

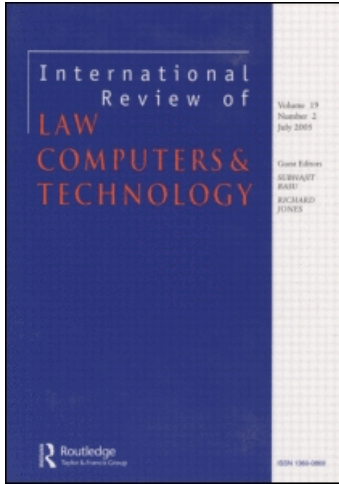
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A framework for identifying Internet information gatekeepers

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Issues of freedom of expression, intellectual property and data protection dominate debates concerning Internet governance, and the legal responsibility of gatekeepers is often at the centre of such discussions. A focused analysis is needed on what is meant by the term and how to identify and differentiate between the various gatekeepers. This article traces the historical development of the term gatekeeper and shows how traditional conceptions of gatekeeping are inadequate for the context of the Internet where gatekeeping primarily involves control over the flow, content and accessibility of information. A particular type of gatekeeper will be identified, termed 'Internet Information Gatekeepers', which are those gatekeepers that as a result of their control of the flow of information, control deliberation and participation in democratic culture. This article will then propose a human rights driven framework for identifying and differentiating between the various gatekeepers and their levels of responsibility.

Keywords: gatekeeper; Internet; human rights

We have a broad understanding of the entities that are gatekeepers and what it is about the Internet that has placed them in this position. These entities include, for example, search engines, Internet Service Providers (ISPs), high traffic social networking sites and portal providers. Yet, a focused analysis of what is meant by the term gatekeeper in the Internet context, but most particularly in the context of viewing the Internet as a democratising force, is needed to not only confirm that these entities are indeed gatekeepers, but to also find a method for identifying other gatekeepers, and for finding the boundary between what is a gatekeeper and what is not. The need for the latter is particularly acute when one attempts to draw a conceptual line between some hosts of message boards or other Web 2.0 platforms, and others. What we want to avoid is imposing the same gatekeeping responsibilities on, for example, 'John Smith' blogging about his family adventures, which friends sometimes comment on in the conveniently pre-fabricated comments section, as on interactive news sites visited by millions around the world, such as the BBC's 'Have Your Say' discussion forums. Likewise, while such interactive sites might have many visitors, they are instinctively different than gatekeepers such as ISPs, which control our very access to the Internet, or search engines, which organise the information available online. Thus, an examination of what is meant by the term gatekeeper not only serves a definitional purpose, but guides the nature and extent of their legal duties. To that end this article will trace the historical development of the term gatekeeper and explain its

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conceptual inadequacy for the Internet. It will then examine a particular type of gatekeeper, termed an ‘Internet Information Gatekeeper’ (IIG) and propose a human rights driven framework for identifying and differentiating between such gatekeepers and their levels of responsibility.

From cupcakes to Yahoo!

At a very general level gatekeepers are entities that decide what shall or shall not pass through a gate. What makes gatekeepers unique is that they usually do not benefit from the misconduct although they are in a position to prevent it, thus shaping a liability regime around gatekeepers instead of those breaking the rules can at times be more effective. Sometimes this is because a government’s capacity to regulate a specific issue might be limited, while a third party gatekeeper’s capacity to regulate the conduct, whether owing to resources, information, or authority, might be better. Sometimes the gatekeeping arises simply by the nature of the activity engaged in. For example, librarians and bookstores choose which books to order, and where to place them on the shelves. Still other gatekeepers emerge because of their role in shaping our social worlds. This can be seen with the media where the gatekeeping metaphor has been used extensively. By selecting what news stories to run, print or discard, at which time, and in which order, they act as ‘surrogates or shortcuts for individual people’s decisions’.¹

The term gatekeeping was first termed by Kurt Lewin in 1947. He used the term to describe how a wife or mother was the gatekeeper because of her role in deciding which foods are placed on the dinner table. However, gatekeeping may be traced back even further to the tort doctrine of vicarious liability. In what continues to be the most influential work on gatekeeping, R.H. Kraakman mainstreamed Lewin’s theory and teased out its roots in vicarious liability, showing that liability of accountants and lawyers for their clients, and employers for their employees, was in essence an issue of gatekeeper liability. More broadly positioned within regulatory studies, gatekeepers are non-state actors with the capacity to alter the behaviour of others in circumstances where the state has limited capacity to do same. This is what Julia Black calls decentred regulation, where there is a shift ‘in the locus of the activity of ‘regulating’ from the state to other, multiple, locations, and the adoption on the part of the state of particular strategies of regulation’.² This shift in regulation away from the state raises public law concerns as it can produce an accountability glut concerning fundamental democratic values such as freedom of expression when such non-state actors take on roles, or share roles with others, which are traditionally reserved for public actors. As Jody Freeman observes, such gatekeepers are not agents of the state and expected to serve the public interest, but additionally they are not subject to the norms of professionalism and public service one normally finds imposed on such institutions.³

There are two fields where the concept of gatekeeper has been most fully developed. First, in the area of mass media and the role of journalists and press institutions as gatekeepers who select the stories and information we consume. Second, in the financial services industry the concept of a gatekeeper has been used to describe the monitoring role of auditors, credit ratings agencies and investment bankers. Whichever area is discussed, two gatekeeping roles can be identified:

- (1) the gatekeeper that controls access to information, and acts in an inhibitor capacity by limiting access to or restricting the scope of information; and
- (2) the gatekeeper that acts as ‘innovator, change agent, communication channel, link, intermediary, helper, adapter, opinion leader, broker, and facilitator’.⁴

This recognises that gatekeepers at once can have two roles – one outward-looking shaping behaviour or perceptions and the other inward-looking by inhibiting behaviour or access. Recognising such dual purposes transfers well to the Internet environment, where gatekeepers have the capacity to act both as facilitators of and impediments to democratic discourse.

