

FOREWORD

I am delighted to introduce Jonathon Penney's research on the topic of "Open Connectivity, Open Data: Two Dimensions of the Freedom to Seek, Receive and Impart Information". This paper discusses whether there is, and whether there should be, anything that is akin to a right to connect to the Internet. As the title suggests the paper links the notion of a right to connect to the freedom to seek, receive and impart information. That freedom has a long history that pre-dates the Internet and Jonathon uses that history to inform the modern debate.

Jonathan was the fourth InternetNZ Senior Research Fellow in Cyberlaw. He was based at Victoria University's Faculty of Law from 2009-2010. InternetNZ, the not-for-profit organisation that fosters co-ordinated and co-operative development of the Internet in New Zealand, sponsored this fellowship. InternetNZ proactively encourages debate and development of public policy in an open and transparent environment and believes this fellowship project adds significant value to the decision making process.

The Faculty of Law and Victoria University are enormously appreciative of the opportunities that hosting this fellowship has brought. The main aim of this joint-venture fellowship, between Internet NZ and the Faculty of Law, was to produce research on Internet related legal subjects to enhance New Zealand's understanding of legal issues as they relate to the Internet and related technology. The fellowship and the research that has been produced under its auspices have achieved this goal.

This paper is the fourth and last paper from the series of Internet fellowships. The previous papers were:

(2007) Judit Bayer, "Liability of Internet Service Providers for Third Party Content".

(2008) Philip J Greene, "Keyword Advertising, and Other Invisible Uses of Third-Party Trade Marks in Online Advertising – A New Zealand/Australasian Perspective".

(2009) Cynthia Laberge, "To What Extent Should National Security Interests Override Privacy on a Post 9/11 World?".

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OPEN CONNECTIVITY, OPEN DATA: TWO DIMENSIONS OF THE FREEDOM TO SEEK, RECEIVE AND IMPART INFORMATION

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Recently, ideas about "rights" to Internet access or connectivity have received growing recognition from governments, legal institutions, and other political actors in several countries, including New Zealand. Despite this emerging political and legal recognition, there are few, if any, systematic studies exploring such ideas. This paper aims to change this. First, it offers a theoretical exploration of the idea of a "right" to Internet access, including the different versions of such rights talk. Secondly, it examines whether there is any legal basis for such rights claims in New Zealand and ultimately argues that section 14 of the New Zealand Bill of Rights offers a legal basis for a certain kind of right to Internet connectivity, as well as a legal basis to claim wider access – via the Internet or other mediums – to government information. Some concrete implications, both legal and political, of these findings are also explored.

I INTRODUCTION

In his 1999 book *The Control Revolution*, Andrew Shapiro notably foresaw two potential futures for the Internet, and the revolutionary social, political and economic changes it then seemed poised to facilitate.¹ One future was one of increased freedom: the Internet and its technologies would empower individuals by giving them greater access to information and data, and more direct input

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¹ Andrew L. Shapiro *The Control Revolution: How the Internet Is Putting Individuals in Charge and Changing the World We Know* (Century Foundation, New York, 1999).

into governance, conferring greater liberty and freedom over their lives and the data, information structures and institutions of their society.² In this future, technology provides greater control *for* individuals. The second future, however, was darker; Shapiro described a world where institutions would assert greater authority over people by utilising technologies to track, monitor, and control citizens, reducing freedom and autonomy. Here, people are no longer the benefactors of the "control revolution", but the subjects.

Writing over a decade later, it is difficult not to see a little of both futures Shapiro described in the world we know today, though, admittedly, there is also much that neither account describes. The Internet, and its digital technologies, have facilitated great advances in global communications while, as apparent in the "remix culture" the Internet has fostered,³ still holding immense potential for freedom, creativity, collaboration, and social, political and economic innovation. On the other hand, other realities foreshadow a less hopeful future: the so-called "digital divide", a lack of access to information and communication technologies ICT in many countries persists,⁴ and where there is access, privacy threats, online censorship,⁵ the emergence of "architectures of control" – like digital rights management, which affects creativity and expression – pose challenges to freedom online and off.⁶

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- 2 Lawrence K Grossman *The Electronic Republic: Reshaping Democracy in the Information Age* (Penguin, New York, 1996) at [16] (expanding on Shapiro's concept of "disintermediation" about how technologies might allow citizens to bypass traditional intermediaries between citizens and government).
- 3 Lawrence Lessig "People Own Ideas" (June 2009) 108 *Technology Review* 46 at 46 ("Will we be more or less free to remix culture in the 21st century than we were in previous centuries? Consider how the kids in Porto Alegre think about remixing. They remix culture with words, certainly. But they want to build the capacity to remix more than words. They hope to use computers to remix culture. For most of us, computers are a way to type fast. But for most of them, computers will be a way to speak, using sounds and images, synchronised or remixed, to make art or remake politics...").
- 4 See, for example Makama Fridausu "Africa's quest for economic and social development should encompass bridging the 'digital divide'" (2011) *Modern Ghana* <www.modernghana.com>; Science and Technology "Vietnam to narrow digital gap with internet connection" (2010) *Saigon GP Daily* <www.saigon-gpdaily.com.vn>; UN ESCAP "Digital divide remains glaring in Asia despite growth in mobile telephones" (2008) <www.unescap.org>; Davey Winder "Digital Divide Remains a British E-Government Hurdle" (2009) *IT Wire* <www.itwire.com>.
- 5 See Paul M Schwartz "Privacy and Democracy in Cyberspace" (1999) 52 *Vand L Rev* 1609 at 1610 and n 4. For online censorship concerns, see, for example BBC News "Global Net Censorship 'Growing'" (2007) <news.bbc.co.uk>; Asher Moses "Internet Censorship Plan Gets Green Light" (2009) *The Sydney Morning Herald Online* <www.smh.com.au>.
- 6 See Lawrence Lessig *Remix: Making Art and Commerce Thrive in the Hybrid Economy* xvi (Penguin, New York, 2008): "[m]y subject in *Free Culture* was the forms of creative expression and freedom that get trampled by the extremism of defending a regime of copyright built for a radically different technological age."

Still, there is a hidden premise in all of this. Shapiro's book, and the futures he describes, each assume that the Internet and its technological innovations will be there for people to access, freely, for better or for worse. But is this premise still sound today? What if Internet access remains a privilege only for the rich? What if states move to prevent any kind of Internet revolution by acting to cut citizens off from Internet access? And if governments were to so act, would there be any means to say cutting off Internet access was illegal or a violation of important fundamental rights?

These are not questions posed in the abstract. Indeed, in several Western countries, including New Zealand, the idea of a "right" to Internet access or connectivity has emerged and received some legal and political recognition. This has often been in response to proposed laws that would confer powers on state agencies or actors to terminate peoples' Internet access in order to curtail infringement of domestic intellectual property rights, like copyright.

France offers the first instance. In May 2009, the French parliament passed a new online copyright infringement law known as HADOPI, which gave power to a government agency to cut off people's Internet access for repeated copyright infringement.⁷ A month later, the country's Conseil Constitutionnel, or national constitutional court, found this power to cut off Internet connectivity an unconstitutional restriction on citizens' right to "free expression and communication".⁸ An amended version of the legislation would later pass scrutiny,⁹ but the recognition that Internet access is an extension of free expression and communication was groundbreaking.

In Finland, in October 2009, the government passed a law making it a "right" not only for its citizens to have Internet access, but that the service provided by telecommunications companies must offer connectivity speeds of at least 1 megabit-per-second (MPS).¹⁰ Not only would citizens be able to claim a basic right to access the Internet, they would also have a right to a certain quality of connectivity or service.

In New Zealand, Internet access was recently likened to a basic human right by key government officials. Since 2008, there has been much public debate on proposed laws that would, similar to French laws above, also provide, or require Internet service providers in New Zealand to impose

7 Xavier Buffet Delmas, Sarah Jacquier and Winston J Maxwell "Telecommunications, Media and Entertainment Update: French Online Copyright Infringement Law Faces Challenges But May Create Business Opportunities" Hogan and Hartson (2009) at 1 <www.hoganlovells.com>.

8 *Re An Act Furthering the Diffusion and Protection of Creation on the Internet*, Décision n° 2009-580 DC, June 10 2009 at [12-16] <www.conseil-constitutionnel.fr> (English version) [*Protection of Creation*].

9 See, for example Eric Pfanner "France Approves Wide Crackdown on Net Piracy" (2009) *The New York Times Online* <www.nytimes.com>; Max Colchester "All Eyes on France as Officials Enforce New Antipiracy Law" (Washington, 27 October 2010) *The Wall Street Journal Online* <online.wsj.com>.

10 Saeed Ahmed "Fast Internet Access Becomes A Legal Right in Finland" (2009) *CNN Technology Online* <edition.cnn.com> [*Fast Internet Access*].

Internet account termination or suspension on offending Internet subscribers for copyright infringement.¹¹ When an early version of these proposals was being discussed, the (then) New Zealand Justice Minister, in response to questions these proposed laws, questioned the necessity of account termination in saying that Internet access was a basic human right, much like water and electricity.¹²

Though each of these examples or instances concern different laws in different countries, all share some notion of Internet access or connectivity as a kind of legal right or freedom. Yet despite these emerging ideas little has been written on this idea to date,¹³ and few, if any, scholars have examined whether there is any legal basis for such a freedom in New Zealand.¹⁴ The purpose of this article to fill this void, by exploring whether a "right" to Internet access or connectivity exists in New Zealand, and if so, what is its scope, nature and dimensions. In so doing, I hope to modestly advance both scholarly and popular understanding and debate of these ideas, while also offering some new insights into some of New Zealand's most important constitutional enactments, the New Zealand Bill of Rights Act (NZBORA).¹⁵

I do want to make one thing quite clear. Since my primary focus is New Zealand, the discussion will sometimes make assumptions that can only be applied to more wealthy or Western countries like New Zealand, which may not apply if I were discussing Internet rights in the context of more underdeveloped countries or emerging economies. As noted, the digital divide between developing and developed countries persists, with many citizens around the world having little access to ICT. In fact, I ultimately argue, that even in the context of New Zealand, any legal right is best conceived as a negative right.

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- 11 Jeremy De Beer & Christopher D Clemmer "Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?" (Summer 2009) 49 *Jurimetrics* 375 at 394 ["Global Trends"].
- 12 Judith Tizard, the former Minister of Justice in New Zealand, suggested Internet connectivity was a "basic human right": *The Dominion Post* "Government Wavers on Web Cut off" (2008) <www.stuff.co.nz> ["Government Wavers"]. The article stated that: "Judith is of the mind that Internet access is almost a human right now, similar to water and electricity."
- 13 As Jordan Cox has noted, the issue has "received little attention in New Zealand": Jordan Cox "Access to the Internet as a Human Right" (April 2010) 135 *NZ Lawyer* 10 at 10 ["Access as a Human Right"]. Of course, past scholarship has, elsewhere, discussed the Internet in the context of human rights (see for example Steven Hick, Edward F Halpin and Eric Hoskins (eds) *Human Rights and the Internet* (Palgrave MacMillan, New York, 2000), but often these works take a more conservative approach, avoiding the claim that Internet access should be conceived as a fundamental right: Michael L Best "Can the Internet be a Human Right?" (2004) 4 *Human Rights and Human Welfare* 23 at 24 ["Can Internet be a Human Right?"].
- 14 Treatment of the idea has been almost exclusively non-academic, with commentary on the idea appearing mainly in popular news media or blogs. See for example Cox, above n 13, at 10; Clare Curran "Internet access as a fundamental right?" (2009) *Red Alert* <blog.labour.org.nz>; Luke Appleby "The internet is not a right" (2009) *Stuff* <www.stuff.co.nz> ["Internet not a right"].
- 15 New Zealand Bill of Rights Act 1990 [NZBORA].

My discussion is divided into several sections. In section II, I explore the theoretical basis of the ideas, providing a kind of taxonomy of the different theoretical models to conceive of Internet connectivity as a right or freedom. This section concludes that the NZBORA offers a unique approach to the first notion – Internet access as a component of free expression – and offers the best means to secure the right in New Zealand. There is no statutory right, and making a natural law claim about Internet access as a human right is a good political argument, but one that is unlikely to lead to any kind of legal or judicial recognition.

In Parts III and IV, I explore the text, purpose, and broader social, legal, and historic context of s 14 of NZBORA, including the history behind much of the provision's unique language which was a product of a Post-War paradigm of information law and politics that emphasised freedom of information and the importance of mass media and the unrestricted flow of information globally. The principles of this paradigm, I argue, are essential to understanding and interpreting the right to "seek, receive, and impart information".

This discussion leads to Part V, where I set out the two dimensions of s 14, embodied in the notions of "open connectivity" and "open data". I argue that s 14 does, in fact, offer a legal basis for a certain kind of right to Internet connectivity (open connectivity) as well as a legal basis to claim wider access – via the Internet or other mediums – to government information and data (open data). Part VI discusses legal and political implications of these findings.

Before I turn to the main discussion, I should clarify my use of a few key terms. First, when I use the term "Internet", I am referring to the global system of private and public "electronics, computers, and communication networks" all connected and linked via the same basic architecture, the Internet's TCP/IP protocol.¹⁶ In other words, my use is generally consistent with popular understanding. However, the discussion will range beyond the most popular parts of the Internet like the World Wide Web ("web"), to other aspects of the Internet as well.

Furthermore, in this article I will often speak of a right to Internet "connectivity" rather than access, because I believe the former term better captures some of the broader or more substantive elements of the right in question. Saying someone has a right to "access" the Internet says nothing about the quality of that access. For example, if Internet traffic is heavily censored in a given country, a right of access might be meaningless for certain users. Or, in another case, the speed or quality of the Internet service may be so poor as to render its use meaningless, despite the fact that citizens may have guaranteed rights of access.

On the other hand, the term connectivity, in my view, implies a broader idea. Connectivity speaks to more than mere access, but also to quality of that access and service, terms of state censorship or other forms of state regulation or control.

¹⁶ Jerry Kang "Information Privacy in Cyberspace Transactions" (1998) 50 *Stan L Rev* 1193 at 1195.

II THEORISING A RIGHT TO CONNECTIVITY

What does it mean to say someone has a right to Internet access or connectivity? Despite being a very simple assertion, there are a number of complex conceptual and theoretical issues that the idea raises. There is a question about the possessor of right in question – whether it is a right held only by citizens only or by people universally; the former suggesting the right is merely statutory and the latter a kind of human right. There is the question as to the nature of the right; is this a kind of natural or fundamental right, or is it more like a positive right that arises only because it is recognised or conferred by a state or legal authority? And then there is a question of substance – if such a right exists, what does it require? What obligations does it impose, and what interests does it protect?

Proper and exhaustive answers to these questions would take us far beyond the scope of this article. However, this section nevertheless aims to offer a foundation or framework for understanding these issues, by exploring some of the different theoretical and legal models for recognising such a right to Internet connectivity. But before moving on to abstract models or theories, a better understanding of the intellectual origins of these ideas can provide some helpful context.

A Intellectual Origins

1 1990s Cyber-libertarian thought

Modern notions of a right to Internet connectivity likely owes themselves to two threads of intellectual thought. The first is the body of "cyber-libertarian" thought that predominated writing and scholarship about Internet in the 1990s, and its "cyberspaces" and virtual communities. Freedom, liberty, and the uniqueness of cyberspace were heralded by the this first generation of the Internet's thinkers, writers and intellectuals – the cyber-libertarians and "information-age luminaries" like John Parry Barlow, Alvin Toffler, George Gilder and Esther Dyson, whose thinking helped forge the early intellectual foundations for theorizing the Internet experience.¹⁷ These ideals and ideas were, says Lawrence Lessig, the "founding values of the Net".¹⁸

These founding values received much attention from technology writers and cyberlaw scholars in the 1990s. In his famous *Declaration of the Independence of Cyberspace*, Barlow proclaimed that

17 Nick Dyer-Witheford *Cyber-Marx: Cycles and Circuits of Struggle in High-technology Capitalism* (University of Illinois, Chicago, 1999) at [34]; Fred Turner *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism* (University of Chicago, Chicago, 2006) at [261].

18 Lawrence Lessig as quoted in Wen Stephenson "The Values of Code (and Code): An Email Exchange with Lawrence Lessig" *The Atlantic Online* (13 December 1999).

he spoke with "no greater authority than that with which liberty itself always speaks".¹⁹ Lessig's influential *Code as Law* explained that the "challenge for our generation" is to "protect liberty" in cyberspace in the face of "architectures of control".²⁰ And Yochai Benkler's similarly popular *The Wealth of Networks* explores concepts of human freedom.²¹ First generation cyberlaw scholarship, influenced by these ideas, thus offered innovative ways to preserve liberty, self-government, and autonomy in cyberspace from coercion.²²

Given the uniqueness and importance these thinkers attributed to the "cyberspace" experience and the new possibilities offered by the Internet, it is not surprising that one of the first modern expressions of a right or freedom of Internet connectivity emerged from this 1990s intellectual paradigm. In a 1997 piece entitled "Freedom to Connect" published in *Wired Magazine*, Leila Connors wrote that an "essential component of the emerging global culture is the ability and freedom to connect to anyone, anytime, anywhere, for anything."²³

Before going further into the substance of Connors' piece, it is worthwhile noting a few things about place of publication. *Wired Magazine* was very influential in the 1990s among those interested in the Internet and related communication technology; it was the "Bible of Cyberspace".²⁴ The magazine, for example, described itself as a "journal of record for the future" that "speaks not

19 See, for example, John Perry Barlow "A Declaration of the Independence of Cyberspace" in Peter Ludlow (ed) *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT, New York, 2001) at 28.

20 Lawrence Lessig *Code Version 2.0* (Basic Books, New York, 2006) at xiv-xv.

21 Yochai Benkler *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale, New Haven, 2006).

22 See, for example Trotter Hardy "The Proper Legal Regime for "Cyberspace" (1994) 55 U Pitt L Rev 993 at 1019-25 (advocating self-help, custom, and contract to regulate cyberspace); David Johnson and David Post "Law and Borders: The Rise of Law in Cyberspace" (1996) 48 Stan L Rev 1367 at 1367-75 (noting possibilities of internal regulation of Internet through competing rule sets); David Johnson and David Post "And How Shall the Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law" in Brian Kahin and James H Keller (eds) *Coordinating the Internet* (MIT, Cambridge, 1997) at 65 (arguing for a decentralized system of Internet governance); Henry H Perritt Jr "Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?" (1997) 12 Berkeley Tech LJ 413 at 419-20 (contending that as a general rule "self-governance is desirable for electronic communities"); David Post "Governing Cyberspace" (1996) 43 Wayne L Rev 155 at 161 (arguing for a metaphor of cyberspace as separate space); Joel R Reidenberg "Governing Networks and Rule-Making in Cyberspace" (1996) 45 Emory LJ 911 at 912-917 (arguing that attempts to define rules for the development of cyberspace rely on disintegrating concepts of territory and sector, and ignore the new borders that transcend national boundaries); Joel R Reidenberg "Lex Informatica: The Formulation of Information Policy Rules Through Technology" (1998) 76 Tex L Rev 553 (arguing for a "Lex Informatica" which would regulate cyberspace through technological devices).

23 Leila Connors "Freedom to Connect" *Wired Magazine* (United States, August 1997) at 106 ["Freedom to Connect"].

24 Sheila Steinberg *An Introduction to Communication Studies* (Juta, Capetown, 2007) at 280.

just to high tech professionals and the business savvy, but also to the forward-looking, the culturally astute, and the simply curious:²⁵

Wired magazine is the journal of record for the future. It's daring. Compelling. Innovative. Courageous. Insightful. It speaks not just to high tech professionals and the business savvy, but also to the forward-looking, the culturally astute, and the simply curious.

Wired was not just a mouthpiece for the cyber-libertarian writers – that would be an oversimplification; the magazine, after all, aimed to speak to more than just the information technology community; to more broadly address issues arising from social and political events.²⁶ Still, *Wired's* editorial line generally followed the same optimism about technology and the "new forms of social interaction and community" that the Internet offered.²⁷ Given *Wired's* standing in the broader intellectual currents of the 1990s – including the predominance of cyber-libertarian thought – it is not surprising that an article heralding a right or freedom to connect would appear in its pages.

Connors, having a background in international politics and policy, was also familiar with the potential of media and technology.²⁸ A year before publishing her piece, she founded a multimedia group called Tree Media, which "creates" media to "support and sustain civil society."²⁹ Her piece, interestingly, combined a kind of internationalism with optimism about technology and the Internet. It heralded a "freedom to connect" not as a right in the period in which she was writing, but that it might someday be the case. She wrote:³⁰

Someday this freedom may be seen as a basic human right, very closely aligned with the right of free speech. But while the freedom to connect is fairly widespread today, its foundations are shaky. As more nations grapple with the politics of connectivity, the liberty to log on may diminish.

Along with her discussion, Connors included a two page map of the world, which indicated the level of Internet censorship and regulation across different countries.³¹

Interestingly, Connors offers no thoughts on the obligation of states to provide Internet access. Instead, she speaks of the "freedom to connect" as a "basic human right" and connects it to free speech, saying the two ideas are closely related. She also brings an internationalist perspective,

25 Wired description as reprinted in David Bell *Cyberculture: The Key Concepts* (Routledge, New York, 2004) at 159.

26 Ibid.

27 Ibid.

28 Tree Media Group "About Leila Connors" (2009) <www.treemedia.com>.

29 Ibid.

30 Connors "Freedom to Connect", above n 23, at 106.

31 Connors "Freedom to Connect", above n 23, at 106-107.

emphasizing the need to be vigilant about guarding these things not just in the United States, but elsewhere in the world. All of these ideas follow the cyber-libertarian line: emphasizing liberty and the need to prevent states from regulating and interfering with the Internet. Many of these themes, as we shall see later, are apparent in more contemporary conceptions of the Internet as a basic right or freedom.

2 *The international movement for a "Right to Communicate"*

A second line of thought relevant to the "intellectual origins" of modern ideas of the Internet connectivity is one Connors may have also drawn on, given her background in international politics and policy. That is, the movement, also in the 1980s and early 1990s, for international recognition of a "right to communicate".

Though the idea of a "right to communicate" was articulated as early as 1969 by the late United Nations (UN) official Jean d'Arcy (who believed the Universal Declaration of Human Rights (UDHR) would one day recognise such a right), it did not gain momentum until the mid 1980's among certain international institutions like United Nations Educational, Scientific, and Cultural Organization (UNESCO).³² In 1980, UNESCO brought the idea of a right to communicate to the international stage when its General Conference in Belgrade passed a resolution recognising it as a "right of the public, of ethnic and social groups and of individuals to have access to information sources and to participate actively in the communication process."³³ In also recognised the idea in subsequent resolutions in 1981 and 1983, and in 1985 UNESCO consultants prepared a "status report" on the right.³⁴

However, by the early 1990s, international interest in the idea began to wane. UNESCO showed less inclination to promote the idea in subsequent meetings.³⁵ And subsequent efforts by other international organizations and officials to take up the cause had little success.³⁶ The movement to codify communication rights internationally ultimately failed to gain traction for a number of reasons, not the least of which was that the right, so expressed and advocated by these institutions, implied a kind of international obligation to provide a means for people to communicate that states in either the First or Third Worlds had neither the resources nor will to support or subsidise.³⁷

32 Cees J Hamelink *The Politics of World Communications: A Human Rights Perspective* (Sage, London, 1995) at 293 [*World Communications*].

33 *1980 UNESCO General Conference Resolution Res 4/19*, 21st sess at [14(xi)] (1980); *ibid*, at 297.

34 Hamelink *World Communications*, above n 32, at 297.

35 *Ibid*, at 298.

36 *Ibid*, at 297.

37 Karol Jakubowicz "The Right to Public Expression: A Modest Proposals for an Important Human Right" (2010) Open Society Institute Media Program at 2 <www.mediapolicy.org> ["Right to Public Expression"].

However, the notion of a "right to communicate" is clearly relevant to more recent claims of rights to Internet connectivity, given the latter's centrality in modern forms of interaction and global communication. Indeed, such claims for communication rights cleared the path for early insistence on the importance of access to the Internet and other information and communications technology (ICT), like the "Declaration of Principles" issued at the 2003 World Summit on the Information Society (WSIS), a summit convened by the UN Secretary General.³⁸ In addition to affirming that "[c]ommunication is a fundamental social process", the Declaration also proclaimed a "commitment" to "build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilise and share information and knowledge."³⁹ Insisting on the social, cultural, and economic importance of ICT access, is only a degree removed from insisting on Internet access as a "right" for similar reasons. Thus, the WSIS has today become a forum for groups like the Association of Progressive Communications who go beyond the 2003 principles, in advocating for universal Internet access.⁴⁰

The "right to communicate" also attempted to build on earlier entrenched international recognition for both free expression and "freedom of information".⁴¹ But it was largely unsuccessful in gaining any lasting traction in the international community, so it thus offers a lesson of caution for Internet rights advocates.⁴² Yet these same earlier concepts – freedom of expression and information – as I will attempt to show in Part III, are essential to understanding the legal basis of a kind of right to Internet connectivity under the New Zealand Bill of Rights. But before we get there, a discussion of different theoretical and legal models for conceiving of such a "right" is necessary.

B Connectivity as a Right: A Brief Taxonomy

Having given some background, both intellectual and legal-historical, for ideas about a "right" to Internet connectivity, this section examines the typical approaches to a "right" to Internet access or connectivity that have been raised or received recognition; a taxonomy of the different theoretical and legal models.

38 Best "Can Internet be a Human Right?", above n 13, at 24.

39 2003 World Summit of the Information Society "Declaration of Principles" (2003) at [4] and [1] <www.itu.int>.

40 Association of Progressive Communications "APC on Internet Governance" (2011) at [4] <www.apc.org>. The blog speaks of the Association of Progressive Communications [APC] and its advocacy at the World Summit on the Information Society [WSIS], affirming its commitment to "[e]nsuring internet access is universal and affordable."

41 Jakubowicz "Right to Public Expression", above n 37, at 2. Jakubowicz discusses how the "right to communicate" movement failed because its advocates failed to offer a means by which states could turn the right to freedom of expression, into a "positive" right, that would impose obligations on states to "give them the tools of public expression".

42 Ibid, at 2.

Though there is little in depth scholarly treatment of Internet access as a "right", when the idea has been discussed, particularly in the New Zealand context, two approaches or models are normally examined: Internet access as an "extension" of the right of free expression, or as a "new and separate right" often recognised by statute.⁴³ However, a more subtle taxonomy reveals at least three kinds of rights-talk concerning Internet connectivity, along with several approaches to according each its own legal recognition. The first is as a natural human right; the second is as a statutory socio-economic right, and the third is as an implied right of free expression.

1 Internet connectivity as a natural human right

Sometimes rights-talk about the Internet conceives the right as a kind of basic or natural human right. Rights of this kind are possessed by all people not because a man-made law or statute somewhere recognises the right, but simply by virtue of their being humans. The right is natural to all humans, and is thus held universally.

One good example of this kind of rights-talk was that of Leila Connors in *Wired* speaking of the "freedom to connect" to the Internet as a "human right".⁴⁴ Another example is the statement, noted earlier, of the New Zealand Justice Minister concerning Internet access and copyright reforms that would allow for Internet account termination.

Copyright reform had been several years in the making in New Zealand.⁴⁵ In 2001, the Ministry of Economic Development released a discussion paper entitled "Digital Technology and the Copyright Act 1994", which offered the foundations for ensuring public debate and legal reforms to update intellectual property laws in New Zealand to deal with challenges posed by the Internet and digital technologies. After years of consultation and re-drafting, the Government passed in 2008 the Copyright (New Technologies) Amendment Act.⁴⁶ Though the law included many expected copyright reforms, like secondary liability and safe harbours for ISPs, it also made those safe harbours contingent upon ISPs implementing policies for Internet account termination to deter copyright infringement.⁴⁷ When questioned about this controversial proposal around that time, the

43 See, for example Cox "Access as a Human Right", above n 13, at 10; discussing "[a]ccess to the Internet as a human right" in relation to free expression and kinds of statutory rights.

44 Connors "Freedom to Connect", above n 23, at 106.

45 Tom Hallett-Hook "Legislative Note: The Copyright (New Technologies) Amendment Act 2008 and New Zealand's Notice and Takedown Regime" (2008) 14 Auck U L Rev 269 at 269.

46 Copyright (New Technologies) Amendment Act 2008; De Beer and Clemmer "Global Trends", above n 11, at 394.

47 Copyright (New Technologies) Amendment Act 2008, s 53 (referencing amendment of s 92A(1) of the Copyright Act 1994); De Beer and Clemmer "Global Trends", above n 11, at 394.

(then) Justice Minister Hon Judith Tizard MP similarly likened Internet access to a "basic human right".⁴⁸

This kind of Internet rights-talk draws heavily on the modern "human rights" tradition that emerged after the Second World War after falling into disfavour – at least within the Western intellectual tradition – during the mid-19th to early-20th century, particularly in Europe and North America.⁴⁹ After the fog of war cleared, and the atrocities of Nazi Germany became apparent, there was a strong movement in the international community towards recognising of basic or fundamental rights held by all people based on their being human, regardless of race, age, religion, or ethnic origin.⁵⁰

These modern conceptions of human rights have roots in several intellectual and religious traditions,⁵¹ not the least of which is the much older natural law tradition.⁵² The Post-War "wave of humanitarianism" led to the codification of these ideas in many important international conventions and legal instruments of the period.⁵³ Such conventions and instruments affirmed "human rights", "equal" and "inalienable rights", as well as the "dignity" of all persons.⁵⁴ The UDHR,⁵⁵ adopted in

48 "Government Wavers", above n 12.

49 Orlando Patterson "Freedom, Slavery, and the Modern Construction of Rights" in Olwen Hufton (ed) *Historical Change and Human Rights: The Oxford Amnesty Lectures 1994* (Basic Books, New York, 1994) at 173. Micheline Ishay argues that there was *some* development of human rights during this period, but many of the advances were undercut by various forms of European nationalism: Micheline R Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, Berkeley, 2004) at 171-72 [*History of Human Rights*].

50 Dale Gibson *The Law of the Charter: General Principles* (Carswell, Toronto, 1986) at 12 [*Law of the Charter*].

51 Olwen Hufton "Introduction" in Olwen Hufton (ed) *Historical Change and Human Rights: The Oxford Amnesty Lectures 1994* (Basic Books, New York, 1994) at 6. Ishay has found "notions of universalism" in every major religious tradition: Ishay *History of Human Rights*, above n 49, at 18-19.

52 Early natural law philosophers like Thomas Aquinas examined the relationship and distinctions between divine law and the law of the state: "...[E]very human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." See Thomas Aquinas *On Law, Morality and Politics* (Hackett Publishing Co, Indianapolis, 1988) at ST I-II, Q.95, A.II.

53 Gibson *Law of the Charter*, above n 50, at 12.

54 For example, see the Charter of the United Nations (proclaiming "fundamental human rights", the "dignity and worth of the human person", and the "equal rights of men and women"); Universal Declaration of Human Rights (signed 10 December 1948), at preamble (proclaiming "inherent dignity" and "equal and inalienable rights of all members of the human family") [UDHR]. See also the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), at preamble (proclaiming "equal and inalienable rights") [ICCPR].

55 UDHR, above n 54.

1948, is the leading modern international document recognising universal human rights.⁵⁶ It recognised "the inherent dignity and of the equal and inalienable rights of all members of the human family".⁵⁷

Saying Internet access or connectivity is a "human right", then, is to invoke this modern rights tradition and the idea of "inalienable" and "universal" rights held by all. Such claims are compelling because they necessarily evoke the same humanitarian impulses that drove recognition of these natural and inalienable human rights. If people are merely claiming a basic human right, it is difficult for state governments like New Zealand to resist such claims. Moreover, there appears to be some emerging international consensus that Internet access is, in fact, an important right. A 2010 BBC poll of 27,000 adults across 26 countries found that four out of five of those surveyed believed Internet access was their "fundamental right."⁵⁸

But making Internet right claims on this basis in New Zealand has problems. First, saying the Internet is a "fundamental" right is different from saying it is a basic human right; a "fundamental" right might mean a right is just important; while a basic human right suggests the right is natural or inalienable to human existence. But saying Internet connectivity is a "basic" or natural human right is just as unusual as asserting that electricity, computing, or other kinds of modern technologies or conveniences, are likewise basic or natural to human existence. True, the Internet is important, if not essential, to modern communications, work, and living; this is likely reflected in the public consensus, previously noted, seeing it as a fundamental right. But given that the Internet has only existed for a short moment in the scale of human history, to say it is "basic" or "natural" to human existence like other "natural" human rights, weakens rather than strengthens, claims to Internet rights.

Secondly, even if there is public consensus about human rights norms and the Internet, there is no clear means to enforce them in New Zealand. At most, people could pressure governments to implement policies that do not impinge upon the public consensus. Beyond that, there would be little means to enforce such a right legally, against governments or otherwise. One way, however, to codify such consensus about the Internet as a right, would be through statutory recognition enacted domestically in New Zealand. This is the second model to be discussed.

2 *Internet connectivity as a statutory socio economic right*

A second approach to a right to Internet access or connectivity has less to do with international law, and more to do with simple domestic legislation. A state has the ability to enact a statute that codifies or guarantees a right to Internet access or connectivity to all citizens. For example, Finland

56 Ishay *History of Human Rights*, above n 49, at 18.

57 UDHR, above n 54, preamble.

58 BBC News "Four in Five Regard Internet Access as a Fundamental Right" (press release, 8 March 2010).

last year passed a law making it a "right" not only for its citizens to have Internet access, but that the service provided by telecommunications companies must offer connectivity speeds of at least 1 MPS.⁵⁹ The Government's pledge is to connect the entire population, as, according to one official with Finland's Ministry of Transport and Communications, "[u]niversal service is every [Finnish] citizen's subjective right".⁶⁰ The requirements applied as of July 2010; after that, Internet providers and telecommunications providers must abide by the access and speed requirements.

Finland is not alone enacting this kind of law. Estonia also has a law guaranteeing Internet access to citizens. However, Finland is unique in being the first country to guarantee a measure of quality or form of connectivity, making *high speed* or *broadband* access a legal right.⁶¹

Though some might say these laws recognise a "human right" to the Internet, what they really are is a kind of legislative provisions for a socio-economic service; and by codifying it as a guarantee, it is a statutory socio-economic right. Indeed, the Finnish approach sees these legal rights as kind of a bridge toward future policy goals or aims about the quality or standard of living in the country. Finland is already one of the most "wired" countries in the world, with 95 per cent of its 5.5 million citizens having some kind of Internet access.⁶² The purpose of the law was to bring greater Internet accessibility to rural areas of the country and also provide a bridge to the government's future aim: to guarantee high speed access of 100MPS by 2015.⁶³

Socio-economic rights are different from the civil or political rights most often found in Western constitutions like free speech, equality, or the right to vote. Instead, they typically concern rights to "food, shelter, and medical care",⁶⁴ those things that determine social or economic living standards. Socio-economic rights are different for other reasons too. Unlike civil or political rights, which, to use Isaiah Berlin's famous terminology,⁶⁵ are "negative" rights, socio-economic rights are "positive" rights because they impose positive obligations on the state to provide something, or to act.⁶⁶

59 Ahmed *Fast Internet Access*, above n 10.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Cass Sunstein "Socio-Economic Rights? Lessons from South Africa" (1999-2001) 11 Const F 123 at 123 ["Lessons from South Africa"]. See also generally Frank Michelman "The constitution, social rights, and liberal political justification" (2003) 1 ICON 13 ["Liberal Political Justification"]

65 Isaiah Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford University Press, Oxford, 1969).

66 Sunstein "Lessons from South Africa", above n 64, at 123; Michelman "Liberal Political Justification", above n 64, at 16-17.

Legislative provision is a sound basis on which to base rights to Internet connectivity in New Zealand, and with Estonia and Finland, there are real world statutory models to follow. The problem, of course, is that there are no such statutes or provisions in New Zealand, nor any statutes from which such a right might be forged. Moreover, there does not seem to be any agenda or will on behalf of the New Zealand Government to take steps to recognise these rights. If anything, past and present legislative proposals that would provide for termination or suspension of Internet service for repeat copyright infringement suggests the government simply does not view Internet connectivity as either fundamental nor even as a right.⁶⁷ Even the government's promotion of greater access to broadband Internet services across the country is, as Jordan Cox notes, "political, not rights based".⁶⁸

So if statutory rights are not necessarily the answer, is there one? A third possibility is the theoretical model discussed next – understanding Internet connectivity as an implied aspect of free expression.

3 Internet connectivity as an implied right of free expression

A third theoretical model conceives a right to Internet connectivity as a component of peoples' right to free expression or speech. That is, it understands Internet access as implied within a right of free expression, or as an "extension" of that right.⁶⁹

A recent constitutional case in France offers a good example of this kind of Internet rights-talk. On May 13, 2009, the assemblies of the French Parliament passed France's online copyright infringement law, known as HADOPI.⁷⁰ The law was controversial. Its main purpose was to establish an agency that would have the power to cut off people's Internet access for infringement of copyright – a technological version of three strikes sentencing, where three copyright violations may lead to Internet account termination.⁷¹ Yet, despite a protracted and acrimonious debate the bill nevertheless passed in parliament.⁷² But in France, that is not the final word. Before a bill becomes law, it must be approved by the Conseil Constitutionnel, the country's national constitutional court,

67 Copyright (New Technologies) Amendment Act 2008; De Beer and Clemmer "Global Trends", above n 11, at 394.

68 See, for example Cox "Access as a Human Right", above n 13, at 11.

69 See, for example Cox "Access as a Human Right", above n 13, at 10 (discussing Internet access as an "extension of the freedom of expression").

70 Xavier Buffet Delmas, Sarah Jacquier and Winston J Maxwell "Telecommunications, Media and Entertainment Update: French Online Copyright Infringement Law Faces Challenges But May Create Business Opportunities" Hogan and Hartson (2009) at 1 <www.hoganlovells.com>.

71 Ibid.

72 Ibid.

which scrutinises new laws for consistency with France's constitutional requirements and principles. The law was referred to the Conseil Constitutionnel on 19 May 2009.⁷³

The law did not pass constitutional scrutiny. On June 10, 2009, the Conseil Constitutionnel issued its decision.⁷⁴ The court, among other things, found that the provision conferring power on the High Authority Committee to "cut off" Internet access for a subscribers' copyright infringing activities online were unconstitutional. Citing France's Declaration of the Rights of Man and Citizen of 1789, the Conseil found that a right to "free communication of ideas and opinions" implied a "freedom to access [Internet] services".⁷⁵ The broad power conferred by the law to restrict this freedom was not proportionate to the "purpose" of protecting copyright, and so it was unconstitutional.⁷⁶

The Conseil's constitutional recognition of a kind of *right* to Internet access was based on a right to free expression under the French constitution. That is, the Conseil essentially found that a citizen's right to freely express ideas included or implied a right to express those ideas through the Internet; and if the French Parliament wanted to remove that right, it needed very good reasons. Ultimately, the Conseil found that the justification offered by the Government – the protection of copyright – was found wanting given the fundamental communication and expression interests at stake.

Like Internet rights-talk concerning basic human rights, the idea that connectivity can be linked to a fundamental right like free expression is compelling. Free expression is widely recognised and protected in many of the most important international "human rights" conventions like the UDHR⁷⁷ and the International Covenant on Civil and Political Rights (ICCPR).⁷⁸ And, as in France, it is codified and protected in many state constitutions and bills of rights around the world, like those in the United States,⁷⁹ Canada,⁸⁰ the United Kingdom,⁸¹ and, most importantly, New Zealand.⁸² Like

⁷³ *Protection of Creation*, above n 8, at 1.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, at [12].

⁷⁶ *Ibid.*, at [16].

⁷⁷ UDHR, above n 54, art 19.

⁷⁸ ICCPR, above n 54, art 19.

⁷⁹ United States Bill of Rights First Amendment.

⁸⁰ Canadian Charter of Rights and Freedoms, s 2(b).

⁸¹ Human Rights Act 1998 (UK), art 12.

⁸² NZBORA, above n 15, s 14.

other human rights, it is difficult both politically and legally for state governments like New Zealand, to limit free expression without good reason.

Moreover, this notion of a right to Internet connectivity builds on the ideas and principles of the "right to communicate" movement, which also linked communications to free expression.⁸³ But, as already noted, after gaining some modest attention on the world stage, the movement ultimately failed in garnering either widespread support, or clear legal protection under international instruments or conventions. In other words, many of the same challenges that faced the "right to communicate" movement remain as obstacles for similar claims about Internet access or connectivity, as a mode or implied component of free expression.

One of those challenges was reticence by states to interpret international requirements to respect free speech or expression as also implying positive obligations to guarantee tools for communication.⁸⁴ It is one thing to link a right of communications to another to free expression in theory or in the abstract. But in practice, it raises a whole host of questions that states wanted to avoid, about the cost and availability of tools of communication, and what positive steps that state governments might have to incur in order to abide by, and implement, a "right to communicate".⁸⁵

Finally, if states resisted such obligations internationally, they would likely resist them domestically too. So, absent a clear national law providing so, whether or not a statute, bill of rights or constitution in a given state guarantees connectivity as an implied aspect of free expression becomes, a question about the unique text, history, and principles of that country's own legal or constitutional traditions. The Conseil Constitutionnel found such a right in France, but that does not mean the same goes for other countries with free expression guarantees. This raises an important question about New Zealand. Does such a right exist here? If so, does it exist within the implied right of free expression, or is it elsewhere?

C A Right to Internet Connectivity in New Zealand?

Having canvassed varying theoretical and legal models for conceiving or founding a right to Internet access or connectivity, we need to ask if such a right might exist in New Zealand. The answer, simply put, is no, at least not today. First, there is no current statute or proposed one that would, like those in Estonia and France, guarantee Internet service as a right. And there appears to

83 Jakubowicz "Right to Public Expression", above n 37, at 2 (noting the links between the "right to communicate" movement and free expression).

84 Ibid.

85 In other words, states approached the right to communicate as a socio-economic right, and sought to avoid situations where they would be legally required to spend money on communications to meet international obligations. For reasons why socio-economic rights might raise complex policy and economic questions that do not fit well with judicially enforced legal obligations, see generally Sunstein "Lessons from South Africa", above n 64; Michelman "Liberal Political Justification", above n 64.

be no will to pass one anytime soon.⁸⁶ Second, while advocacy continues at the international level in forums like WSIS, there is no clear international obligation for the New Zealand government to recognise, protect, or enforce such a right domestically. And there are no judicial decisions interpreting the New Zealand Bill of Rights Act in such a way to protect such a right.

But this is not necessarily the last word. The question, after all, has received "little treatment" in New Zealand.⁸⁷ In fact, I believe a proper understanding the text, history, and purpose of the right to seek, receive, and impart information in s 14 of the NZBORA, does, in fact, protect a certain kind of right to Internet connectivity in New Zealand. But both the argument for this interpretation, and its foundations, require elaboration.

III THE FREEDOM TO SEEK, RECEIVE AND IMPART INFORMATION IN SECTION 14 OF THE NZBORA

A An Introduction

NZBORA, enacted in 1990, affirms, protects and promotes "human rights and fundamental freedoms in New Zealand".⁸⁸ Though the NZBORA was not entrenched as supreme law, its subject matter has unquestionably rendered it part of the country's "constitutional canon"⁸⁹ and an older legal tradition of similar enactments like the Magna Carta and English Bill of Rights of 1688⁹⁰ and, more recently, the United Kingdom's Human Rights Act 1998.⁹¹ In other words, the NZBORA has, and will to continue to play, an important role in New Zealand's "constitutional future".⁹²

Among the rights protected in the NZBORA is the right to "freedom of expression" in s 14. This right, interestingly, includes the "freedom" to "seek, receive, and impart" information and ideas of

86 As noted earlier, past and present legislative proposals that require account termination or suspension for repeat copyright infringement suggests the government will not be guaranteeing Internet access or connectivity anytime soon. See Copyright (New Technologies) Amendment Act 2008, s 92A; De Beer and Clemmer "Global Trends", above n 11, at 394. See also Cox "Access as a Human Right", above n 13, at 11 (noting the government's promotion of national Internet broadband services is "political, not rights based").

87 Cox "Access as a Human Right", above n 13, at 10.

88 NZBORA, above n 15, at preamble. See also Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 1 [*New Zealand Bill of Rights*]: "The Bill of Rights is an affirmation of fundamental human rights for all persons in New Zealand, reflecting rights and freedoms long established in the Anglo-New Zealand tradition as well as most of those affirmed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights"; Andrew Butler and Petra Butler *The New Zealand Bill of Rights: A Commentary* (LexisNexis, Wellington, 2005) at 7-8 [*NZBORA: A Commentary*].

89 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 1.

90 Bill of Rights 1688 (Eng) 1 & 2 Will & Mar c 2.

91 Butler and Butler *NZBORA: A Commentary*, above n 88, at 9.

92 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 1.

"any kind".⁹³ Not surprisingly, the few lawyers and commentators that have considered the issue of Internet connectivity rights in New Zealand have often raised this language as both relevant and important to this issue.⁹⁴ This is because a freedom to seek, receive and impart information suggests a kind of right or freedom to communicate ideas, information and data, and the Internet is today's most powerful tool for communication.⁹⁵

Interestingly, however, while the amount of commentary and jurisprudential treatment of the right to free expression is voluminous,⁹⁶ there is very little written specifically on the right to "seek, receive, and impart information" that looks in depth at its text, history or purpose.⁹⁷ And as for judicial treatment of the right, the vast majority of cases offer little in-depth analysis or investigation. Rather, courts typically cite these words in passing when dealing with an issue of free expression just because they are part of s 14's full text.⁹⁸ Alternatively, they may acknowledge that

93 NZBORA, above n 15, s 14.

94 For example, s 7 of the NZBORA provides that the Attorney General must report to Parliament any provision in a newly introduced Bill that "appears to be inconsistent" with any rights in the NZBORA. In its advice on whether the Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) appeared inconsistent with NZBORA, the Ministry of Justice examined whether the Bill's sections providing for Internet account suspension for repeat copyright infringement was consistent with the right to "seek, receive, and impart information" in s 14: Attorney General *Consistency with the New Zealand Bill of Rights Act 1990: Copyright (Infringing File Sharing) Amendment Bill* (Ministry of Justice, 2010) [*Attorney General's s 7 Consistency Report*]; Cox "Access as a Human Right", above n 13; Cabinet Paper "Illegal Peer to Peer File Sharing" (14 December 2009) at [93] (concluding that the Ministry of Economic Development's [MED] recommendation that the new s 92A is consistent with the right in s 14); Appleby "Internet not a right", above n 14 (citing the same language in the UDHR).

95 Gary P Schneider, Jessica Evans and Katherine T Pinard *The Internet: Illustrated* (Cengage, Boston, 2009) at 2: "In just over 30 years, the Internet has become one of the most amazing technological and social accomplishments of the century. Many people born after 1990 cannot even conceive of a world without the Internet. The World Wide Web has made information on the Internet so accessible that users can access this information without the need to know much about computers and how they work. This ease of access has shrunk out world, opened international borders, and enabled people to connect and share information on an unprecedented scale...". Indeed, recent studies by Statistics New Zealand show that 80 per cent of New Zealanders use the Internet today: Interactive Advertising Bureau New Zealand "Kiwi Internet Usage Soars" (2010) <www.iab.org.nz>.

96 Butler and Butler *NZBORA: A Commentary*, above n 88, at 9.

97 As already noted, the issue of the Internet in relation to the right to "seek, receive and impart information" has seen little treatment: Cox "Access as a Human Right", above n 13, at 10. And those commentators who have turned their attention to the wording, acknowledge that the scope of the right in many "contexts" is subject to "ongoing dispute". Rishworth and others *New Zealand Bill of Rights*, above n 88, at 312. The fullest treatment of the language can be found in Butler and Butler *NZBORA: A Commentary*, above n 88, at 317-320, which mainly examines how the language has been understood and applied by courts internationally.

98 See, for example *Moonen v Attorney General of New Zealand* HC Wellington CIV-2006-485-2909, 23 August 2007 (assigning no special meaning to the terms, only citing the language because it is part of the full text of s 14); *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573

the words may have meaning or significance for s 14 but take the analysis no deeper or further,⁹⁹ or draw presumptive conclusions, without further analysis, about its substance by merely reasoning, abstractly, about the text and its plain meaning.¹⁰⁰

In other words, a more in-depth treatment is seriously needed. This article aims to help fill this void by offering one of the first in-depth examinations of this aspect to the right of free expression in s 14 of the NZBORA, but, of course, with a specific aim to illustrating its proper understanding and application in the context of Internet rights or freedoms.

B Brief Note on Methodology

A few things should be said about my methodology to interpret and give meaning to the right. My approach is relatively straightforward and, I think, uncontroversial in terms of interpretive strategies for bills of rights, or constitutional documents. My strategy is *purposive*, that is, I aim to investigate and illustrate the purpose of the right to "seek, receive, and impart information", in order to give meaning and substance to the right, and to determine its scope and application. This interpretive approach is widely accepted.¹⁰¹

To determine purpose, I will draw on what Phillip Bobbitt calls the "modalities" of constitutional interpretation,¹⁰² that is,: text (the text of section 14); history (or "historic, social and

(HC) at 583 and 588 (only citing the language, in dealing with a property condition that limited expression, because it is part of the full text of s 14); *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 465-466 (citing the language while citing s 14, to deal with a defamation and free speech issue).

99 See, for example *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 61. The court finds, among other things, "[i]n New Zealand s 14 expands on the expression of the freedom by an inclusive reference to the freedom to seek, receive and impart information and opinions of any kind and in any form".

100 See, for example *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at 584. There the Court assumes, without analysis, that the word "seek" involves a right of the "public to receive information", but goes no further. In *Police v O'Connor* [1992] 1 NZLR 87 (HC) at 99, the Court, with little analysis, simply speaks of "the media's right to seek and impart information". In *R v Mahanga* [2001] NZCA 354, [2001] 1 NZLR 641 (CA) at 650 [*Mahanga*], McGrath J stated that "[u]nder s 14 of the Bill of Rights, freedom of expression includes 'the freedom to seek, receive, and impart information and opinions of any kind in any form', but that does not confer any right to acquire information, let alone in the form in which a person wishes to use it. Here the videotape was played in open Court at a trial to which the public was at all times admitted. That satisfies the right to open justice."

101 See Rishworth and others *New Zealand Bill of Rights*, above n 88, at 44 (noting that "purpose" is the overriding concern when interpreting the NZBORA). See also Butler and Butler *NZBORA: A Commentary*, above n 88, at 75 ("[t]he most fundamental principle of BORA interpretation is that it is to be interpreted purposively").

102 Phillip Bobbitt *Constitutional Interpretation* (Basil Blackwell, Oxford, 1991) at 12-13 (describing six "modalities" as textual, historical, structural, doctrinal, ethical, and prudential).

legal context"¹⁰³ of the right and its text); structure (or "scheme" of the NZBORA¹⁰⁴); and precedent (or case law). These factors are all relevant to determining purpose under the NZBORA.¹⁰⁵

My analysis, in particular, will focus heavily on the text of s 14, and its "historic, social and legal context" in determining purpose, with particular focus on materials contemporaneous to its drafting, which are illustrative of how its *purpose* and overarching aim was understood at the time of enactment. As commentators have acknowledged, when determining the purpose of a right, the purpose as understood at the time of drafting and enacting can be "significant".¹⁰⁶

Moreover, as we will see, the words "seek, receive, and impart information" did not appear out of nowhere to arrive in the NZBORA in 1990, but have an interesting and insightful history that I aim to tell, at least in part, here.

Of course, this is also not to suggest that history or evidence about the purpose of seeking, receiving, or imparting information in 1990 trump all other factors, but simply that the purpose of a right can and should be informed by how that purpose was understood by its drafters, and how that purpose arose in the historic, social and legal context in which it was enacted.¹⁰⁷

III INTERPRETING THE RIGHT

A The Text

1 Drafting history

Though freedom of expression was established in New Zealand's legal tradition long before the Bill of Rights was enacted, s 14 has been described as "unquestionably" one of the Bill's most important rights.¹⁰⁸ The full text of the right in s 14 of the New Zealand Bill of Rights reads as follows:¹⁰⁹

¹⁰³ Butler and Butler *NZBORA: A Commentary*, above n 88, at 75. See also: *R v Jefferies* [1994] 1 NZLR 290 (CA) (per Richardson J: "Along with other provisions affecting human rights and fundamental freedoms, s 21 is to be understood in its historical, social and legal context. That is not to diminish its importance").

¹⁰⁴ Butler and Butler *NZBORA: A Commentary*, above n 88, at 75.

¹⁰⁵ Rishworth and others *New Zealand Bill of Rights*, above n 88, at 46.

¹⁰⁶ Butler and Butler *NZBORA: A Commentary*, above n 88, at 75; Rishworth and others *New Zealand Bill of Rights*, above n 88, at 44-45.

¹⁰⁷ In other words, I am not advocating for originalism, but for a purposive approach that is informed by some of the original ideas or understandings of the purpose of the NZBORA and s 14. Again, this approach has been relatively uncontroversial in New Zealand law: Rishworth and others *New Zealand Bill of Rights*, above n 88, at 46-47.

¹⁰⁸ Rishworth and others *New Zealand Bill of Rights*, above n 88, at 308.

¹⁰⁹ NZBORA, above n 15, s 14.

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Like many of the rights in the NZBORA, the precise wording of s 14 did not change from the original proposed draft set out in "A Bill of Rights for New Zealand: A White Paper" (White Paper).¹¹⁰ The language for the section in the White Paper (then s 7) was not amended at any stage of the drafting process.¹¹¹

This is an important observation, because that original language was not uncontroversial. The work of a team in the Department of Justice's Law Reform Division and a "small number of external advisors", the White Paper was tabled by (then) Minister of Justice Hon Geoffrey Palmer MP in Parliament in April 1985, and referred to the Justice and Law Reform Select Committee the following October.¹¹² The Select Committee received submissions and oral evidence across New Zealand in 1986 on the White Paper's proposals.¹¹³ 431 submissions were received.¹¹⁴

The Select Committee issued two reports, an Interim and Final, on the White Paper.¹¹⁵ Both reports responded to the submissions and evidence received, particularly the Interim Report, issued in July 1987, which discussed many of the most pertinent concerns raised.¹¹⁶ In authoring the Interim Report, the Select Committee also took into consideration a "comprehensive summary" of submissions authored by its Advisory Office, as well as a Report of the Department of Justice

110 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 ["White Paper"].

111 Compare Palmer "White Paper", above n 110, at 78 (s 7) and New Zealand Bill of Rights 1990 (203-2), cl 13.

112 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 7; Butler and Butler *NZBORA: A Commentary*, above n 88, at 29. See also Rt Hon Geoffrey Palmer discussing the NZBORA's background, including the White Paper's original tabling: (10 October 1989) 502 NZPD 13038. The Law Reform Division team was headed by BJ Cameron the Deputy Secretary of Justice and included KJ Keith of Victoria University, Janice Lowe, Geoffrey Lawn and Ellen France from the (then named) Department of Justice, and lawyer DAR Williams. Canadian constitutional lawyer Peter Hogg was also consulted: Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) at 54 [*Constitution in Crisis*].

113 Butler and Butler *NZBORA: A Commentary*, above n 88, at 29; (10 October 1989) 502 NZPD 13038 (Rt Hon Geoffrey Palmer discussing submissions received on the White Paper).

114 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 7; Butler and Butler *NZBORA: A Commentary*, above n 88, at 29.

115 Butler and Butler *NZBORA: A Commentary*, above n 88, at 29; Rishworth and others *New Zealand Bill of Rights*, above n 88, at 7.

116 Butler and Butler *NZBORA: A Commentary*, above n 88, at 29.

commenting on the "public response" to the White Paper.¹¹⁷ Though most submissions addressed the issue as to whether the Bill of Rights would ultimately be "supreme law",¹¹⁸ some did speak to the text and scope of s 14.

The Interim Report noted that the "principal concern" with section 14 among the submissions, was that its language was "too wide".¹¹⁹ Yet despite concerns that it the right may prevent Parliament from controlling pornography, or trump defamation law, the Select Committee disagreed, choosing to retain the broad language. This left any limits on s 14's scope to the "balancing" of competing interests under s 3 (later enacted as s 5 of the NZBORA).¹²⁰ Another point raised was whether section 14 should refer specifically to the press and media. The Select Committee agreed that the mediums of expression were important, but thought it was unnecessary to add the language, given the already broad scope.¹²¹

The summary of submissions prepared by the Select Committee's Advisory Office details additional concerns about s 14 that the Committee did not directly address in its Interim Report.¹²² The Book Publishers Association of New Zealand, for example, were concerned that the broad language might be interpreted to limit the scope of current copyright laws, and suggested that language be added that would explicitly affirm intellectual property rights.¹²³ Another submission was concerned the language failed to explain how the right to "impart" information might be balanced with a negative right not to receive information.¹²⁴ Again, despite these arguments concerning s 14's scope, the Select Committee's Interim Report did not suggest any changes to the provision's text.

The Final Report, tabled in July 1988, set out an amended version of the White Paper draft of the Bill of Rights that "substantially" followed the White Paper draft.¹²⁵ Interestingly, however, the

117 Justice and Law Reform Select Committee "Interim Report of the Justice and Law Reform Select Committee – Inquiry into the White Paper – A Bill of Rights for New Zealand" [1987] AJHR 1.8A at 4 ["Interim Report"].

118 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 7; Butler and Butler *NZBORA: A Commentary*, above n 88, at 29.

119 "Interim Report", above n 117, at 43.

120 *Ibid*; NZBORA, above n 15, s 5.

