Of Cybernorm Evolution*, 78 Washington University Law Quarterly 59 (2000); Perritt Jr.: *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?* 12 Berkeley Technology Law Journal (1997); Netanel: *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory* 88 California Law Review 395 (2000)

[60] David Post a leading commentator of the Cyberlibertarian school has recently called the emergence of Cyberspace "an event of incalculable importance in the history of human liberty". Post, *What Larry Doesn't Get: Code, Law and Liberty in Cyberspace* 52 Stan. L.R. 1439 (2000) at 1439.

[61] These companies collectively own and/or publish the New York Post, The Times, The Sun, Die Zeit, Wall Street Journal , Time Magazine, all HarperCollins publications, all Macmillan Press Publications and control Fox and Sky Broadcasting, Star TV, CNN, BBC and ABC television networks (among others).

[62] The Cyberlibertarian school can count upon the support of, among others, Esther Dyson, Nicholas Negroponte, John Perry Barlow, David Post and David Johnson.

[63] This is most famously put in John Perry Barlow's, *A Cyberspace Declaration of Independence* where he said to the "[g]overnments of the Industrial World...You have no sovereignty where we gather." *A Cyberspace Declaration of Independence* available at: <http://www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration>

[64] "You have no moral right to rule us *nor do you possess any methods of enforcement* we have true reason to fear", Barlow, s*upra* (emphasis added).

[65] (1996) 48 Stan. L.R. 1367.

[66] *Ibid*

[67] *Ibid.* See also Johnson & Post, *The New `Civic Virtue' of the Internet: A Complex Systems Model for the Governance of Cyberspace*, The Emerging Internet (1998 Annual Review of the Institute for Information Studies) C. Firestone (ed.)

[68] See *Cyberlibertarian Myths and the Prospects for Community*. Available at <http://www.rpi.edu/~winner/Cyberlib2.html>

[69] See *A Critique of Barlow's "A Declaration of Independence of Cyberspace"*, Extropy#17 Vol.8 (2) (1996)

[70] See *Governing Networks and Rule-Making in Cyberspace*, 45 Emory LJ 911 (1996) and *Lex Informatica: The Formation of Information Policy Rules Through Technology* 76 Tex. L.Rev. PAGE (1998). Reidenberg's *Lex Informatica* greatly influenced the work of Lawrence Lessig (discussed below) which now forms the focal point of the Cyber-paternalist school.

[71] Perritt, *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 Indiana Journal of Global Legal Studies 423 (1998). Available on-line at <http://www.law.indiana.edu/glsj/vol5/no2/4perrit.html>

[72] *Ibid*

[73] *Ibid*

[74] Post, *The "Unsettled Paradox": The Internet, the State and the Consent of the Governed*, 5 Indiana Journal of Global Legal Studies 521 (1998). Available on-line at http://www.law.indiana.edu/glsj/vol5/no2/8post.htm

[75] Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 Indiana Journal of Global Legal Studies 443 (1998). Available on-line at http://www.law.indiana.edu/glsj/vol5/no2/5aoki.htm

[76] *Ibid*

[77] Basic Books, New York, 1999.

[78] Lessig's analysis will be discussed in more depth below.

[79] The main protocol is the TCP/IP (Transmission Control Protocol/Internet Protocol). Upon this are layered many higher level protocols including HTTP (Hypertext Transfer Protocol) for web pages and SMTP (Simple Mail Transfer Protocol) for e-mail communications. Each of these protocols tells the user that is/is not permissible in relation to such communications and in Lessig's terminology *regulate* the user.

[80] *Code* at p.6 (original emphasis).

[81] Lessig's thesis has not only formed the Cyber-paternalist approach it has also led to the development of a neo-Cyberlibertarian school of thought. This is most clearly illustrated in David Post's book review, *What Larry Doesn't Get: Code, Law and Liberty in Cyberspace*, *supra* n.60. In this review he concedes Lessig's anthropological analysis of regulatory structures is "truly dazzling" (at p.1448). He then expounds the neo-libertarian approach which he calls "The Ought of It" (pp.1448-1458). This new approach asks simply ought regulation to be hierarchical? Thus neo-libertarianism accepts the ability to regulate hierarchically, but suggests that socio-politically organic regulation is still best for Cyberspace.

[82] *Code* at p.6.

[83] Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*. *Supra* n.75

[84] See e.g. David Post, "truly dazzling...[makes] a deeply important contribution to our understanding of law in this strange place." Post, *What Larry Doesn't Get: Code, Law and Liberty in Cyberspace*, *supra* n.1 (at 1448); Jack Balkin, "Larry Lessig compellingly demonstrates the central idea of Cyberlaw: Software architecture can regulate our lives as much as any legal rule."

[85] *Code* at p.87.

[86] *Ibid* at p.235-239.

[87] Murray & Scott, *The Partial Role of Competition in Controlling the New Media*. Presented at `Competition Law and the New Economy' University of Leicester 12-13 July 2001.

[88] These elements being detector and effector. All control systems requiring a Director, Detector and Effector. See Baldwin, Scott & Hood (eds) `Introduction' in *Socio-Legal Reader on Regulation* (Oxford, Oxford University Press, 1998)

[89] Murray & Scott, *Supra* n.87, at p.10.

[90] *Ibid* at pp.10-11.

[91] There are four "pure" modalities, six pairs, four threesomes and one foursome.

[92] Currently 258 top level domains are available. These are 244 country code top level domains as outlined in ISO-3166, 12 generic top level domains as allowed under the ICANN policy and two US Federal top level domains.

[93] For details on these design restrictions see Meir Galperin and Ira Gordin *The Domain Name System*. Available at <http://www.rad.com/networks/1995/dns/dns.htm>.

[94] See *Financial Times* 11 June 2001.

[95] This is due to the central role played by the legacy root. In theory any Top Level Domain is possible and may be added to the network. The legacy root is though the only root to which *all* name requests are sent by domain name servers. Thus any domain not recognised within the legacy root remains invisible to the majority of surfers. These domains may be "made visible" by pointing your domain name server to one of these alternate roots, most ISPs though do not do this. For more on alternate roots see Rony & Rony, *The Domain Name Handbook*, CMP Books, 1998 at pp513-72 (the "Alterweb").

[96] The ICANN Uniform Domain Name Dispute Resolution Policy (UDRP) is discussed in greater depth below. The policy itself may be accessed at <http://www.icann.org/udrp/udrp-policy-24oct99.htm>

[97] This has engendered a great deal of debate on the legitimacy of ICANN. See Weinberg, *Greeks and Geeks* 3 Info 313 (2001); Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution* 50 Duke L.J. 17 (2000); Final Report of the ICANN At Large Study (November 2001) (Available athttp://www.atlargestudy.org/final_report.shtml(visited 25 February 2002)); Lynn, President's Report: ICANN The Case for Reform (February 2002) (Available athttp://www.icann.org/general/lynn-reform-proposal-24feb02.htm (visited 26 February 2002)).

[98] Pub. L. No. 106-43 § 3(a)(2), 5, 113 Stat.218, 220 (1999).

[99] UDRP Para. 4(c)(iii).

[100] Section 10 of the Trade Marks Act 1994 lists several grounds of infringement, all of which require to occur "in the course of trade".

[101] For further analysis of the concert of tarnishment of trade marks see Strasser *The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine Into Contex*t, 10 Fordham

Int. Prop. Media & Ent. L.J. 375 (2000).

[102] ICANN, Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy, Oct. 25, 1999, <http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm>