

PRIVACY AND THE INTERNET – AN UPDATE

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The setting – Convention rights

For purposes of English law, the starting point is the Human Rights Act 1998. By s6 the Court (as a public authority) is required to act compatibly with Convention Rights. These rights include the right to respect for private life protected by Art 8, which provides that “*Everyone has the right to respect for his private and family life, his home and his correspondence*” and that “*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others.*”

The leading English case is [*Naomi*] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, in which Lord Nicholls observed “*The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual.*”

In accordance with *Campbell*, the correct approach to the balancing exercise where both Art 8 and Art 10 rights are involved is that: (i) neither Article as such has precedence over the other (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) finally, the proportionality test – or “ultimate balancing test” – must be applied to each (*Re S* [2005] 1 AC 593, Lord Steyn at [17]).

The principles to be derived from *Campbell* were further explained in *Murray v Express Newspapers plc* [2009] Ch 481, in which Sir Anthony Clarke MR confirmed that when deciding a competition between Arts 8 and 10 the Court considers the matter in two stages. The first question is whether there is a reasonable expectation of privacy. This is an objective question “*which takes account of all the circumstances of the case*”. The test is “*what a reasonable person of ordinary sensibilities would feel if s/he was placed in the same position as the claimant and faced with the same publicity.*” If and only if that question is answered in favour of the claimant does the Court go on to the second stage, and ask: “*whether in all the circumstances the interest of the owner of the information must yield to the right of freedom of expression conferred on the publisher by Art 10?*”

As Tugendhat J pointed out in *Goodwin v News Group Newspapers Ltd* [2011] EMLR 502 at [85], the right to respect for private life embraces not only “*unwanted access to private information*” but also “*unwanted access to [or intrusion into] one's ... personal space.*”

The Courts in England have been left to grapple with the problem of giving effect to Art 8 rights in the age of the Internet without the help of much targeted legislation or, indeed, the deliberations of the Law Commission. In these circumstances, this paper draws on the work of the New Zealand Law Commission in its detailed report (176 pages in length) of December 2011 entitled *“Rights, Responsibilities and Regulation in the Digital Age”*.

In that report, the New Zealand Law Commission explained how, for many of those involved with the Internet, the starting point is one which accords precedence to Art 10:

“The idea of restraining, or delaying free speech, in order to protect other human rights is an anathema to many internet users. Free speech values and an abhorrence of censorship have been hardwired into the architecture of the internet and are deeply embedded in its culture. When attacked, these values are often fiercely defended.”

The *Campbell* case was concerned with the balance between the right to freedom of expression guaranteed by Art 10(1) and the right to respect for private and family life guaranteed by Art 8(1). However, in accordance with Art 10(2), the Art 10(1) right is also qualified by the need to protect further *“rights of others”*, such as the Art 1 First Protocol right to peaceful enjoyment of possessions, which protects intellectual property rights.

The tendency of the culture of the Internet to accord primacy to the ability to publish material without practical or legal restriction places these *“rights of others”* in jeopardy. Those who advocate such primacy perhaps do not appreciate that this is inimical not only to rights like Art 8 but even to Art 10, as the New Zealand Law Commission pointed out:

“However, censorship is not the only enemy of free speech. Those who exercise their free speech to intimidate, bully, denigrate and harass others on the internet lessen the credibility of free speech arguments. Even though the web provides those who are harmed by abusive speech the opportunity to exercise their right of reply, not all have the courage or the standing to exercise it. In effect, those who exercise their free speech rights to cause harm may inhibit others from participating freely in this vital new public domain. The practical anonymity afforded abusers, and the lack of real-life consequences can create an environment where such abusive behaviour can thrive. “

Art 10(2) contains a reason for the qualifications which it contains, namely that the exercise of the right to freedom of expression *“carries with it duties and responsibilities”*. This wording is unique: it appears nowhere else in the European Convention on Human Rights. There are real difficulties about giving effect both generally to the *“rights of others”* and in particular to these important concepts of *“duty and responsibility”* in the context of the Internet. In large part, the Internet represents power without responsibility.

Nature of the problems

Most of the problems to which the Internet has given rise are not new. However, what are new on a practical level are matters such as scale and duration, and, in legal terms, when it comes to giving effect to the rights which qualify the Art 10 right, *“accountability”*.

The problems were summarised in this way by the New Zealand Law Commission:

Practical problems

(i) Reach of Internet publishers

“Before the advent of the web, the risk of causing harm to others through the exercise of free speech was most commonly a question that concerned the news media rather than ordinary citizens. However, now that everyone has the ability to publish, these risks – and potential liabilities – are much more widely shared.”

The point can be illustrated by two statistics quoted by the New Zealand Law Commission and by one quoted by Eady J in *Tamiz v Google Inc* [2012] EWHC 449 (QB) at [35]:

- (1) Each month Facebook’s 750 million users exchange 30 billion pieces of content.
- (2) Trade Me has 2.8 million members who, on average, will publish 25,000 new posts on Trade Me message boards each day. At any given time there may be as many as 550 million words contained on these message boards.
- (3) The blogs on Blogger.com, a blogging platform provided by Google, contain more than half a trillion words, and 250,000 new words are added every minute.

(ii) Spread of Internet publications

“Then there is the difficulty of spread. Once published, a piece of information can “go viral”; it may be taken up and repeated by others. It is not unusual for a suppressed name which has appeared on a website to spread rapidly via other websites and media such as Twitter. In the UK recently the suppressed name of a football player became the subject of a multitude of “Tweets””.

Legal problems

(i) Uncertainty

“The law imposes constraints on certain types of speech and in some circumstances provides remedies for those harmed by others’ speech. However most of these laws were drafted in the pre-digital era and questions now arise as to how effective they remain.”