In practice, however, the traditional definitions of gatekeeper have been much narrower and transfer less well to the networked environment of the Internet. This is because of two reasons. First, traditional definitions tend to focus on gatekeepers' capacity to prevent third party misbehaviour. Second, the gated (a term introduced by Karine Barzilai-Nahon to refer to those on whom the gatekeeping is exercised) tend to be treated in static terms with little attention devoted to their *rights*. With regard to the first, for example, Kraakman's traditional definition is narrowly focused on the liability imposed on gatekeepers to prevent third-party misconduct. This is replicated in the financial services industry, where gatekeepers are mainly conceived as John Coffee defines them: 'an agent who acts as a reputational intermediary to assure investors as to the quality of the "signal" sent by the corporate issuer'. In other words, the gatekeeper acts as a voucher for corporate trustworthiness, enabling investors or the market to then rely on the corporation's disclosure or assurances. A broader definition is used in the media where the term has become a metaphor for the way the media make decisions about what stories to run or discard and when, and how much attention to give to the stories once they pass through the initial gate. Most recently, Pamela Shoemaker defined such gatekeeping as 'the process of culling and crafting countless bits of information into the limited number of messages that reach people every day'.⁵ However, even such a definition is targeted to the media's role as an information publisher and the debate is simply about the nature and extent of this gatekeeping role.

The online gatekeepers targeted herein are not necessarily nor usually engaged in the same tasks covered by such traditional definitions. The concept of gatekeepers as builders of our social reality resonates when examining the pivotal role certain online gatekeepers play in shaping our online experience, such as our reliance on ISPs simply to gain access to the Internet, or our reliance on search engines to sort through the clutter of information online. However, there are limits to such parallels. For example, most ISPs are not in the business of providing users with information, but rather run a business of providing access to the Internet and possibly hosting services. While media and online gatekeepers share a common gatekeeping role of information control, some online gatekeepers come to this role by a more indirect route. ISPs are not exactly CNN or the *New York Times*, but neither are they simple telecommunications carriers either.

Indeed, it is this inability to seamlessly draw comparisons between the Internet and various other media models that has proved the major stumbling block to the development of a coherent and cohesive gatekeeping model. Early jurisprudential and legislative debates concerning how to categorise the Internet revolved around whether to categorise intermediaries using traditional media models of print, broadcasting and common carrier. In the USA, for example, under the good Samaritan provision of the *Communication Decency Act* 47 U.S.C., Section 230, any service, system or access provider is shielded from liability for not only failing to act when aware or notified of unlawful content, but for any steps taken to restrict access to content. Europe has opted for a notice-and-takedown regime with Directive 2000/31/EC (the Electronic Commerce Directive). These regimes have been widely criticised and it is arguable that this is, in part, because the concept of gatekeeping has not yet been sufficiently developed for the digital environment.⁶

In addition, the static way in which the gated have been treated in traditional gatekeeping literature fails to capture the fluid, dynamic, and unstable environment of the Internet.

This is because the roles people and institutions play online changes. The technology of the Internet is generative, allowing the people on whom gatekeeping is exercised to participate in the sharing of content and code. With generativity one questions the one-way approach of traditional gatekeeping theory of information from the gatekeeper out to the gated. In a Web 2.0 world the gated are not static, but rather dynamic players in creating and managing the Internet environment. What this means is that there are an infinite number of possible gatekeepers and gated, whose roles are fluid and constantly changing, operating in a dynamic regulatory environment. For example, an individual who runs a blog might be gated by the terms of service of the blog provider, yet might also man the gates of the comments section of his or her blog. At the same time the blog might be viewed by few readers, or become so mainstream that it is read by millions and itself generates financial benefits.

Thus far, traditional definitions of gatekeeping have been used in Internet regulation scholarship. In Jonathan Zittrain's earlier work he identifies two kinds of gatekeepers: first, the traditional kind where gatekeepers are enlisted to regulate the conduct of third parties, and second, the technological kind of gatekeepers, where technology is used to identify and regulate individuals. His definition broadly identifies the types of business activities that move businesses into the position of gatekeepers, describing them as 'businesses that host, index and carry others' content'. However, he still relies on Kraakman's traditional definition of gatekeeping treating them as bodies that can prevent or identify wrongdoing by third parties. Ronald Mann and Seth Belzley also adopt the Kraakman approach and focus purely on whether liability should be *imposed* on gatekeepers, separating this notion from responsibilities the intermediary might undertake.⁷ With generativity Zittrain reconceived the notion of how information is produced, stored, processed and consumed, and the next step is to understand what this means for our traditional conceptions of regulatory players such as gatekeepers. It is proposed herein that it is not third party misconduct that is at the heart of democracy-shaping gatekeepers, but rather their power and control over the flow, content and accessibility of information.

Internet gatekeepers

This article differentiates between two types of gatekeepers: Internet gatekeepers, which are those gatekeepers that control the flow of information, and IIGs, which as a result of this control, impact participation and deliberation in democratic culture. This thread of information control is the key to understanding online gatekeeping, and for the first criteria, we can turn to Barzilai-Nahon's Network Gatekeeper Theory (NGT), whose theory helps bring the gatekeeping concept into the networked world.

Barzilai-Nahon was driven to develop NGT because traditional gatekeeping literature ignored the role of the gated thus failing to recognise the dynamism of the gatekeeping environment. Most relevant herein is not only was NGT developed specifically with the Internet in mind, but it moves gatekeeping from a traditional focus on information 'selection', 'processes', 'distribution' and 'intermediaries' to 'information control':

Finally, a context of information and networks makes it necessary to re-examine the vocabulary of gatekeeping, moving from processes of selection (Communication), information distribution and protection (Information Science), and information intermediary (Management Science) to a more flexible construct of information control, allowing inclusion of more types of information handling that have occurred before and new types which occur due to networks.⁸

NGT helps identify the processes and mechanisms used for gatekeeping, and most particularly highlights information control as the thread that ties the various online gatekeepers

together. Under NGT, an act of gatekeeping involves a gatekeeper and gated, the movement of information through a gate, and the use of a gatekeeping process and mechanism. A gatekeeping process involves doing some of the following: selecting, channelling, shaping, manipulating and deleting information. For example, a gatekeeping process might involve *selecting* which information to publish, or *channelling* information through a channel, or *deleting* information by removing it, or *shaping* information into a particular form. Her taxonomy of mechanisms for gatekeeping is particularly useful. The mechanisms include, for example, channelling (i.e. search engines, hyperlinks), censorship (i.e. filtering, blocking, zoning), value-added (i.e. customisation tools), infrastructure (i.e. network access), user interaction (i.e. default homepages, hypertext links), and editorial mechanisms (i.e. technical controls, information content).

Pursuant to NGT, therefore, online gatekeeping is the process of controlling information as it moves through a gate, and the gatekeepers are the institutions or individuals that control this process. However, just because someone is an online gatekeeper does not mean that they are an IIG in the sense that human rights responsibilities should be incurred. Traditional approaches see the gatekeeper as somehow uninvolved, or the gated as being unaffected, at least in the sense that the focus is purely on gated *misconduct* rather than gated *rights* as well. Human rights theory helps flesh out the facilitative aspect of how gatekeepers work that is missing from such traditional approaches. By incorporating the gated's *rights* into the mix, a fuller picture emerges. Barzilai-Nahon focuses on this as the role of the gated, while Andrew Murray focuses on this as 'nodes' in a polycentric regulatory environment. Add to that a human rights conception of gatekeeping emphasising the rights of the gated to freedom of expression, privacy and freedom of association and assembly, and we have a better picture of the complex environment within which we are tasked with identifying IIGs.

The human rights framework proposed herein depends on the extent to which the gatekeeper controls deliberation and participation in the forms of meaning-making in democratic society. Democracy here is conceived of in semiotic terms, meaning that the public plays an active role in creating and circulating meaning and pleasure. Democracy has always been embodied in the practices of communication and freedom of expression has consistently been identified by the courts as central to democracy. Thus when it is said herein that the gated have rights and are not just the sources of the misconduct, this shift in focus incorporates human rights as the driver of gatekeeper responsibility. The following sections expand on this concept and articulate a framework for identifying IIGs.

Internet information gatekeepers: identification

When does a company's responsibilities go from semi-private, wherein no gatekeeping function is occurring, to something more wherein a gatekeeping function necessitates certain responsibilities? When does an entity go from being a gatekeeper to an IIG? We can say that even individuals running their own blogs act as gatekeepers. They can accept, reject or delete comments by others, but they are not yet IIGs. It is when the space for which they intermediate becomes one that facilitates or impedes democratic discourse that the entity is a 'gatekeeper' for the protection of civil and political rights.

Two things are required for a framework of analysis. First, we must identify what qualifies an entity as an Internet gatekeeper. Second, we must identify what elevates such a gatekeeper to an IIG. As shown above, for the first criteria, Barzilai-Nahon's NGT can be used. Once an entity has been identified as a gatekeeper through such an assessment, it must be determined whether the gatekeeper is an IIG.

Conceptual basis of Internet information gatekeepers

An IIG is conceptually different than any other online gatekeeper, because it attracts human rights responsibilities. Whether human rights responsibilities should be incurred and the extent of the responsibilities depends on the extent to which the gatekeeper controls deliberation and participation in the forms of meaning-making in democratic society. This reflects the most mainstream conception of the corporate social responsibility (CSR) model, which is that businesses are responsible for human rights within its sphere of influence. Sphere of influence is a concept articulated in one of the leading CSR instruments, the United Nations Global Compact:

While the concept [of sphere of influence] is not defined in detail by international human rights standards, it will tend to include the individuals to whom the company has a certain political, contractual, economic or geographic proximity. Every company, both large and small, has a sphere of influence, though obviously the larger or more strategically significant the company, the larger the company's sphere of influence is likely to be.⁹

John Ruggie, the special representative to the Secretary General on issues of human rights and transnational corporations, has suggested that the sphere of influence approach is problematic because it focuses on a limited set of rights but with expansive and imprecise responsibilities. He proposes that instead we focus on all human rights and set out business-specific responsibilities in this regard. To that end he suggests that we focus on the potential and actual human rights impacted, and imposes a requirement of due diligence on companies. His work will have a dramatic impact on the development of CSR, and signals there will likely be a shift away from the concept of sphere of influence.

What is proposed herein, unlike Ruggie's approach, does not wholly reject the sphere of influence notion that has arisen in CSR literature. It does not, however, fall victim to Ruggie's criticisms either. The reason is that while human rights are broader than democracy-related rights, the human rights referred to in the context of this article, specifically the human rights engaged on the Internet in a democratic culture, are narrow. A broader conception of democracy engages rights such as the right to vote, and it arguably depends on such rights as the right to life and prohibition of torture. However, when the term human rights is used herein and when the term IIG is used, the focus is on the right to freedom of expression, freedom of association and assembly, and the right to privacy. Thus, we start from the position of specifically engaged human rights and the issue is identifying the gatekeepers that impact these rights. The regulation that results would be, as Julia Black describes it, the 'outcome of the interactions of networks, or alternatively "webs of influence" which operate in the absence of formal governmental or legal sanction'.¹⁰

An IIG is an entity, which because of the role it takes on, the type of business it does, or the technology with which it works, or a combination thereof, has the capacity to impact democracy in a way traditionally reserved for public institutions. An IIG's human rights responsibilities increase or decrease based on the extent that its activities facilitate or hinder democratic culture. This scale of responsibility is reflected not only in the reach of the gatekeeper but in the infiltration of that information, process, site, or tool in democratic culture. While at this juncture we will not identify what those responsibilities are, it is necessary to understand that it is a sliding scale to help identify who the gatekeepers are. Figure 1 represents a typical illustration of the public sphere using concentric circles to illustrate that a business's human rights obligations are strongest to its workers where it has the most influence, and gradually weakening as its sphere of influence decreases out to the supply chain, marketplace, community and government.

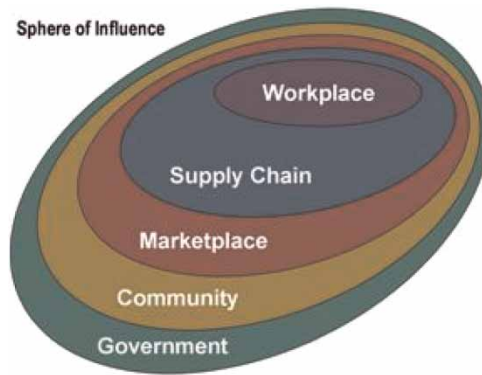


Figure 1. Sphere of influence.

For the purposes herein the model can be set up in exactly the opposite manner. It is not thought of in terms that the sphere of influence lessens as one moves to the outer circles, but rather that as the democratic impact increases, so does ones' responsibilities. How does one as a gatekeeper have a greater or lesser impact on participation in democratic culture? There are two ways: (1) when the information has democratic significance; and (2) when the communication occurs in an environment more closely akin to a public sphere.

Characteristics of Internet information gatekeepers

Keep in mind here the broader definition of democratic culture, which encompasses more forms of speech as furthering democracy than reflected in traditional human rights jurisprudence. This is drawing from the theory of Jack Balkin that the Internet has changed the social conditions of speech such that promotion of democratic culture is one of its central purposes. The Internet, he concludes, accentuates the cultural and participatory features of freedom of expression:

It is more than representative institutions of democracy, and it is more than deliberations about public issues. Rather, a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture.¹¹

Freedom of expression, like the Internet's topology, can be described as an interconnected network; a system of cultural and political interactions, experienced at both individual and collective levels. Information and communication technologies (ICTs), largely owned by private companies, allow for participation in such interactions at a level, speed, distance and cost previously unimagined. For example, by contributing to a message board, a person uniquely communicates in a many-to-many format to individuals potentially all over the world. This interaction expands what is meant by democracy beyond the political to the cultural. What democratic culture does is broaden our conception of what it means for the Internet to have democratic potential and it recognises that democracy is as much something experienced as a political structure; it is a way of life inextricably tied up with community and culture.

Thus, the democracy offered online is not restricted to the notion of representative democracy, but rather is the broader notion of facilitation and participation in democratic

culture, which brings within its ambit cultural participations such as non-political expression, popular culture and individual participation. Therefore, in assessing the impact on democratic culture, it is not just political discussions that are heralded and protected, but any communication which is part of meaning-making in democratic culture. Celebrity gossip, while titillating, offers little in the way of democratic meaning, yet community-oriented portals such as www.mumsnet.co.uk might, as well as social networking sites such as Facebook.

What this means for identification of gatekeepers is that at the far end of the scale of clearly protected speech would be overtly political speech. Historically political speech is given a preferred position over other forms of expression. Discussing issues pertaining to the governance of one's community or country are considered crucial to the healthy functioning of democracy. This can serve as a marker of the most protected form of speech for which businesses incur the most extensive responsibilities. However, non-political speech that furthers democratic culture is offered more protection than might have been available in a traditional conception of democracy. This can be seen with the increasing reliance by individuals on the Internet to help them cope with major life experiences. For such users, the Internet is not only an information resource, but a community they can visit to seek comfort and guidance from others going through similar experiences. For example, online communities have become an increasingly important resource for cancer patients. The operators of such message boards, therefore, exercise significant power to delete members and censor content.¹² Under a traditional conception of freedom of expression, such content might be accorded less weight, yet through the lens of democratic culture such content is more significant and its' gatekeepers in a greater position of responsibility.

