



**INFLUENCE AND CONTROL:  
GETTING CITIZENS TO BEHAVE IN A DIGITAL SOCIETY  
KAY WITHERS**

*This paper was published to accompany a joint ippr-Ofcom, 'A Panacea for all Ills? What Can Media Literacy Achieve?' on 17<sup>th</sup> March 2005.*

**Introduction**

The Internet as a mass market tool has posed particular challenges to those seeking to limit illegal or undesirable actions online, and attempts to regulate such behaviour have taken different approaches over the few short years the Internet has been used on a large scale by citizens, consumers, corporations and governments. There have been initial attempts to target misbehaving users through legal provisions. These include the Recording Industry Association of America (RIA) bringing suit against illegal uploaders, and downloaders, of copyright infringing content, a general international consensus (particularly between Europe and the US) that Internet service providers (ISPs) have a significant role to play, and finally more diffuse attempts to understand and influence behaviour as part of a strategy to promote media literacy.

Currently, 53 per cent of the population of Britain have home internet connections, of which 25 per cent are broadband.<sup>i</sup> The two most common reasons for signing up to broadband are thought to be accessing adult content and music downloads.<sup>ii</sup> Research produced by Envisional, a web tracking company, in February 2005 found that TV downloads via the Internet had increased by 150% over a 12 month period and that 18% of downloaders were from the UK<sup>iii</sup>. The UK leads the world in this form of illegal activity, with 16 per cent originating from Australian, and 7 per cent from the US.

This state of affairs matches those of previous technical innovations in the field of communications. Uptake of many older ICTs was initially driven by the demand for 'adult' content, particularly the VCR, and hopes of mass market appeal for third generation network phones for a good part rest on the appeal of access to over-18 content via this media. As in previous situations, the Government faces a dual challenge of promoting the development of such technologies for economic reasons, while regulating 'undesirable' use to prevent offence or harm to society. Adult content found in print and video form has therefore been subject to restrictions regarding age of purchaser and location of sale, as well as falling under the Obscene Publications Act 1956. But in the case of the Internet this challenge is ever more complicated, and cannot be met using traditional methods of regulation.

The UK Government's role in regulating the Internet has traditionally been very 'hands-off', relying on self-regulatory schemes developed by the Internet industry. Regulation and the law have previously moved slower than the growth of the Internet itself: the technology and the Internet industry have set the agenda and the limits of regulation and the law has obliged. This is partly because of the difficulties presented by the architecture of the Internet but also due to the lack of a concise 'placing' of the Internet in public life. Despite the wealth of content that is now available online, initial



regulatory approaches focussed on the infrastructure element; in particular competition between incumbent and new entrants. However, growth in bandwidth and recognition of the consumer potential have led to the Internet being seen as primarily a content tool, and increasingly becoming the online extension of offline institutions. Traditional broadcasters are keen to utilise the interactivity the Internet provides and the move to digital television has presented opportunities for 'brand extension' accessible by pressing the red button on your remote control.

As convergence between broadband and broadcasting becomes a real possibility, we stand at a regulatory crossroads – do we extend the piecemeal, self-regulatory approach of the Internet to cover all forms of broadcasting, or do we allow for the regulatory methods modelled on linear broadcasting to encroach on the 'free' world of the Internet? There does not appear to be much political enthusiasm to make this difficult choice.

This paper will examine attempts to regulate behaviour online considering difficulties associated with the technical architecture of the Internet, and the effect this has on the relevance in 'cyberspace' of social meanings and etiquettes formed offline. It will consider the success or otherwise of campaigns for 'good behaviour' or at the least the cessation of illegal activity by economic and government powers in light of a recent focus on media literacy initiatives and the forthcoming review of by the European Commission of the E-Commerce Directive due in 2006.

### **Locating control: ISPs and the E-Commerce Directive**

Any drive to make the Internet more 'regulable' faces an essential difficulty in identifying a central point of control. The sheer number of users and creators online means it would be impossible to monitor the activities of each one of them individually, especially given the cross-jurisdictional nature of the Internet. The Internet consists in a complex layer of intermediaries where small ISPs may be purchasing upstream services from larger ISP, where one ISP may 'peer' with another and pass data between them, and where data moves from one router to the next in an attempt to pass content from the creator in response to a user request.