“If an infringing publication has taken place, who can be held accountable, and against whom will criminal sanctions or civil remedies lie? Possible defendants are any media company responsible for the publication; the editor of the relevant publication (if there is one); the individual who wrote and/or uploaded the item in question; the host of the website on which the item has appeared; and (possibly) the internet service provider (ISP). The current law is complex and unclear. The answer may well be different for the purpose of different rules. It depends on the way the law defines the particular offence or civil wrong – whether, for example, intention or negligence is required; on whether in a

particular case the defendant had knowledge of the infringement; on the laws of agency (where a company is concerned); and on what amounts to "publication" for the purposes of the particular rule in question."

(ii) Enforcement

"Sometimes, even if the law clearly has been broken, there may be problems enforcing it. The fact that the internet has no geographical boundaries and that once published, information can be stored and accessed from a practically limitless number of places making it difficult, if not impossible, to remove, are among the challenges posed."

From an English perspective, among other difficulties in the path of enforcing orders in respect of Internet publication is the fact that many search engine and website operators are outside our jurisdiction (see *G and G v Wikimedia Foundation Inc* [2010] EMLR 364).

One remedy available under English law is *Norwich Pharmacal* relief, whereby someone who has become mixed up in the wrongful acts of another person may be required to provide information to assist the wronged person to take steps to address the wrong. However, information can be, and often is, made available anonymously. For example, it may be posted under a pseudonym from an internet café. Even assuming that it is possible to obtain a *Norwich Pharmacal* order, in these circumstances the order may lead to a dead end. Or it may be rendered nugatory by the same person continuing to post material using a different name and/or a different URL. In *Bacon v Automattic Inc & Ors* [2011] EWHC 1072 (QB), Tugendhat J held that he had power to order the service upon the defendants in the USA of a claim against three USA website operators requiring them to disclose names, addresses, IP addresses and other information which would identify, or assist in identifying, the person(s) responsible for publishing on those websites statements that were alleged to be defamatory of claimant. See, also, *Lockton Companies International v Persons Unknown* [2009] EWHC 3423 (QB), Eady J and *Patel v UNITE* [2012] EWHC 92 (QB), HH Judge Parkes QC. However, even assuming that there is a system for enforcing such orders abroad, and that utilising this system is not prohibitively costly, and even if in other respects such orders may achieve their aims, the time taken to obtain relief will typically render such orders an inadequate remedy for a privacy claimant.

Due to the Internet, a media injunction may do a claimant more harm than good: the information which is sought to be kept secret may be made more public than if no injunction had been sought, and even if that does not happen the claimant may suffer more harm from speculation and vilification than would be caused by loss of that secrecy.

What happens in practice

For most privacy claimants, damages are not an adequate remedy. Accordingly, where publication has not already occurred before the claimant gains access to the Court, in general the claimant's rights can only be satisfactorily protected by the grant of an interim injunction which ensures that there is a purpose to the trial by keeping available the only remedy of real value to the claimant. There is a substantial body of English case

law concerning the grant of interim injunctions in privacy cases. In addition, a Committee chaired by the Master of the Rolls, Lord Neuberger, was set up in April 2010 and produced a report on *“Super-Injunctions, Anonymised Injunctions and Open Justice”* on 20 May 2011, and this was followed not long after by the *“Practice Guidance: Interim Non-Disclosure Orders”* issued by Lord Neuberger MR with effect from 1 August 2011.

While there are cases involving less well known people, or children, or vulnerable adults, a feature of the development of the law of misuse of private information in England is that it has largely involved cases in which the claimants are celebrities. A number of these claims, especially by footballers but also by others, have involved “kiss and tell” stories. It may be that the New Zealand Law Commission considers that the English Courts have been too sympathetic to such claimants, because it remarked that *“In England there has recently been a succession of cases where celebrities have been successful in getting injunctions to prevent publication of their moral transgressions.”* However, the rights and wrongs of that debate are beyond the scope of this paper. What matters for present purposes is that the English Courts have made orders designed to afford the protection which they have held to be appropriate for claimants’ Art 8 rights, but whereas those orders have undoubtedly been effective not only against the defendants but also (on the *“Spycatcher”* principle) against traditional media third parties who have been given notice of the same, in practical terms, at least in accordance with the arguments presented by claimants to date, those orders have been shown to be ineffective against publication on the Internet – where social networking platforms have assumed increasing significance.

The Ryan Giggs case provides the paradigm example. It is important for a number of reasons. First, it shows how the Courts will strive not to allow either Internet publication or, more generally, the revelation of information in breach of an order, to deter them from providing whatever protection they are able to provide to those who they regard as being entitled to the benefit of injunctions (claimants and, not unusually, their families). The legal basis for this approach is that (a) in the case of private information, there is no bright line between what is and what is not “in the public domain”, as there is in the case of commercial information and (b) the law of privacy is concerned with preventing not only unwanted access to private information but also unwanted access to, or intrusion into, one’s personal space. In this regard, the fact that exposure on the Internet is regarded as less intrusive than exposure in the conventional media is a relevant consideration when balancing Art 8 and Art 10 rights. It means that even where exposure on the Internet has occurred, there may still be some purpose in restraining additional exposure in other media. (In fact, although this was not a feature of the Ryan Giggs case, this can cut both ways: because exposure on the Internet is less intrusive, to allow it may be a proportionate interference with Art 8 rights, whereas exposure in other media would be a disproportionate interference (see *Goodwin v News Group Newspapers Ltd* [2011] EMLR 502)). Second, it shows how, sooner or later, the effect of Internet publication may be to undermine the protection that the Court can give to such an extent that an injunction becomes pointless (a) from the claimant’s perspective (possibly causing the claimant to refrain from seeking relief or, as in the case of the broadcaster Jeremy Clarkson, to abandon that relief) and (b) from the perspective of the Court (causing the Court to refuse to continue relief, as in the case of the anonymity order in favour of Ryan Giggs). Third, and perhaps most importantly, it is, perhaps, the main reason why there