Second, it must be reminded that the notion of the public sphere discussed herein is necessarily relaxed. The Internet is, to borrow from Peter Dahlgren's description of the public sphere, 'a constellation of communicative spaces'. There are multiple spaces, some private, some public, with opportunities to participate in forms that mimic the real world, and at other times, with opportunities to participate in new forms of communication. Most, if not all, of these spaces would fail Jurgen Habermas' utopian model of the public sphere, but they do empower participation in democratic life creating a form of self-determination from below. Oren Bracha and Frank Pasquale talk about it in terms of the Internet's structure. They say:

[The web's] structure results in a bottom-up filtration system. At the lowest level, a large number of speakers receive relatively broad exposure within local communities likely composed of individuals with high-intensity interest or expertise. Speakers who gain salience at the lower levels may gradually gain recognition in higher-order clusters and eventually reach general visibility.¹³

While this focuses on speakers, we can think of this also in terms of those who receive information. The 'speaker' might be a blogger. In a Web 2.0 world, the blogger writes in an interactive environment. It is not a one-way communication where the writer is separate from the gatekeeper and/or the information is received by a static gated. Rather there are multiple channels of communication. The writer writes, readers comment, information is hyper-linked, and eventually a blog might become so well known that the conversation becomes relevant to democratic culture, and the entity becomes a gatekeeper.

As the gatekeepers targeted herein control information, the public sphere enabled or disabled by such gatekeepers is the environment where information is communicated. In a participative democracy, this is information that is of democratic significance, being

content going closer to the core protected by freedom of expression discussed above, which by reason of (1) reach or (2) its structure, can be described as a modern public sphere. This structure, to adopt part of James Bohman's approach, has two dimensions. First, visitors can express their views and others can respond. Second, the space is inclusive in that the communication is to an indefinite audience. Bohman adds that the interaction is in an environment of free and equal respect, but this is perhaps rather a duty of the gatekeeper to facilitate, instead of being a quality of the structure itself. If required it would mean that someone was not a gatekeeper as long as the interaction was disrespectful and unequal. For example, a blog might not be interactive as comments are not permitted, and therefore only engages issues as to the right of the gated to seek and receive information, but because of its reach to many readers takes on democratic significance elevating the blogger to the level of IIG.

What one can imagine beginning to emerge is represented in Figure 2.

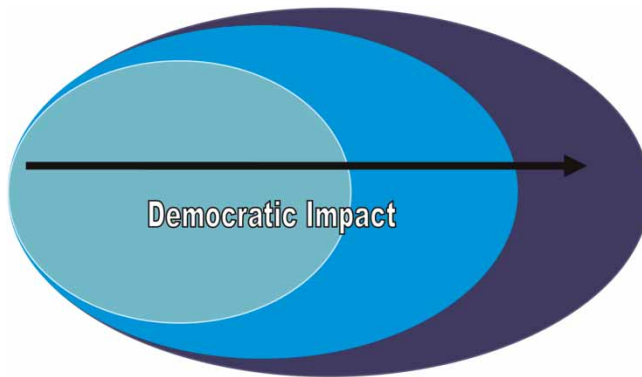


Figure 2. Internet information gatekeepers model – democratic impact.

Internet information gatekeepers: a framework

We must then identify what the different levels are in the model. Barzilai-Nahon's functional approach to gatekeepers is very useful and is partially used to flesh out the model. The analysis of the democratic impact of gatekeepers is structured as a sliding scale from macro-gatekeepers down to micro-gatekeepers or vice versa. Figure 3 represents such an analysis.

At the top-level we have macro-gatekeepers, something various authors seem to recognise using terms such as 'chokepoint' or 'bottleneck'. Barzilai-Nahon refers to them as 'eternal' gatekeepers. Bracha and Pasquale implicitly recognise these macro-gatekeepers when in discussing the same theory of democratic culture used herein they comment, 'though speakers in the digital network environment can occasionally "route around" traditional media intermediaries, the giant intermediaries are likely to maintain significantly *superior salience* and exposure, both on and off the Internet'. It is when they are a certain size, influence, or straddle several types of gatekeepers and have strong information controls, they are macro-gatekeepers. These macro-gatekeepers are not categorised on their own in any other models. They are distinguished from the other levels because users must inevitably pass through them to use the Internet and thus engage all aspects of such rights as the right to freedom of expression. This can be literal as in the case of our reliance on ISPs for access to the Internet, or figurative, as is the case of search engines on which we depend

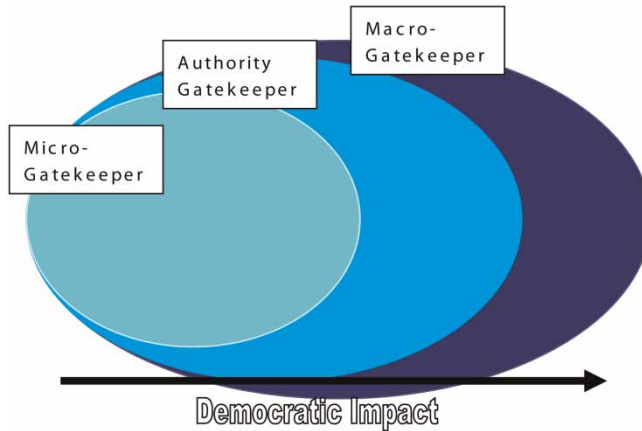


Figure 3. Internet information gatekeepers model: webs of influence.

to organise the information on the Internet. Such bodies incur the strongest human rights obligations. In contrast, portals were once macro-gatekeepers, but have since been downgraded to the next level of authority gatekeepers, because while central to a user's Internet experience, they are no longer inevitable to it. A new macro-gatekeeper is likely to be a mobile phone provider. As mobile phone owners increasingly move to smart phones, which have pc-like capabilities, mobile phone providers become one of the key gatekeepers setting the terms of access to and use of the Internet.