Not only is it difficult to restrict data flow in this mess, it is also impossible to identify a single 'carrier' of information. Unlike the print or broadcast world the media used to deliver content to an audience is not similarly editing material it delivers. It may have no specific role in creating or hosting the information it may be called upon to deliver. Often the Internet has been compared to the postal service in this sense, where the Royal Mail has no responsibility for the content of the letters it delivers. However, this is a massive over-simplification. A more realistic representation would be to compare the Internet to a consortium of several different mail carriers, all of whom swap mail and deliver that 'belonging' to other carriers.

The role of ISPs in regulating the net has so far been limited to informal procedures of 'notice and takedown'. Although in place since at least 1997, when the Internet Watch Foundation (IWF) was created to establish a notice and takedown scheme for child pornography, the concepts behind notice and takedown were only formalised in UK law following the implementation of the E-Commerce Directive in 2002.

The Directive has not been without its critics. Although providing "mere conduit" status to ISPs, limiting their liability for content they carry and installing "no general obligation to monitor", the notice and takedown regime is lacking in detail and leaves

great room for interpretation of its terms. For example, an ISP is only liable for content if it receives 'actual knowledge' of illegal material by receipt of a notice. The Directive provides no direction as to what such a notice should contain. Similarly, although ISPs are expected to act 'expeditiously' to investigate and remove content once notice has been received, there is no guidance as to how 'expeditiously' should be interpreted.

There is evidence that instead of regulating illegal content, a notice and takedown procedure in this form encourages censorship of the Internet. A 'mystery shopper' project undertaken by Oxford University illustrated how lack of clarification and guidance for ISPs is leading to hasty, under-investigated removal of content<sup>iv</sup>. Complaining on behalf of the fictitious John Stuart Mill Foundation, the study found that a major UK ISP was willing to immediately remove the supposedly offending content despite the sparse information given by the complainant, and the falsity of the claim. The complaint focussed on a piece of alleged copyright infringement - the works of John Stuart Mill. A routine investigation would have been able to determine that copyright for this material has long expired.

Compared to the Digital Millennium Copyright Act (DMCA) in the US, the E-Commerce Directive is quite vague. Introduced in 1998, the DMCA includes various conditions for a notice and takedown scheme relating to copyright infringement which specifies what constitutes a "proper written notification", including name, address and electronic signature of the complaining party, sufficient information to identify the copyrighted work or works, the infringing matter and its Internet location, a statement by the owner that it has a good faith belief that there is no legal basis for the use of materials complained of as well as a statement of the accuracy of the notice. The complainant must also guarantee under penalty of perjury that the complaining party is authorized to act on behalf of the author.

The Oxford University experiment also included a complaint regarding the infringing copyright of John Stuart Mill's literary works to a major US ISP. In this instant, the ISP responded with further detailed questions including a request for the relevant statements listed above. The requests were not met and the content was not removed.

Why are ISPs in the UK so eager to takedown content without proper investigation? Primarily it is due to fear of liability for content and the resulting potential financial penalties. In 1997, the ISP Demon internet received notice from Dr Laurence Godfrey regarding a comment posted in the US to the Newsgroup 'soc.culture.thai'. The comment was eventually routed to the Demon news server in the UK. Dr Godfrey sent a letter by fax to Demon Internet claiming the comment was defamatory. Demon Internet, although admitting they received the fax, failed to remove the content. Demon Internet claimed they were not, under common law, the publishers of the comment and they had provided 'innocent dissemination', using the defence provided under the Defamation Act 1996.

The judge agreed that Demon were not the publishers of the comment and that the defence under the Defamation Act therefore applied. However, he concluded that following the fax received from Dr Godfrey, Demon knew of the defamatory posting and since they had failed to remove it, fell foul of other provisions in the Defamation Act. Demon eventually settled out of court and provided a formal apology to Dr Godfrey.

The outcome of this case resulted in a nervous-ness amongst ISPs, and an

eagerness to remove content immediately that notice – no matter how lacking in detail – was received. The threat of financial payouts to complainants has also led to a trend of siding with larger corporate complainants rather than fully investigating claims. This is particularly the case with complaints regarding copyright infringement.

It is difficult to assess the extent of wrongful takedown as there are no centrally collected statistics and because the process is not uniform across all ISPs. The Internet Services Providers Association (ISPA) did lobby for detailed notice and takedown provisions to be included in the UK's e-commerce regulations but this request was not met.

The usefulness of notice and takedown provisions in the E-commerce Directive in regulating illegal or harmful content online is severely hampered by the lack of government guidelines. At the very least, specifications for what constitutes 'notice' should be supplied as in the DMCA. Similarly, the absence of 'put back' procedures further damages the fairness of this mode of regulation and again can increase liability for ISPs. Filling in the gaps may provide some improvement in enabling a standard procedure for regulation of this kind. However, there are developments in the involvement of the ISP community in further filtering and content regulation that threaten the concepts of "mere conduit" and "no general obligation to monitor" that the Directive is founded upon.

Political pressure following the murder of Jayne Longhurst by Graham Coultts who had frequently accessed necrophilic websites led to movements amongst the ISP industry to developing systems for blocking content known to contain illegal images. BT was first to introduce the 'cleanfeed' system which disables access to a list of sites supplied by the Internet Watch Foundation known to carry illegal child pornography or hardcore adult pornography. The Home Office welcomed this step and has encouraged the rest of the industry to use the technology.

Given the strength of various lobbying industries regarding their particular bugbear of content they wish to see removed from the Internet, it is unlikely such technology will be restricted to disabling access solely to child pornography for long. The Internet industry has proven blocking actions can be taken and can be successful. An industry trade body representing copyright owners' interests would be able to draw up a list of regularly copyright infringing websites, just as the IWF does for child pornography, and provide this to the ISP asking for such sites to be blocked. This list of sites could constitute 'notice' under the E-commerce Directive. Where an ISP has 'actual knowledge' of the existence of such content, and the technical ability to disable access to it there is a chance that a judge may confer liability on the ISP for inaction, regardless of their mere conduit status and whether they provide the web hosting space. The threat of liability may well be enough to encourage action in this direction by ISPs.

Calls for regulation of the Internet from politicians and moral guardians have generally been met with derision from the technology industry, claiming that it can't be done and the government had better accept that. However, studies of filtering systems in place in China show that it is being done and with increasing sophistication. Automatic censorship systems are able to remove undesirable postings in a matter of minutes whereas 18 months ago they would survive for about half an hour.<sup>v</sup> There is also evidence of Internet users' access being disabled for some arbitrary amount of time following a request for blocked information.<sup>vi</sup> It is time for greater voice to be given to why it *shouldn't* be done.

In brief, filtering on this scale has two implications for the Internet and society. In the first place it poses a threat to freedom of speech, and a move towards a more heavily censored Internet with judgements along the lines of the test for obscene publications (does the article have a tendency to deprave or corrupt the persons who are likely to read, see or hear it?) applying to content which has previously escaped this level of interference. The practice of blocking entire sites in China leads to a great deal of benign content being inaccessible. In the second, it could motivate a drive towards increased use of peer-to-peer technology for disseminating illegal or presumed harmful content which has implications in terms of tracing users, and also for the relevance of notice and takedown regimes at all. To remove even ISPs as a semi-central point at which to locate content control creates great difficulties for regulating users. The Government is only beginning to address this challenge.

### **Regulating Behaviour**

While the Communications Act 2003 opted not to include the Internet under its content regulation obligations, the Act did confer upon Ofcom, the newly created communications regulator, the duty to promote media literacy in a world of converging communications. In 2004, Ofcom sought views from stakeholders on the concept and potential of media literacy and began to prepare a 'media literacy strategy'.

The importance of media literacy is generally agreed. Exactly what media literacy is finds less consensus. At one end of the scale it is the provision of a basic set of ICT skills that enable the owner to use new communication media proficiently. At the other, it is the ability to access, interpret, understand and create new media content. In between there exist various messages to ensure citizens are empowered to be able to avoid harmful or undesirable content and contact, and that they understand the rights and wrongs of various online behaviour. The latter has particularly been the pursuit of rights-holder organisations aiming to increase respect for copyright online. But while the language of media literacy is one of empowerment, at its heart it is about influencing the behaviour of many, in the absence of a proprietary control mechanism.

On first glance it may seem odd that such time and effort is directed towards re-teaching social and legal concepts that have existed offline for several centuries. The Internet industry itself has often attempted to escape further regulation by repeating the mantra "what is illegal offline is illegal online", dismissing the need for additional laws on online copyright theft, online fraud, online defamation and so on. And the Internet industry is right: the law does extend to online activity in the UK. However, the regard for the law seems to be significantly lower online than it is elsewhere. Is this due to lack of awareness, or something else?

In 2004, the number of illegal downloads occurring via the Internet stood at 870 million.<sup>vii</sup> In 2003 the global piracy rate for software stood at 36 percent.<sup>viii</sup> The music and software industries were understandably concerned by these trends and launched various facets of a campaign to stop consumers behaving badly. One of the key messages being you wouldn't walk into HMV, pick up several CDs and walk out without paying: this would be stealing. Illegally downloading material is exactly the same. The analogy seems simple enough, why aren't consumers making the connection?

A simple explanation, and one which governments and other lobbying organisations

are most willing to believe, is that consumers simply don't know what they are doing is wrong. They lack awareness of certain laws offline but here the power to misbehave unintentionally is severely restricted. Online, however, they are readily offered illegal goods and have little instruction not to take them up. Rights-holders in particular appear to be placing great faith in the ability of education messages to get consumers to behave.

This is a simple explanation, and one which fails to encapsulate the drivers and motivations for consumers' online behaviour. Surveys undertaken by the Pew Internet Project in the US indicate that consumers do know illegal downloading, for example, is against the law.<sup>ix</sup> One would have had to live in a news-free zone for some time to have missed the column inches dedicated to the Napster trial and the RIAA lawsuits. This is unlikely to apply for the individuals partaking in this particular illegal activity.

We should assume that Internet users know what they are doing. The 20,000 individuals who recently downloaded advanced episodes of 24 using BitTorrent understand that Sky charges subscriptions to access such content, that it is not available for free outside of the Internet. So if lack of information is not the cause of transgressions online, what is? Two initial explanations present themselves. The first is a political one, and points to the *lawlessness* of the internet; the second is an ethical one, and suggests that the 'online world' suffers from diminished *perceptions* of right and wrong.

#### *The absence of online laws*

Do consumers decide to behave badly because of lack of enforcement online? The number of people sued by the RIAA for file sharing activity represents only a drop in the ocean of the actual number of people uploading or downloading material everyday. The likelihood of you being next on the RIAA's list is very slim indeed. A perceived lack of enforcement has also led to an expansion of illegal P2P activity, especially in the area of child pornography where those seeking to access such content believe the chances of being traced are significantly lower on peer to peer networks since content is not hosted centrally. Additionally there have been numerous reports of police resources, or lack of them, hindering investigations into Internet crime – Operation Ore is a prime example. The message seems to be you are not going to get caught, so why worry?

Linking consumer behaviour directly to enforcement in this manner would seem to suggest that the only reason we don't misbehave in face-to-face environments is because enforcement is much stronger and we fear being caught. This might be true in some situations – I might walk on the grass when signs clearly instruct me not to since the park keeper is distracted or elsewhere, I regularly ignore pedestrian crossings when cycling if no-one is around - but I don't steal from shops, friends or others and I would deny that the only thing stopping me is fear of being caught.

#### *The absence of online norms*

The problem for industry and government is that, as much as they might seek to address transgression through new enforcement mechanisms, it is the second, more entrenched basis for deviance that poses the real social and political challenge. Much of what usually moderates our behaviour is the recognition and understanding of social meanings. We participate in various activities and processes because we understand them to be right, to have a certain social meaning we wish to convey. For example, the population of the UK is known to be extremely good at queuing. Where there aren't even any instructions to do so, we queue (sometimes) patiently

because we believe it to be the right thing to do and because to avoid queuing, to jump the queue, has a social meaning and would convey something about ourselves we don't necessarily want to convey. It is to invite the disapproval of our peers. Similarly, I am not likely to steal a number of CDs from HMV in the near future, not merely because I think I will get caught (I don't have that much faith in the ability of security guards to monitor the thousands of customers that come and go through these stores on a busy Saturday afternoon) but also because to behave in this manner would be to convey some thing undesirable about myself.

No matter how deep-seated such social meanings are offline, it seems they can disappear online. The force of social meanings in part rest on them seeming innate, natural or traditional, and relatively uncontested in a certain context. A number of theories seek to explain why this social meaning fails to develop online, and three in particular are worth exploring.

The first states that offline social meanings tend to collapse online, because of their construct becoming apparent. This has particular resonance for the fight against copyright infringement. Peer-to-peer file-sharing challenges traditional ideas of intellectual property as a 'property right', given that downloading a track does not deprive the original owner of the ability to use it nor others the opportunity to download it. Claims by the recording industry that one download is equivalent to one lost CD sale further damaged the plausibility of this being 'theft' in the traditional sense: many individuals felt that if they could not download it, they would not have sought it out at all and empirical evidence has similarly dismissed the recording industry's theory.<sup>x</sup>

A second theory is that social meanings were re-defined online by early Internet pioneers. File sharing applications such as Napster came long before legal download services such as iTunes Music Store and MusicMatch Jukebox were available. To increase legitimacy of this new method of accessing music, proponents of weaker copyright law attempted to link the behaviour to 'traditions' of home-taping, making mix tapes and sharing music with friends. They created an invented tradition defined as "a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour with repetition which automatically implies continuity with the past".<sup>xi</sup> This discourse also links itself symbolically to the language of the Founding Fathers of the US, in particular the quote from Thomas Jefferson that "he who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me."<sup>xii</sup> Without an alternative system online to contest this practice, file sharing became the social norm and therefore lacked the stigma associated with theft, nor any discernable negative social meaning.

Thirdly there is the theory, which has links to the previous two that social meanings collapse because of the inability of offline constructs to be transferred online due to the technical architecture of the Internet itself. On this reading, 'cyberspace' is a sufficiently different place to collapse the analogy between the online and the offline altogether. Perhaps it is disingenuous to talk of the Internet as providing a sense of 'place' in the traditional sense at all, just as there is no central point of control, there is no central meeting point and interactions with individuals are reduced to interactions with information.

It is no surprise that this lack of physical location could have such a dramatic effect on the social structures and etiquettes we have constructed offline. In the offline world, social instructions have been determined as existing within social contexts,

physical appearances and non-verbal communication connected with the body.<sup>xiii</sup> The latter two are clearly not supported online, while attaching a social context to the Internet as a whole would be impossible. There are examples of functioning communities which seem to act in a similar way to those offline; some chatrooms for example develop social rules which go beyond that laid down by the chatroom provider, and eBay is a particularly good example (for reasons set out further on), but these do not extend to the Internet as a whole. While reports of online communities, worldwide online days of action, online campaigns and so on give the semblance of a shared experience, the Internet is accessed in isolation and content is delivered to an individual rather than truly 'visited'.

This loss of public self-awareness has led to individuals' behaviour online being characterised as dis-inhibited, de-individuated and self-absorbed. People appear to become less concerned with the feelings and evaluations of others and instead become more self-orientated. Again, lack of behavioural discipline is key. In Bentham's Panopticon, prisoners are coerced into good behaviour by the knowledge that someone is watching them, despite the fact that they cannot see this person.<sup>xiv</sup> Offline the people surrounding us fulfil this role to in part prevent misbehaviour. It is readily accepted that no such monitoring exists on the Internet, except again in closed communities such as moderated chatrooms.

This can lead to a problem of collective action, the 'free-rider problem': if no-one else is well behaved or there are no means to ensure the good behaviour of others, why should I be the one to lose out and to fail to act opportunistically in this sense? Lessig provides an analogy to a village fete, where all villagers are instructed to deposit one litre of wine into the communal well to assist the celebrations, and contribute to the supply of a community good.<sup>xv</sup> Since no-one is charged with monitoring the villagers' behaviour, individuals realise they are able to deposit water instead of wine but still share in the well of (slightly watered down) wine at the evening's celebrations. Once one individual has realised this, they will also realise that anyone could be adding water instead of wine. Rather than be the only one contributing the more costly litre, each individual may make the rational decision to add water instead of wine as the cost of non-compliance is less than the cost of compliance.

#### *Peer-to-peer enforcement?*

The resolution to this problem is to raise the cost of non-compliance such that it exceeds the cost of compliance. The eBay model of a community ratings system not only enables others to 'check up' on our behavioural record, but it also raises the cost of non-compliance to virtual exclusion from the group: sellers frequently state they will refuse to sell goods to eBay members with negative, or very low, feedback ratings. eBay is often referenced as a model for enabling trust online - difficult without a standard, secure, method of identification - but it is also remarkable in its ability to promote good behaviour, despite the anonymity of eBay identities, through incorporating peer review which occurs offline.

The success of eBay has frequently led policy makers to seek some other, public policy use for the model.<sup>xvi</sup> The community of trust the site has managed to create despite having several million users is certainly something governments would do well to replicate elsewhere and it could have a use in a converged broadcasting world where individuals had the capacity to rate content, rather than other users.

It is thought that the future of media use, be it music, television programmes or film, will follow a power law model of distribution. A small number of very successful items

of content will be distributed very widely (as with blockbuster films), while a 'long tail' of less popular, but no less available items will be consumed by niche audiences. Individuals will be able to split their time between sharing in mass market experiences, and cherry-picking more obscure, perhaps more amateur artists. In short, the overall volume of content available increases hugely. E-commerce successes such as iTunes Music Store and Amazon have already illustrated the profit potential of such a distribution model and it is likely similar systems will be developed for commercial offerings of television and films via the Internet.

But this poses a problem for regulators once again who cannot possibly cope with rating this volume of content. The British Board of Film Classification can rate films U, PG, 12, and so on as there are distribution bottlenecks which offer the time and opportunity to do so. These bottlenecks do not exist online. Enabling users to rate content within a community could go some way to providing a solution. Instead of just rating other users, individuals could also be given the opportunity to provide reviews of content while the reviews themselves could be rated for usefulness. This is to borrow from Amazon who allow for customer reviews, but also asks other customers to rate the review on the basis of whether it was helpful or not.

This model could not successfully be extended to all content available on the Internet for two reasons. First, to be meaningful an average rating would need several individual ratings. If the numbers are dispersed over too wide a range of content, meaningful ratings would be in short supply. Second, eBay models have to work in a restricted environment in order to foster the conditions necessary for their success (community, peer monitoring, punishment or exclusion and so on). However, the model could be used to cover more content than traditional ratings methods are able.

#### *Peer-to-peer influence*

The eBay model is also representative of another key feature of the Internet, which is not incorporated in other consumer/producer relationships: the community rating system gives equal power to buyer and seller and both are 'judged' using the same criteria and mechanism. In other functions of the Internet, the consumer/producer power balance is drastically altered. Traditional methods of marketing products have had to be re-assessed in light of consumer abilities to block pop-ups, fast-forward broadcast adverts using PVRs and the disappearing 'captive audience' that the commercial broadcast channel previously had.

This has led to an increase in 'viral' marketing which poses challenges to regulators as it is more difficult to control. While strict regulations for tobacco advertising exist offline, online numerous 'smoking lifestyle' pages can be found promoting the habit to Internet users. A smoking blog, purported to be written by a teenage girl, celebrated the delights of teen smoking and escapes advertising guidelines as it is not promoting any particular product. The power of such methods to promote products has not been lost on large corporations: a few years ago, British American Tobacco reportedly spent several million dollars to build a website aimed at young people looking for bars, clubs and restaurants.<sup>xvii</sup> The establishment listed on this site sold, gave away and aggressively promoted the Lucky Strike and State Express 555 brands of cigarettes. Using peer influence or pressure can be easier online: it is cheap, and easy to roll out on a mass scale. The increased prominence of intermediaries as 'trusted' elements online means they are unlikely to remain untouched as prospective tools for advertisers to reach an increasingly disparate audience. Traditional methods of regulation again face a challenge in protecting citizens, particularly young children, from the influence of advertising delivered in an apparently peer to peer context.

## Conclusion

The current state of the Internet is often characterised as being in the midst of a battle between anarchy and control: a fight between proprietary models and the open source movement, consumers and producers, rights-holders and the ‘copyleft’, and moral guardians against misbehaving users. The outcomes of these battles do have important public policy ramifications, especially for the intellectual property regime and the mere conduit status of ISPs, which should be taken seriously. It is important the Government consider in the long term the choices we are currently facing and that, should either side win outright, the public is likely to be the loser.

For the majority of the public, the battles go unnoticed, and bear no direct relevance to the every day workings of their lives and we should not lose sight of this. In so far as it is the role of regulation to protect the public, we need to find a policy approach which navigates a way through anarchy and control, does not compromise the functionality of the Internet for all but only provides choice where choice is needed. The difficulty of enforcing the law online has been illustrated. Further legal provisions are therefore not the answer as lack of enforcement renders them meaningless. The notice and takedown regime under which Internet content regulation previously resided has been undermined in the face of limited guidance within the law and increased pressure to clean up the Internet. Likewise, targeting individual users has not led to the permanent dip in copyright infringement the music industry expected – making an example of one out of tens of millions doesn’t appear to impact on an individual’s propensity to behave oneself online.

The most compelling approach for governments aiming to chart a course, or create a safe haven, amidst the wild frontier of the Internet is the promotion of media literacy. But there is a danger that media literacy teaching which insists on describing these battles in great detail will increase people’s fear of the Internet and drive people away from Internet use. It is also important to realise that engagement with the Internet, and more particularly e-commerce models on the World Wide Web, very much depends on the extent to which such services fit with the every day tasks and challenges citizens face.

With these two points in mind, it is easy to see why the breadth and scope of content accessible via the Internet presents a different kind of choice to the one technology evangelists imagine. Instead of ‘where do you want to go today?’ the consideration is very much ‘shall I use the Internet or not?’ A recent report found that the majority of UK citizens still preferred to interact with their MPs via traditional communications models, such as the telephone and postal service.<sup>xviii</sup>

If media literacy is about empowering consumers and enabling them to go online with confidence then providing so much choice will lead to failure. Instead there is a strong argument for limiting choice, in Internet terms the number of available sites to visit, with a focus on fitting the services to the citizen. This is not to recommend the World Wide Web as a whole be filtered to provide only government-endorsed services citizens feel safe with, but instead to recommend the provision of a ‘walled garden’ service aimed at adults, and with a non-commercial bias that can provide access to functional services – e-banking, local government information, news etc. – limit choice and empower citizens to use the Internet in a way which works for them, rather than being forced to consider the ‘battles’ that may rage in the wider Internet world. A similar approach can now be found e-banking sites such as Egg which provides facilities for individuals to view all their accounts, even if held with different

banks, in one place.

The end goal of media literacy – to enable people to cope with, and to function in, a digital society – should be kept at the forefront of the development of any media literacy strategy. There seems little benefit in following a more techno-evangelist agenda merely for the sake of it, particularly as this is more likely to reduce Internet use and confidence online. A ‘limited’ World Wide Web in the sense suggested above, combined with an eBay-like rating system, would provide a guarantee of safety and validity of content accessible within the walled garden. It would thus reduce chances of individuals accessing harmful or undesirable content accidentally and could limit calls to the government to further censor the Internet using ‘cleanfeed’ technology.

Of course this system may not meet all of the future challenges the entirety of the Internet poses. However it limits the panic that suddenly people will have no idea what and when to watch programmes with the absence of a watershed. Even in the absence of such a longstanding regulatory tool it is likely that people will continue to stick with known brands, such as the BBC, Channel 4 etc. and watch output created by them. They may do it at times more convenient to them, and powerful brands may not remain the BBC and Channel 4 for long, but nonetheless consumers will not be thrown into a frightening wilderness without assistance.

As far as filtering the wider Internet is concerned, it is important that potential threats to freedom of speech are taken seriously, rather than just considered as claims of conspiracy theorists. We have seen recently the potential power of single interest lobby groups to restrict content in the broadcast world following the BBC’s decision to screen Jerry Springer: the Opera late night on BBC2, and it is extremely plausible that rights-holder groups could campaign for the deployment technology similar to cleanfeed for use to halt copyright infringement. To see this as undesirable for the Internet - because it has limited sophistication, blocks whole sites rather than specific pieces of content, and obliterates the notice and takedown principles on which Internet content regulation has worked for so long - is not to support copyright infringement. But it is to recognise that this may be the ‘thin edge of the wedge’ and to impose this level of control would be to risk further disquiet on each side of the respective debates. It is very much a short term solution with potential for significant harm.