have been so few applications for privacy injunctions against the media in England since the Ryan Giggs and Fred Goodwin cases in the Spring of 2011 (the main examples are: *Spelman v Express Newspapers (No 2)* [2012] EWHC 355 (QB), in which a Cabinet Minister failed to obtain an interim injunction to prevent publication of private information concerning her 17 year old son, who was a successful Rugby player; *McLaren v News Group Newspapers Ltd* [2012] EMLR 729, which concerned the first contested interim injunction against the media involving a “kiss and tell” story since those cases, and in which Lindblom J refused relief to the claimant, a professional football manager and former manager of the England team; and *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), in which the claimant obtained an interim injunction restraining publication in the Sun newspaper of photographs of him taken at a fancy dress party, some of which showed him partially naked, together with a description of their contents).

Among the explanations for this sea change in the interim applications workload of the Courts is the consideration that most privacy claimants who have the legal and financial resources to seek injunctions against the media are drawn from a relatively small community (comprising in large part sportspeople, celebrities, wealthy businesspeople, and political figures). They are likely to know that although Ryan Giggs and others (such as Fred Goodwin) obtained interim relief, their overall experiences were not such as to be particularly encouraging for any claimant. In addition, many privacy claims relate to extra-marital or covert sexual relationships, and a significant concern in many of those cases is to prevent the information from reaching spouses, partners and other family members: yet there is a real risk that this will occur through the Internet, as happened with Jeremy Clarkson, even if an injunction is obtained and obeyed by the media.

(It is fair to say that footballers in particular may also have regard to other matters, such as the outcome in *Terry v Persons Unknown* [2010] EMLR 400, the result of the full trial in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), and, most recently, the outcome in *McLaren v News Group Newspapers Ltd* [2012] EMLR 729; and that claimants’ legal advisers may also be taking into account the freeing up of the concept of what is in the public interest apparent from those cases and the Strasbourg decisions in *von Hannover v Germany (no 2)* [2012] ECHR 228 and *Axel Springer AG v Germany* [2012] ECHR 227.)

(It is also fair to say that the media’s appetite for publishing “kiss and tell” and similar stories was dampened, at least for a time, because they were subject to the scrutiny of two Parliamentary Committees and the Leveson Inquiry. Further, they are conscious of the continuing criminal investigations into telephone hacking and police corruption. Still further, the News of the World is no longer with us. However, in recent months there has been a resurgence of such stories, albeit mostly in a modified form typified by *McLaren*.)

The Ryan Giggs case

Initially, Ryan Giggs was granted an anonymity order which permitted him to bring proceedings using the initials “CTB”. The first judgment in the case was that of Eady J of 16 May 2011: *CTB v News Group Newspapers Ltd (“NGN”) & Another* [2011] EWHC 1232.

Against the background of a threat by CTB to seek an injunction on the evening of 13 April 2011, The Sun undertook not to publish any information which identified or tended to identify CTB as the other party to a sexual relationship with Imogen Thomas (a "Big Brother Babe"). The undertaking nevertheless allowed the newspaper to publish that CTB was a top Premier League footballer and/or Premiership star or words to that effect, and that he was known as a married man with a family. The newspaper published an article which did not identify CTB, but contained that information and the further information that (1) CTB and Ms Thomas met for sexual encounters at a string of luxury hotels, usually for an hour or two, and sometimes before key games (2) he and Ms Thomas had a "six month fling" (3) he told Ms Thomas that she was the love of his life (4) a friend of Ms Thomas feared that he had been stringing Ms Thomas along for sex (5) Ms Thomas was completely lovestruck by him and (6) when his agent was asked about these matters, his agent said that the agent was shocked, that the agent could not believe it, and that the agent did not know what to say because he was such a family man, and having regard to the closeness of his family. The Sun declined to extend the undertaking beyond the afternoon of 14 April 2011. CTB therefore applied to the Court "*to restrain publication not only of the identity of the Claimant but also of any further account, or purported account, of such a relationship*" (Eady J at [2]). An injunction to that effect was granted.

A week later, NGN applied to vary the injunction of Eady J on the grounds that there had been such widespread coverage on the Internet since the Order was first granted on 14 April 2011 that it would be pointless for the court to maintain the anonymity of CTB. This included about 75,000 thousand tweets on Twitter which claimed to identify CTB.

The matter came back before Eady J: *CTB v NGN and Another* [2011] EWHC 1326 (QB). Rejecting NGN's application, Eady J said

"24. It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or "broadsheet", is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with each exposure of personal information or allegations, whether by way of visual images or verbally, there is a new intrusion and occasion for distress or embarrassment ...

26. In these circumstances, it seems to me that the right question for me to ask, in the light of *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324 and *Re Guardian News and Media Ltd* [2010] UKSC 1, is whether there is a solid reason why the Claimant's identity should be generally revealed in the national media, such as to outweigh the legitimate interests of himself and his family in maintaining anonymity. The answer is as yet in the negative. They would be engulfed in a cruel and destructive media frenzy. Sadly, that may become unavoidable in the society in which we now live but, for the moment, in so far as I am being asked to sanction it, I decline to do so. On the other side, as I recorded in my judgment on 16 May, it has not been suggested that there is any legitimate public interest in publishing the story."

Later the same day, NGN returned to Court, seeking the discharge of the injunction on the basis that an MP had named CTB in Parliament: *CTB v NGN and Another* [2011] EWHC 1334 (QB). Tugendhat J referred to the judgment of Eady J of that day and continued:

- “2. Very shortly afterwards a name was mentioned by Mr Hemming MP in the House of Commons in the course of a question which was interrupted by the Speaker. On that basis NGN asked me to hear a further application shortly after 5pm for the anonymity of the claimant to be removed. As the public now know, anyone who wanted to find out the name of the claimant could have learnt it many days ago. The reason is that it has been repeated thousands of times on the internet. NGN now want to join in.
3. It is obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed. The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media.”

The naming of Ryan Giggs in Parliament added an additional twist to the saga, as, indeed, did his attempt to obtain relief against Twitter. The injunction was breached by the media, whether because it suited them to do so or because they had difficulty in making sense of a Court order restraining the publication of what had become an open secret. For example, the Daily Mail of 23 May 2011 reported the events of that day as follows:

“Following the revelation thousands of people once again took to Twitter to spread word Giggs had finally been outed. The Prime Minister's spokesman this afternoon refused to comment on individual cases, although David Cameron had earlier admitted to knowing it was Giggs. The Attorney General Dominic Grieve, who would be responsible for any prosecution for contempt, had earlier said during a Parliamentary debate on the injunction issue: 'It is our duty as parliamentarians to uphold the rule of law.' The row provoked one of the biggest acts of civil disobedience in modern times and David Cameron branded the orders 'unsustainable' and 'unfair'. Giggs had mounted a desperate campaign to keep his name secret, not only taking out an injunction but also threatening to sue Twitter users for leaking his name. Earlier this afternoon Mr Justice Eady rejected a fresh application by News Group Newspapers to discharge the privacy injunction relating to CTB – the initials used to identify Ryan Giggs to the court – on the basis that to continue it would be 'futile', given recent widespread publicity about his identity.”

Following these events, The Sun's sister newspaper, the now defunct News of the World, published the story over two Sundays that Ryan Giggs had conducted an adulterous affair with his brother's wife for several years. The newspaper gave no advance notice of the first week's publication (as to which, see *Mosley v UK* [2012] EMLR 1). Ryan Giggs made no attempt to obtain an injunction to prevent the second week's publication; nor did he

issue proceedings claiming damages. These events were not before the Court in the CTB litigation, although they may help to explain why he did not progress that action to trial.

The CTB case was due to be tried in November 2011. Neither side was ready for trial. In light of the fact that the interim injunction affected the rights of third parties, however, Tugendhat J ordered new directions designed to ensure that the claim was tried in March 2012, to which “strike out” sanctions for non-compliance were attached. The claimant’s solicitors failed to comply with the first of those directions, and in consequence his claim was struck out, and he had to apply to the Court for relief from that sanction.

In the meantime, the claimant agreed terms of settlement with Imogen Thomas. These included the reading of a statement in open court in which it was accepted that (contrary to CTB’s claim against her on the injunction application) she had not sought to reveal the details of their relationship to the media. By the time that statement was made, although in principle protected by the interim injunction, the identity of CTB had become an open secret, especially on the Internet and at football matches. Therefore, when reporting on the statement, the media referred to the man in question not as “CTB” but as Ryan Giggs.

What happened next is that Eady J was asked to approve a Consent Order embodying the terms of settlement agreed between the claimant and Imogen Thomas. This he did on 1 February 2012. Unbeknown to NGN until shortly before the hearing of the claimant’s application for relief from sanctions, however, on that occasion: (a) Eady J declined to continue the anonymity order in favour of Ryan Giggs, and (b) the title of the claim was amended in that Order to name Ryan Giggs as the claimant. No reasons were given by Eady J for this decision, because the matter was not dealt with at a hearing. It appears, however, that he must have taken this stance because he considered that any further attempt to preserve anonymity had become futile in light of (a) Internet publication and/or (b) widespread disregard of the earlier orders of the Court by the media. The failure of Ryan Giggs’ solicitors to notify NGN or any third parties of these events was one matter which led Tugendhat J to refuse relief from the sanctions imposed on Ryan Giggs by the Order for directions of November 2011: *Giggs v NGN* [2013] EMLR 111.

The end result is apparent from the opening words of that judgment of Tugendhat J:

- “1. There can be few people in England and Wales who have not heard of this litigation. The initials CTB have been chanted at football matches when Mr Giggs has been playing for Manchester United. And Mr Giggs has been named in Parliament, raising questions as to the proper relationship between Parliament and the judiciary.
2. In the issue of *The Sun* dated Thursday 14 April 2011 the defendants published an article on pages 1 and 4 under the heading “Footie Star’s Affair with Big Bro Imogen”. It did not name Mr Giggs but in due course the fact that Mr Giggs was the footie star referred to became very well known.”

Possible solutions

(i) Voluntary actions by ISPs

A number of intermediaries gave evidence to the Leveson Inquiry. According to this evidence, the position of Google, for example, is that it will remove search results upon receipt of a valid legal notice that a particular search result is defamatory under UK law, and that complaints accompanied by court orders are likely to be removed more quickly than those without. The position of Yahoo! is that: it will remove defamatory content upon receipt of a valid court order; if a complaint is made without a court order, it may request that access to links are removed upon receipt of a well-substantiated, legitimate request; and complaints are assessed on a case-by-case basis. The Terms of Service of Yahoo! are similar to those of other intermediaries and state that members *“agree to not use the Services to upload, post, email or otherwise transmit any Content that is unlawful... defamatory... libellous, invasive of another's privacy... or otherwise objectionable. Violations of the Terms of Service should be reported to Customer Care.”*

The Report of the Leveson Inquiry stated at Volume 1, section C, paragraphs 3.12, 3.16 and 7.2: *“In many circumstances ISPs and others have cooperated with Law enforcement and other agencies to remove illegal content or block access to it. The Internet Watch Foundation (IWF) is an example of this self-regulatory approach. The IWF works closely with ISPs to ensure that webpages, including those hosted outside of the UK, which provide access to potentially criminal content and, specifically, images of child abuse, are reported and removed or blocked at source ... To this end, it is worth noting that Twitter and other social media have cooperated with UK law enforcement in cases of obvious criminality ... [ISPs] offering services to UK customers will block content that has been declared illegal. They are, however, understandably unwilling to make decisions on whether content may or may not be illegal or to take decisions where there are grey areas of the law”*. This seems to suggest that the Inquiry considered there was little prospect of ISPs and others removing private information voluntarily without a court decision.