At the next level is what Barzilai-Nahon calls authority sites, sites which are high traffic, and control traffic and information flow. They are, for example, portals and high traffic sites such as Wikipedia. They too impact all aspects of the rights of freedom of expression, privacy and freedom of association and assembly. They are identified separately from other websites and macro-gatekeepers because they play a significant role in democratic culture, both in reach and in impact on culture, but their use is not an inevitable aspect of using the Internet. Some of them started out in small capacities with no obligations and then meteorically shot to the level of authority gatekeeper, attracting human rights obligations, such as Facebook.

At the base level there are micro-gatekeepers, which are not well-known sources of information or discussion. They do not necessarily engage all aspects of the rights of freedom of expression, association and assembly, and the right to privacy. A website might engage the right to seek/receive information because it is a source of one-way communication of information to the masses, but not the right to speak, because visitors are unable to leave comments or engage in any interactive discourse. The smaller the reach the less the right is engaged. In addition, the less the site is of democratic significance, the less of a gatekeeping obligation is incurred. In Barzilai-Nahon terms, these are administrator sites such as application and content moderators, and network administrators. They can be designated gatekeepers or take the role of administrator. At its most basic level, there are no gatekeeping obligations that it does not impose on itself or develop in the community. This is where there is the most fuzziness and the categorisation of a website depends on its function, and in a dynamic environment can change. If one worries that, say, a particular discussion might elevate a message board's impact on democratic culture thus instantly and temporarily inviting obligations, this would not be the case. In that case, it is up to the site to decide how to be governed. Something more sustained would be needed to shift up a level

from a micro-gatekeeper to a middle-level gatekeeper, or from a simple gatekeeper to an IIG.

In order for a gatekeeper to qualify as a micro-gatekeeper, the content of the site must pertain to democratic culture and the space must have attributes of a public sphere in either reach or structure. For example, this author's family blog would not qualify as a micro-IIG, although gatekeeping is exercised, as the information is not of democratic significance, it is read by few people, and it is not structured as an interactive space. However, this author's work blog, www.laidlaw.eu, has the potential to be an IIG, although is not one yet, as the information has democratic significance, is read by more people and is structured to allow user comments, although such comments require approval to be posted. A greyer example is a website such as www.dooce.com, which started out as a personal blog, but over time attracted a large audience, which in turn attracted advertisements and revenue for the author. A clearer example of an IIG is www.huffingtonpost.com, an interactive news blog followed by millions around the world. It actively invites reader contributions, such as its 'Off the Bus' feature during the 2008 American presidential campaign. Some reader contributions have broken important stories that have been subsequently picked up by mainstream media. A website such as Huffington Post is arguably of such democratic and discursive significance, and with such great reach, that it has moved up a level from a micro-IIG to be an authority gatekeeper. An illustration exemplifying various gatekeepers is shown in Figure 4.

Such a model helps pinpoint the gatekeepers along the scale of responsibility to tackle certain issues such as Internet filtering. In the UK, for example, a body such as the Internet Watch Foundation (IWF), the industry's self-regulatory body for addressing unlawful content, would be a macro-gatekeeper. This is because the content a UK user accesses is inevitably moderated to a degree by the IWF. The IWF sends its members a blacklist of child sexual abuse images to be filtered, but the body also makes use of the notice-and-take-down regime to issue notices for the removal of criminally obscene or incitement to racial hatred content hosted in the UK. The members themselves are a mix of macro-gatekeepers, such as ISPs, Internet access providers and search engines, and authority-gatekeepers, such as Facebook and the BBC.¹⁴ Such gatekeepers have greater impact on democratic culture thus invite greater scrutiny as to their responsibilities. Using this model to identify the gatekeepers for filtering has an additional benefit. It reveals that the dynamics are happening

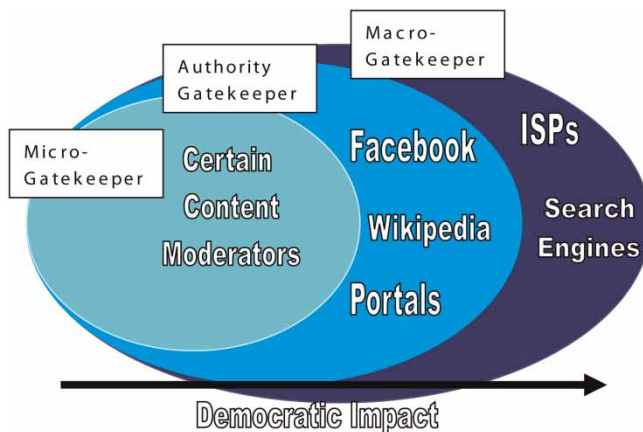


Figure 4. Internet information gatekeepers model: webs of influence (examples).

largely at the outer-reaches of the model, where there is the most democratic impact, inviting greater scrutiny of the regulatory arrangement between these various gatekeepers.