As for influencing behaviour, it is important that any such campaigns operate with an understanding of the social context of the group they are attempting to influence. This is particularly true when it comes to children who are often very resistant to guidelines or advice given by anyone but their peers. There have been significant errors made by the music industry in previous campaigns which have been guilty of ambiguity (free music given away on the front of newspapers and magazines), of attempting to impose external control (the recent release of free software to enable parents to search their children’s computers for peer to peer programme files) and of making apparent the construct of their views which are thus open to challenge. In contrast there have been significant successes achieved by viral advertising and not always to ends we may support. The ability of the Government to regulate such activity is very much reduced, especially since the notice and takedown regime is unlikely ever to be up to this particular challenge. To run successful counter-campaigns, the government must learn lessons from successful viral marketing and use similar techniques in new media to reach media-savvy groups, particularly young people.

There is opportunity to consider these issues both in Ofcom's media literacy work and in the forthcoming review of the E-commerce Directive, which is to take place in 2006. As a starting point, the notice and takedown regime must be improved to provide further clarity to ISPs as to exactly what their role is in content regulation. It should provide specifications for what constitutes an 'actual notice' and procedures for putting back content that has been removed. If notice and takedown can work, then there may be less call for the arbitrary filtering mentioned above. It must also be considered whether notices can apply to entire sites containing infringing material, or the infringing material itself. Once this has been determined, it is important that governments and ISPs stick to these principles.

## Endnotes

- <sup>i</sup> Report from Digital Inclusion Panel (2004), *Enabling a Digitally United Kingdom, a Framework for Action*
- <sup>ii</sup> 'Entertainment beats family in the home', Homecall 3<sup>rd</sup> December 2003
- <sup>iii</sup> Envisional (2005), *TV Piracy: an Envisional Briefing Note*
- <sup>iv</sup> Christian Ahlert, Chris Marsden and Chester Young (2004), "How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Regulation", PCMLP, Oxford University
- <sup>v</sup> "China's tight rein on online growth", BBC News Website, March 2005
- <sup>vi</sup> Zittrain, Jonathan and Edelman, Benjamin (March 2003), *Empirical Analysis of Internet Filtering in China*
- <sup>vii</sup> "Downloading soars as music fans buy 200 million songs", Telegraph (20/01/05)
- <sup>viii</sup> British Software Alliance and IDC Global Software Piracy Study (2004)
- <sup>ix</sup> Pew Internet Project (2003), "Music Downloading, File Sharing and Copyright"
- <sup>x</sup> Oberholzer, Felix and Koleman, Strumpf (2004), "The Effect of File Sharing on Record Sales – An Empirical Analysis", [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf)
- <sup>xi</sup> Hobsbawm, E., and T. Ranger (1983), *The Invention of Traditions*, Cambridge: University of Cambridge Press
- <sup>xii</sup> Thomas Jefferson to Isaac McPerson, 1813
- <sup>xiii</sup> Denegriti – Knott (2003), *Consumers behaving badly: deviation or innovation?*
- <sup>xiv</sup> Bentham, Jeremy, *The Panopticon Writings*. Ed. Miran Bozovic (1995), London: Verso
- <sup>xv</sup> Lessig, Lawrence (1995), 'The Regulation of Social Meaning', 62 U. Chi. L. Rev. 943
- <sup>xvi</sup> See W. Davies (2004), 'Is Online Community a Policy Tool?', ippr
- <sup>xvii</sup> Anon, BAT's Internet marketing plan. Tobacco Control 2001, <http://tc.bmjournals.com/cgi/content/full/10/2/91a>
- <sup>xviii</sup> Stephen Ward et al (2005), 'The Promise and Perils of 'Virtual Representation': the Public View', University of Salford

### About the author

Kay Withers joined the Institute for Public Policy Research as Research Fellow in 2004. Prior to this, she worked as a researcher to Brian White MP and was previously policy adviser to the Internet Services Providers Association where she led the Association's work on data retention and the Communications Act. Her research interests include e-Government, internet regulation and intellectual property rights. She has contributed articles to several e-Government and IT industry publications on a variety of regulatory issues.