However, the New Zealand Law Commission gave an encouraging example:

“As an online auction site Trade Me’s priority is protecting and enhancing the security of the site and designing systems which can detect frauds and other illegitimate activities with the potential to undermine customers’ trust in the site. However Trade Me is also committed to ensuring its community message boards provide a safe environment for discussion and that those using the message boards comply with both internal and legal publishing standards.

Over and above their systems of community moderation and reporting, Trade Me has devoted considerable resource to customising software programmes that will allow them to filter for content that is offensive, including breaches of current court orders relating to suppressed evidence or names. Trade Me’s legal team has fostered strong relationships with key private and public sector organisations, including the Police, banks and the telecommunications sector, allowing it to respond swiftly when required.

Trade Me's physical presence in New Zealand and its strong engagement with both its users and the regulators contrasts with the remoteness and inaccessibility of the other online entities which dominate in New Zealand."

In *Contostavlos v Mendahun* [2012] EWHC 850 (QB) the Second Defendant (a person unknown) was defined as "Any person in possession or control of the material referred to in Schedule 2 of the Order of Mr Justice Tugendhat dated 20 March 2012". Having made an Order prohibiting disclosure of the material in question, Tugendhat J was able to say at a later hearing that "Very many persons have been served who are within this description of the Second Defendant. None of them has suggested that there is any basis in law for resisting a non-disclosure order. The steps taken by [the Claimant's solicitors] have been so successful that, at the time I heard the application ..., the evidence was that people were making postings on the internet complaining that they could not find on the internet a copy of the video or videos the subject of my order". In light of the international nature of the Internet, and the difficulties of enforcing orders abroad, it seems likely that at least some of the compliance with this Order was voluntary.

(ii) Criminal proceedings

The New Zealand Law Commission had this to say:

"While in theory every repetition constitutes a separate offence for which every person involved could be prosecuted, the practical realities are obviously such that that is unlikely to happen. But that is not to say that there might not be some prosecutions. If the names of offenders can be obtained from Twitter, there is no reason why one or two persons (perhaps the initiator of the swarm of publications, or a person who has incited others to publish, or someone who has offended frequently, or the host of a particularly prominent website) could not be singled out for enforcement measures. A test case of that kind might well have a chilling effect on others. Recently in the UK the Attorney-General said that individuals who had breached an injunction by "tweeting" the name of the footballer in question could be prosecuted: "I will take action if I think that my intervention is necessary in the public interest."

The "footballer in question" was Ryan Giggs. The Attorney-General has not, so far as is known, taken steps to prosecute anyone for breaching the injunctions obtained by him.

The Leveson Inquiry reported at Volume 1, section C, paragraphs 3.13 and 7.1: "... successful prosecution relies on considerable cooperation across a number of agencies, not least the ISPs and content providers, and is most effective where the alleged act is also clearly criminal in the host country ... Despite the efforts made to comply with national law, it is clear that the enforcement of law and regulation online is problematic. Although the law with regard to online content is clear, and UK hosted content is by and large compliant, the ability of the UK to exercise legal jurisdiction over content on Internet services is extremely limited and dependent on many things (explored below) which are rarely aligned. These include: the location of the service provider; the location of the servers on which material is held; and international agreements and treaties".

(iii) Substantive claims against intermediaries

This issue has been considered in the context of claims for defamation.

In the USA, section 230 of the Communications Decency Act 1996 provides that *“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”*. The Courts in the USA have, of course, applied this law, although in one case they were moved to comment that *“the prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications”*.

In the United Kingdom, s1 of the Defamation Act 1996 is more restrained. It creates a defence in defamation proceedings for a person who shows that (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. In accordance with s1(2), for the purposes of s1 “publisher” means *“a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business”*.

Bunt v Tilley [2006] EMLR 523 involved a judgment on a strike out/summary judgment application in respect of a claim for damages for defamation and an injunction brought against, among others, a number of ISPs. The claimant was a litigant in person. The defendant was represented by Counsel, who relied on various Regulations which are discussed further below. The claimant’s case was to the effect that an ISP was obliged to act as a “gatekeeper” between the source of the defamatory material and the Internet. Eady J rejected the claimant’s arguments, holding (among other things) that: *“The notion of a ‘gatekeeper’ appears to derive from the claimant himself; it is nowhere to be found in the regulations”* and *“I can see no realistic prospect of such an argument succeeding because it flies in the face of the fundamental policy underlying the regulations”*.

In *Metropolitan International Schools Ltd v (1) Designtecnica Corporation (2) Google UK Ltd & (3) Google Inc* [2011] 1 WLR 1743 both sides were represented. However, the rehearsal of the extensive legal arguments contained in the judgment suggests that the claimant’s Counsel may have concentrated on familiar defamation concepts (for example, he submitted that s1 of the 1996 Act had nothing to do with the circumstances of that case, and that the third defendant was clearly a “publisher” of the snippet complained of) and may not have grappled with the Regulations which are discussed below. Eady J held (among other things) that a search engine is not a publisher at common law, whether before or after notification of a defamation claim, and is not analagous to a website or ISP, the search engine having no input over search terms entered and the process of publication being automated. With regard to voluntary actions and the availability of injunctions, Eady J observed that it did not follow from the fact that the third defendant’s “notice and take down” procedure had not operated as rapidly as the claimant would have wished that the third defendant had become or remained liable as a publisher of the offending material. He continued at [58] and [59]:

- “58. While efforts are being made to achieve a “take down” in relation a particular URL, it is hardly possible to fix the Third Defendant with liability on the basis of authorisation, approval or acquiescence.
59. These practical difficulties also impact upon the feasibility and effectiveness of injunctive relief. That is obviously a separate issue from that of responsibility for publication, but it is another illustration of the powerlessness of the Third Defendant to control what is thrown up by Google searches.”