A contrasting dynamic involves users, bloggers and blog providers. A blog provider such as Google's Blogger service, has Terms of Service that the blog owner is gated by, which can include sweeping powers to, among other things, delete the blog. Blogger represents the type of gatekeeper that on its own would be an authority gatekeeper, but under the umbrella of Google and the breadth of services it offers, is a macro-gatekeeper. The blog writer has the power to create and select its content, whether to allow comments, and whether to delete them. For example, as a result of complaints under the US *Digital Millennium Copyright Act* (DMCA) of copyright infringement, Google deleted a series of popular music blogs. Some of the bloggers disputed the copyright infringement claims, arguing that they had been asked to post the music by either the promotional company, record label or the artist.¹⁵ The purpose of this example is not to analyse the issues it raises concerning copyright or the DMCA. Rather, this incident serves to highlight the value of a human rights driven framework. By shifting the perspective to the gated's *rights*, as argued herein, the question becomes the democratic significance of the blogs. One of the blogs might be a place, whether as a result of numbers or its structure, which elevates it to micro-gatekeeper and occasionally to the authority gatekeeper level. Thus users might have a stronger *right* to the content of the blog, and the blogger a stronger *right* against the blog provider to run his or her blog. In turn, the blog provider might have greater human rights responsibilities and deletion of the blog require greater regulatory scrutiny. Shifting the perspective gives a fuller account of the concerns raised by Google's deletion of the blogs.

Conclusion

The above framework targets a particular type of gatekeeper termed IIGs, which as a result of their control over the flow of information, facilitate or hinder deliberation and participation in democratic culture. Whether a gatekeeper has this impact, and the extent of it is determined by the gatekeeper's web of influence, where a gatekeeper with less impact on democratic culture incurs less responsibility or may not be an IIG at all, sliding up the scale to a gatekeeper that has a significant impact on democratic culture and incurs more responsibility. Where a gatekeeper fits on this range, as either a macro-gatekeeper, authority gatekeeper, or micro-gatekeeper, is determined by the extent to which (1) the information has democratic significance; and (2) the reach or structure of the communicative space. While a simpler model might clearly delineate what qualifies as a gatekeeper from what does not, such a simple, categorical model would artificially hive off certain entities from the gatekeeper label. This artificiality cannot work when taking a human rights approach to gatekeeping as the human rights impact crosses categories. The consistency here is in the method for assessing gatekeeper qualities, which then provides guidance on the scale of human rights responsibilities it attracts.

Acknowledgement

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Notes

1. P. Shoemaker, *Gatekeeping (Communication Concepts)* (Newbury Park, CA: Sage, 1991), 235. For information on gatekeeping, see some of the following material. Shoemaker has recently

updated her work in *Gatekeeping Theory* (New York: Routledge, 2009). See J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); J.C. Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford: Oxford University Press, 2006); K. Lewin, 'Frontiers in Group Dynamics', *Human Relations* 1, no. 2 (1947): 143–53; R.H. Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls', *Yale Law Journal* 93 (1983–1984): 857; R.H. Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy', *Journal of Law, Economics and Organization* 2 (1986): 53–104. In the Internet context, see in particular, J. Zittrain, 'A History of Online Gatekeeping', *Harvard Journal of Law & Technology* 19, no. 2 (2006): 253, who discusses Kraakman extensively, R.A. Heverly, 'Law as Intermediary', *Michigan State Law Review* (2006), 107–8, M.D. Birnhack and N. Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment', *Virginia Journal of Law and Technology* 8 (2003): 6, and R.J. Mann and S.R. Belzley, 'The Promise of Internet Intermediary Liability', *William and Mary Law Review* 47 (2005): 239. Also see the work of K. Barzilai-Nahon, discussed throughout this article, in note 8 below.