Tamiz v Google Inc [2012] EWHC 449 (QB) was another case in which the claimant was a litigant in person and the defendant was represented by Counsel. Eady J held that Google was not a publisher of blogs posted on Blogger.com, but that even if it was a publisher it would have a defence under s1 of the 1996 Act. Part of that reasoning was that Google had exercised reasonable care in response to a series of complaints made by the claimant that were first notified at the end of April 2011 and that were the subject of a letter of claim dated 29 June 2011 in forwarding those complaints to the blogger on 11 August, who promptly removed his original article and all the comments on it on 14 August 2011. In reaching that conclusion Eady J appears to have accepted Google’s arguments that this response was proportionate in view of the huge number of posts on Blogger.com and the “unreality” of expecting Google to investigate complaints and defences to them.

On appeal, both sides were represented: *Tamiz v Google Inc* [2013] EWCA Civ 68. The Court of Appeal upheld the decision of Eady J. However, it differed from his conclusions in a number of important respects. In the result, it is now clear that, once notified, the provider of an Internet platform can be a publisher and, if such a provider does not act promptly in response to notification, it may not have a defence under s1 of the 1996 Act.

The Court of Appeal held, first, that it was arguable that Google Inc was a publisher of the blogs in question after notification by the claimant. In this regard, Eady J’s analogy of a wall on which graffiti is posted was less apt than HH Judge Parkes QC’s analogy in *Davison v Habeeb* [2011] EWHC 3031 (QB) of a giant notice board provided by the Internet platform provider on which others post material. Richards LJ added at [33]:

“The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.”

Second, the Court of Appeal held that Google Inc would not have an unassailable defence under s1 of the 1996 after notification. As Richards LJ explained at [44]:

“... the very considerations that lead me to conclude that Google Inc arguably became a publisher of the defamatory comments ... also tend towards the conclusion that following notification it knew or had reason to believe that what it did caused or

contributed to the continued publication of the comments. The judge in *Davison v Habeeb and Others*, at [46], thought it arguable in that case that at some point after notification Google Inc knew or had reason to believe that its continued hosting of the material in question caused or contributed to the publication of a defamatory statement. In my view the same can be said in the present case.”

Third, however, the Court of Appeal agreed with Eady J that the number of people who viewed the comments between notification and eventual take-down, and therefore the damage to the claimant’s reputation, would have been so trivial as not to justify the maintenance of the proceedings (applying *Jameel (Yousef) v Dow Jones* [2005] QB 946).

Fourth, given that conclusion, the Court of Appeal did not consider it necessary to decide whether Google Inc would have had a defence under Regulation 19 of the 2002 Regulations (as to which, see further below).

Accordingly, the first occasion on which the Court of Appeal has had to consider the matter has opened up the prospect that providers of Internet platforms may be potentially liable as publishers under the law of defamation. Overall, however, the cases provide little comfort for claimants who are confronted by misuse of private information on the Internet. They suggest not only that it will be hard to render ISPs and search engines substantially liable for violation of privacy rights, but also that it is unlikely that the Courts will be persuaded to grant any form of injunction against an ISP or a search engine which is effective to protect those rights, either because it would not be feasible to grant such relief at all or because of the length of time that it would be reasonable to allow for compliance. At least on one view, this is logical enough: it is now clear that Art 8 includes the right to reputation, and so there is no reason in principle why it should be possible to protect other aspects of Art 8 rights by advancing claims against ISPs and search engines when it is not possible to do so in respect of the right to reputation.

(iv) The availability of injunctions

This leads to the final aspect of this paper, which discusses whether claimants might be able to obtain greater protection from the use of injunctions than they have done to date.

Return of the super-injunction?

The Committee on *“Super-Injunctions, Anonymised Injunctions and Open Justice”* chaired by the Master of the Rolls, Lord Neuberger, was set up in April 2010 in response to concern following two cases: *RJW and SJW v Guardian News and Media Ltd (“Trafigura”)* (11/9/09 Maddison J) and *Terry (previously “LNS”) v Persons Unknown* [2010] EMLR 400 (*“Terry”*) (29/1/10 Tugendhat J). Both of those cases involved applications for “super-injunctions”, defined by the Report of the Committee as follows: *“A super-injunction is an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, (ii) publicising or informing others of the existence of the order and the proceedings.”*

According to the Report of the Committee, following *Terry*, super-injunctions had only been granted in two cases: *Ntuli v Donald* [2011] 1 WLR 294 (2/4/10 Eady J; 5/10/10 and 16/11/10 CA) and *DFT v TFD* [2010] EWHC 2355 (QB) (27/9/10 Sharp J). In the former case, the super-injunction was set aside by the Court of Appeal, on the basis that it was not necessary; in the latter case, the super-injunction was granted for only 7 days, in keeping with the philosophy behind the standard wording in the Form of Search Order given in the Practice Direction to CPR Part 25 at [20]:

“Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly inform anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 p.m. on the return date or further order of the court.”