2. J. Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', *Current Legal Problems* 54 (2001): 103, 110–2. See also B. Morgan and K. Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge: Cambridge University Press, 2007), 280, and R. Brownsword and H. Somsen, 'Before We Fast Forward – A Forum for Debate', *Law, Innovation & Technology* 1, no. 1 (2009): 1–8.
3. J. Freeman, 'Private Parties, Public Functions and the New Administrative Law', in *Recrafting the Rule of Law*, ed. D. Dyzenhaus (Oxford: Hart Publishing, 1999), 331–5. See also by J. Freeman, 'The Private Role in Public Governance', *New York University Law Review* 75 (2000): 543.
4. C. Metoyer-Duran, 'Information Gatekeepers', *Annual Review of Information Science and Technology* 28 (1993): 111–8.
5. Shoemaker, *Gatekeeping Theory* (2009), 1; and see P. Shoemaker, M. Eichholz, E. Kim and B. Wrigley, 'Individual and Routine Forces in Gatekeeping', *Journalism and Mass Communication Quarterly* 78, no. 2 (2001): 233–46. Kraakman's definition is from Kraakman, 'Gatekeepers: The Anatomy', 53–4. For Coffee's definition see Coffee, *Gatekeepers: The Professions*, 2. Also see D. McQuail, *Mass Communication Theory*, 5th ed. (London: Sage, 2005), 308 and D. McQuail, *Media Accountability and Freedom of Publication* (Oxford: Oxford University Press 2003), 4.
6. For a critical discussion of the European approach see, for example, D. Tambini, C. Marsden and D. Leonardi, *Codifying Cyberspace* (London: Routledge, 2008). See also *Bunt v. Tilley & Ors* [2006] EWHC 407 (QB). With regard to the USA, see cases such as *Reno v. ACLU*, 521 U.S. 844 (1997), *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997), and more recently *CLCCRL v. Craigslist Inc.*, WL 681168 (7th Cir. March 14, 2008) and *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, WL 879293 (9th Cir. 3 April 2008). See also discussion in J. Zittrain, 'Internet Points of Control', *Boston College Law Review* 44 (2002–2003): 653.
7. Zittrain, 'A History', 253, and 255–6; Mann and Belzley, 'Promise of Internet', 19; Brownsword and Somsen, 'Before We Fast Forward', 7; J. Zittrain, *The Future of the Internet and How to Stop It* (New Haven, CT: Yale University Press, 2008).
8. K. Barzilai-Nahon, 'Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control', *Journal of the American Society for Information Science and Technology* 59, no. 9 (2008): 1493–5. See her other work on gatekeepers in Barzilai-Nahon, 'Gatekeepers, Virtual Communities and the Gated: Multidimensional Tensions in Cyberspace', *International Journal of Communications Law & Policy* 11, no. 9 (Autumn 2006): 1–28 and in particular see Barzilai-Nahon, 'Gatekeeping Revisited: A Critical Review', *Annual Review of Information Science and Technology* 43 (2009), 433 and her summary of the various approaches to gatekeeping.
9. Business Leaders Initiative on Human Rights, United Nations Global Compact and the Office of the High Commissioner for Human Rights, 'A Guide for Integrating Human Rights into Business Management I': 8. There are many variations of the sphere of influence model, http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/guide_hr.pdf

10. Black, 'Decentering Regulation', 110–1. For John Ruggie's discussion of sphere of influence, see his 2008 report, 'Protect. Respect and Remedy: A Framework for Business and Human Rights': <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed 1 June 2010), 14–5. For Ruggie's material generally see <http://www.business-humanrights.org/SpecialRepPortal/Home> (accessed 1 June 2010). See in particular his yearly reports from 2006 to 2010, available at <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (accessed 1 June 2010).
11. J.M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', *New York University Law Review* 79, no. 1 (2004): 3–4. He discusses therein T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970). Emerson describes such as a system as having four key values: (1) Self-fulfilment; (2) Advance of knowledge and discovery of truth; (3) Participation in decision making; (4) Stability of the community (Emerson, *System of Freedom*, 6–8).
12. See S. Orgad, 'The Cultural Dimensions of Online Communication: A Study of Breast Cancer Patients' Internet Spaces', *New Media & Society* 8, no. 6 (2006): 87. For a discussion of traditional speech theories, see E. Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005), Ch. 1. Or, for example, *Lingens v. Austria* (1986) 8 EHRR 407 wherein the European Court of Human Rights commented that broadly, 'freedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment' (para 41), and specifically that 'freedom of political debate is at the very core of the concept of a democratic society' (para 42).
13. Oren Bracha and Frank Pasquale, 'Federal Search Commission? Access, Fairness and Accountability in the Law of Search', *Cornell Law Review* 93 (2008), 1149–59. For the Bracha and Pasquale quote in the following section, see 1160. For P. Dahlgren's quote above, see his article 'The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation' *Political Communication* 22 (2005), 147–8. In a recent interview, J. Habermas expressed scepticism that the Internet can produce public spheres: S. Jeffries, 'A Rare Interview with Jurgen Habermas', *Financial Times*, 30 April 2010, <http://www.ft.com/cms/s/0/eda3bcd8-5327-11df-813e-00144feab49a.html> (accessed 2 June 2010). For the discussion that follows of James Bohman's approach, see J. Bohman, 'Expanding Dialogue: The Internet, Public Sphere, and Transnational Democracy', in *Democracy Online: The Prospects for Political Renewal Through the Internet*, ed. P.M. Shane (New York: Routledge, 2004), 49.
14. See the IWF's website, <http://www.iwf.org.uk>, for further information. For critical analysis of the role and remit of the IWF, see for example, J. Petley, 'Web of Control', *Index on Censorship* 38, no. 1 (2009): 78 and T.J. McIntyre and C. Scott, 'Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility', in *Regulating Technologies: Legal Future, Regulatory Frames and Technological Fixes*, ed. R. Brownsword and K. Yeung (Oxford: Hart, 2008).
15. For news articles on the incident see S. Michaels, 'Google Shuts Down Music Blogs Without Warning', *The Guardian*, 11 February 2010, <http://www.guardian.co.uk/music/2010/feb/11/google-deletes-music-blogs>; C. Metz, 'Google's "Musicblogocide" – Blame the DMCA', *The Register*, 11 February 2010, http://www.theregister.co.uk/2010/02/11/google_musicblogocide_2010/. Google changed its policy with regard to bloggers in 2009. See Google's blog post in this regard, 'Let the Music Play' (26 August 2009), <http://buzz.blogger.com/2009/08/let-music-play.html>. See also Google's response to the incident, 'A quick note about music blog removals' (10 February 2010), <http://buzz.blogger.com/2010/02/quick-note-about-music-blog-removals.html>. The DMCA takedown letters are archived at Chilling Effects, <http://www.chillingeffects.org>. For the Blogger Terms of Service see <http://www.blogger.com/terms.g>