Although there can be no doubt that super-injunctions were granted in a number of cases before *Trafigura* and *Terry*, a fuller indication of what had been going on in privacy cases in which interim orders were sought, and of the media’s grounds for concern, is provided by the full title of the Report of the Committee. In brief, and with increasing frequency, claimants in such cases had sought orders which had some or (with increasing regularity) most or all of the following features: (1) the applications were heard in private, (2) there was no public judgment, (3) they were sought without notice to anyone (for example, because the Defendant was a “person unknown”, or because the Defendant was said to be likely to frustrate the order if given notice), (4) the injunctions were served on media third parties with the intention of binding them in accordance with the “Spycatcher” principle, (5) the proceedings were brought in an anonymised form, and (6) CPR 25 PD [9] (requiring service of materials on such third parties) was disapplied by “ordering otherwise”. On the one hand, the media protested strongly against such orders, essentially on the grounds that they run counter to elementary principles of fairness and open justice. On the other hand, claimants sought such orders on the grounds that they had a genuine need for them, possibly even to the extent that if they were not granted these protections they would be deterred from seeking any relief at all. Among other things, claimants argued that: (1) to give prior notice to potential media third parties would risk secrets that are sought to be protected being made known to those who do not already know of them and/or the damage being done before any order can be obtained and/or considerable exposure to costs, (2) to allow publication of the claimant’s interest in the proceedings would give rise to speculation and further intrusion, (3) to allow publication even of the fact of the proceedings would give rise to speculation and further intrusion, and (4) complying with CPR 25 PD [9] would give rise to serious invasion of the claimant’s privacy and/or a risk of use or publication of the secret(s).

Prior to *Terry*, the claimant’s arguments tended to prevail. In that case, however, Tugendhat J emphasised that these protections were only to be granted if they were truly necessary. In addition, a number of cases made clear that some public judgment was always required. Next, in *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645, the “vigilance” of Tugendhat J led to the rejection of the draft Order that he had been invited to make, on the basis that, in general, anonymisation and the withholding of information about the subject matter of the action are alternative forms of protection for a claimant. The Court of Appeal ruled that, in general, the public interest in open justice was better

served by ordering anonymity and explaining more about the subject of matter of the action in a public judgment than by withholding anonymity, which would have the result that less could be said about the subject matter without infringing the claimant's privacy.

Neither the Court of Appeal in the *J/H* case nor the Committee chaired by the Master of the Rolls appear to have given consideration to the prospect that the result of applying the ruling in that case would have consequences such as occurred in the Ryan Giggs case. In the age of the Internet, it is at least arguable that there may be more justification for the grant of "super-injunctions" than the Report of that Committee believed to exist.

Enjoining intermediaries?

European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("the E-Commerce Directive") was transposed into domestic law by the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 ("the 2002 Regulations").

These provisions apply to service providers, namely persons who provide an information society service. They provide "safe harbour" protections against liability for damages or criminal sanctions for those who carry out the roles of "Mere Conduit" (Art 12), "Hosting" (Art 13) and "Caching" (Art 14). In brief, the first "safe harbour" applies without qualification and the other two apply where the service provider does not know of the unlawful activity and upon obtaining knowledge acts expeditiously to remove or disable access to the information in question. Art 15 provides that service providers whose services fall within the scope of Arts 12, 13 and 14 shall not be made subject to general obligations either to monitor the information which they transmit or store or actively to seek facts or circumstances indicating illegal activity. Importantly, however, each of Arts 12, 13 and 14 expressly allow for *"the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement"*; and Art 15 contains no prohibition on the imposition on service providers of limited monitoring obligations.

Art 18 ("Court Actions") and Art 20 ("Sanctions") of the E-Commerce Directive provide, respectively, that *"court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved"* and that *"Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive."*

European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("the Information Society Directive") was transposed into domestic law by the Copyright and Related Rights Regulations 2003, SI 2003/2498 ("the 2003 Regulations").

Recitals 58 and 59 and Article 8(3) of the Information Society Directive provide as follows:

- (58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive.... The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.
- (59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.
- 8(3) Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

These provisions have been given wide effect by the Court of Justice of the European Union. For example, in Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* [2009] ECR I-1227, one of the questions referred by the Austrian Supreme Court was "*whether the term 'intermediary' in Art 8(3) was to be interpreted as including an access provider who merely provides a user with access to the network by allocating him a dynamic IP address but does not himself provide him with any services such as email, FTP or file-sharing services and does not exercise any control, whether de iure or de facto, over the services which the user makes use of?*" Answering that question in the affirmative, the Court of Justice said:

- "42. ... under Article 8(3) of Directive 2001/29, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.
- 43. Access providers who merely enable clients to access the Internet, even without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.
- 44. Moreover, according to Recital 59 in the preamble to Directive 2001/29, rightholders should have the possibility of applying for an injunction against an intermediary who 'carries a third party's infringement of a protected work or other subject-matter in a network'. It is common ground that access

providers, in granting access to the Internet, make it possible for such unauthorised material to be transmitted between a subscriber to that service and a third party.

45. That interpretation is borne out by the aim of Directive 2001/29 which, as is apparent in particular from Article 1(1) thereof, seeks to ensure the legal protection of copyright and related rights in the framework of the internal market. The protection sought by Directive 2001/29 would be substantially diminished if 'intermediaries', within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights."

To similar effect is the Report the European Commission, entitled "The concept of intermediaries and the workability of injunctions", [3.3] of which suggests that search engine providers are "intermediaries" who should be amenable to injunctive relief:

"The [Enforcement] Directive makes a broad interpretation of the concept of 'intermediaries' to include all intermediaries 'whose services are used by a third party to infringe an intellectual property right'. This implies that even intermediaries with no direct contractual relationship or connection with the infringer are subject to these measures provided for in the Directive ...

Intermediaries who transport goods suspected of infringing intellectual property rights (such as carriers, freight forwarders, or shipping agents) can play a leading role in controlling the distribution of goods that infringe intellectual property rights. Internet platforms such as online market places or search engines can also play an important role in reducing the number of infringements, in particular through preventive measures and 'notice and take-down' policies."

Art 8(3) of the Information Society Directive was implemented by Regulation 27 of the 2003 Regulations, which inserted s97A into the Copyright Designs and Patents Act 1988. s97A is entitled "Injunctions against service providers" and provides that "*The High Court ... shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.*"

European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights ("the Enforcement Directive") was transposed into domestic law primarily by the Intellectual Property (Enforcement, etc.) Regulations 2006, SI 2006/1028. In essence, the Enforcement Directive replicates with regard to industrial and intellectual property rights the provisions of the Information Society Directive. The last sentence of Art 11 of the Enforcement Directive provides that "*Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Art 8(3) of [the Information Society Directive]*". The UK did not take any specific steps to implement this provision, but instead relied upon its pre-existing law as being in compliance with it. This is in spite of the fact that Art 8(3) of the Information Society Directive had been specifically implemented by inserting s97A into the Copyright Designs and Patents Act 1988.

These provisions, and especially s97A of the Copyright Designs and Patents Act 1988, were the subject of extensive consideration and analysis by Arnold J in *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] RPC 28 (“*20C Fox v BT*”) and *20C Fox v BT* (No 2) [2011] EWHC 2714 (Ch). In that case the Hollywood film studios succeeded in obtaining an order requiring an ISP to block access to a website called Newzbin 2 which provided the means for large scale infringement of their copyrights. A number of further orders have been made since that decision, as a result of which the studios and other rights holders have sought orders to the same effect against other ISPs. See, for example, *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] 3 CMLR 14, *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] 3 CMLR 15 and *EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch).

The decisions in *20C Fox v BT* and these later cases may be said to depend upon the specific implementation of Article 8(3) of the Information Society Directive through the insertion of s97A into the Copyright Designs and Patents Act 1988. In *L’Oréal v eBay* [2009] RPC 21 (“*L’Oreal*”), however, Arnold J had to address the problem that although Art 8(3) of the Information Society Directive had been specifically implemented by the UK in this way, when, subsequently, the European Community legislature extended the protection afforded to copyrights and related rights by Art 8(3) of the Information Society Directive to other intellectual property rights, such as registered trade marks, by the third sentence of Art 11 of the Enforcement Directive, the UK did not specifically implement Art 11 of the Enforcement Directive. Arnold J concluded (at [447]–[454]) that the Court had power under s37(1) of the Senior Courts Act 1981 (“*The High Court may by order ... grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so*”) to grant an injunction against an intermediary whose service had been used by third parties to infringe an intellectual property right, such as a registered trade mark, to the extent that this is what Art 11 of the Enforcement Directive required.

The only question, therefore, was what scope of injunction the third sentence of Art 11 required Member States to make available. Arnold J referred that question to the Court of Justice, which stated in Case C–324/09 *L’Oréal SA v eBay International AG* at [144]:

“... the third sentence of Article 11 of Directive 2004/48 must be interpreted as requiring the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, dissuasive and must not create barriers to legitimate trade.”

As was stated at the beginning of this paper, the Court has a statutory duty under s6 of the Human Rights Act 1998 to act compatibly with (among others) the Art 8 Convention Right to respect for private and family life. In the age of the Internet, however, as illustrated by the Ryan Giggs case, there will be circumstances in which injunctions which the Courts have decided are necessary and appropriate to protect Art 8 rights will not provide effective protection to claimants if they are directed at, or notified to, potential wrongdoers alone. In *L’Oreal* Arnold J held that the Court has jurisdiction pursuant to s37(1) of the Senior Courts Act 1981 to grant an injunction against an intermediary

whose services are being used by third parties to infringe a Convention Right (in that case, the Art 1 First Protocol to peaceful enjoyment of possessions, which protects intellectual property rights) although the intermediary was not a wrongdoer; and the same result was reached in *20C Fox v BT*, albeit on the basis of the specific implementation of Art 8(3) of the Information Society Directive. Accordingly, it is suggested that the Court not only has the power to grant injunctions against intermediaries in order to protect Art 8 Convention Rights but also that, in an appropriate case, it may be entitled or even obliged to exercise that power to give effect to its orders.

To take a narrower view of the Court's powers would lead to the result that the Court would be in danger of acting incompatibly with the Art 8 Convention Rights of claimants (and others, such as their families) in that it would be unable to grant an injunction even in a case in which (in the language of Arnold J at [201] in *20C Fox v BT*) the injunction sought is "*necessary and proportionate to protect [their] Article [8] rights*".

Formulating the relief that it would be appropriate for the claimant to seek, and for the Court to consider granting, in any case would involve taking into account points such as those discussed in *20C Fox v BT* at [150]–[177], as well as the considerations discussed under the heading "Discretion" at [178]–[201] of that judgment, and relying upon findings and rulings such as those that were made in favour of the claimants in that case which are contained in those passages. At the end of the day, the relief sought would need to satisfy criteria to the effect described in [177] of that judgment:

"On the contrary, the order sought by the Studios is clear and precise; it merely requires BT to implement an existing technical solution which BT already employs for a different purpose; implementing that solution is accepted by BT to be technically feasible; the cost is not suggested by BT to be excessive; and provision has been made to enable the order to be varied or discharged in the event of a future change in circumstances. In my view, the order falls well within the range of orders which was foreseeable by ISPs on the basis of s97A, and still more Article 8(3) of the Information Society Directive. I therefore conclude that the order is one "prescribed by law" within Article 10(2) ECHR, and hence is not contrary to Article 10 ECHR."