121 "Interim Report", above n 117, at 44.

122 *Ibid*, at 85 (Appendix 3).

123 *Ibid*, at 147 (Appendix 3).

124 *Ibid*, at 149 (Appendix 3).

125 Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Select Committee – On a White Paper on a Bill of Rights for New Zealand" [1988] AJHR 1.8C at 3 ["Final Report"]; (17 July 1990) 509 NZPD 2798 (Justice and Law Reform Select Committee Chairman Bill Dillon tabling the final report in Parliament); Rishworth and others *New Zealand Bill of Rights*, above n 88, at 7.

Final Report's "Appendix" uses language for s 14 as the right to "speak, receive and impart information", rather than using "seek, receive, and impart information".¹²⁶ However, the use of "speak" instead of "seek" was likely a typographical error, because the preamble to the Final Report does not address or discuss any changes to s 14's language.¹²⁷ Indeed, when the New Zealand Bill of Rights Bill 1989 was introduced by the Government in October 1989, which remodeled the White Paper in response to the Final Report, it retained the original "seek, receive, and impart" language for the section, rather than using "speak".¹²⁸

This language would remain for the remainder of the legislative process. After first reading, the Bill was referred to the Justice and Law Reform Select Committee and the Committee received a further 78 submissions on the draft bill's contents.¹²⁹ The Select Committee's report on the draft bill tabled in July 1990 included draft provisions that also retained the original White Paper language (including using "seek" and not "speak").¹³⁰ The White Paper language would ultimately remain in the final draft bill, and the NZBORA itself, and has never been changed.¹³¹

This is a first important point about s 14. It was drafted in broad language, and kept that way, despite clear objections raised as its potential breadth and scope. Section 14 protects the right to freedom of expression and goes on to clarify the scope of the right by saying it includes the "freedom to seek, receive, and impart information and opinions of any kind and in any form". Certainly, returning to the idea of a right to Internet connectivity, we could say that the Internet is a means by which people can seek, receive, and impart information and opinions. So, does this conclude our investigation? That is, section 14, by its plain language, includes a right to Internet access?

Not quite. There are two key problems with this. First, saying that s 14 includes a right to the Internet implies a kind of socio-economic right. It implies that the NZBORA includes a right to a certain kind of social right or service. And the proposition that socio-economic rights should be

126 "Final Report", above n 125, at 6.

127 "Final Report", above n 125, at 3-4 (here the Select Committee refers to changes it made to the White Paper draft).

128 See New Zealand Bill of Rights Bill 1989 (203-1), cl 13 and explanatory note; Rishworth and others *New Zealand Bill of Rights*, above n 88, at 8.

129 (10 October 1989) 502 NZPD 13058; (17 July 1990) 509 NZPD 2799-2800 (Justice and Law Reform Select Committee Chairman Bill Dillon in tabling the Final Report says that 78 submissions were received); Butler and Butler *NZBORA: A Commentary*, above n 88, at 33.

130 (17 July 1990) 509 NZPD 2799-2800 (Justice and Law Reform Select Committee Chairman Bill Dillon in tabling the Final Report, discusses the minor changes made to the White Paper draft, but makes no mention of the right to free expression, or the substitution of "speak" for "seek" in the right).

131 See NZBORA, above n 15, s 14; New Zealand Bill of Rights Bill 1990 (203-1), cl 13 (but with suggested changes, cl 13 would become s 14).

included in the NZBORA was explicitly rejected during the drafting and legislative process. The Justice and Law Reform Select Committee's Final Report on the White Paper recommended that the NZBORA include a list of socio-economic rights, but this was one of the few recommendations in the Final Report that the Government did not accept.¹³² Rather, as Palmer would later note, there was a "spirited debate" in the Labour Government's Caucus Committee about whether social and economic rights be included, but it was "successfully opposed".¹³³

Second, a proper *purposive* approach to interpreting the right requires more than just a plain text analysis. Section 14's historical, social, and legal context must be examined, before determining its purpose and scope.

So beyond the text, what else can tell us more about s 14's purpose and the principles it was aiming to invoke? There is, unfortunately, very little in the reasons advanced by the Government in tabling the Bill, nor in the debates in the House of Representatives on early and later drafts of the NZBORA bills, that reveals much about s 14. The vast majority of the debate concerned whether a Bill of Rights should be enacted at all, since it would no longer be "supreme law", interpreted and enforced by courts, as originally proposed in the White Paper.¹³⁴ There were a few comments in the course of debates recognising the importance of free expression,¹³⁵ but certainly nothing about the right to "seek, receive, and impart information".

Arguably, the "purpose" underlying the "freedom to seek receive and impart information and opinions" might be easy to discern as the White Paper's commentary for s 7 (which would ultimately become s 14 of NZBORA), sets out four familiar overall purposes of the right. However, those purposes are general and it is difficult to see, immediately, what role a freedom to seek, receive and impart information plays in promoting them: individual self-fulfilment through self-expression; democratic self-government; to advance knowledge and reveal truth; and to achieve a more adaptable and hence stable community.¹³⁶

All of these purposes could be said to relate generally to the importance of allowing citizens the freedom to "seek, receive, and impart information and opinions", but I believe the second purpose –

132 "Final Report", above n 125, at 4.

133 Palmer *Constitution in Crisis*, above n 112, at 57.

134 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 8; Butler and Butler *NZBORA: A Commentary*, above n 88, at 29.

135 See, for example (10 October 1989) 502 NZPD 13055 (per RJS Munro (Member of Parliament for Invercargill) saying the right in the draft Bill on "freedom of expression", and the other key rights mentioned therein, "sound magnificent"); (10 October 1989) 502 NZPD 13043 (per Mr Graham (Member of Parliament for Remuera) saying, rhetorically, how could anyone "demur" from many of the important rights in the Bill, like the "right to freedom of expression").

136 "White Paper", above n 110, at 79.

concerning "democratic self-government" is most important among these to understanding the principles and purposes underlying a right or freedom to "seek, receive, and impart information". In explaining this "purpose" the White Paper cites a 1957 Canadian case for the principle concerning that "parliamentary democracy":¹³⁷

(2) *Democratic Self-Government*. For a Canadian judge, parliamentary government was "ultimately government by the free public opinion of an open society": it demanded the conditions of a virtually unobstructed access to and diffusion of ideas.

In other words, protections for freedom of expression enhance and preserve democratic self-government by promoting the "virtually unobstructed", or free flow and dissemination, of information and ideas. This free flow principle, as will be particularly seen in my investigation of the history behind this language about a freedom to "seek, receive, and impart information" in the right, is essential to understanding the meaning and purpose of this language in section 14.

Indeed, to say free expression "includes" an additional freedom to "seek, receive, and impart information and opinions of any kind in any form" certainly implies an uninhibited flow of ideas and information, both active ("seek" and "impart") and passive ("receive"), between citizens. And, this language also privileges the importance of *mediums* or media in which the expression is communicated: through mediums and media of "any form". But why is this free flow principle important? Where does it come from? And why did the drafters choose such language that would imply it?

On a political level, affirming such language made sense. Ideas like the free flow of information ideas were important to the Labour Government because they formed part of the platform upon which the party had won election in 1984 – a platform of "Open Government", which included a plan to enact Bill of Rights.¹³⁸ Less than a year later, in April 1985, the White Paper was issued.¹³⁹ So this principle was consistent with the politics of the Government driving the drafting and enactment of the NZBORA.

But as will be seen, the choice to use this language draws on a history and social and legal context much deeper than mere political preference, linking the unique language in s 14 – the freedom to "seek, receive, and impart information" – to broader and international thinking about the importance of free information, and the necessity to protect mediums for that free flow.

137 "White Paper", above n 110, at 79 (emphasis in original).

138 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 6.

139 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 6-7.

2 *Textual origins and sources*

Section 14's final language, as noted, was first set out in the White Paper and was never amended. So to determine its purpose, aims, and proper social-historical context, the origins of the text in the White Paper must be examined closely. The "Introductory Note" to the White Paper offers some key insights as to the general materials essential to the drafting of the various provisions.¹⁴⁰ It states that the Canadian Charter of Rights and Freedoms and the ICCPR were "of major importance" in both the "drafting" and "substance" of the draft Bill.¹⁴¹ Another key source for drafting was the New Zealand Government's 1982 Report to the UN Human Rights Committee on New Zealand's compliance with the ICCPR (ICCPR Report).¹⁴²

The annotation for s 7 of the White Paper (now s 14 of the NZBORA) lists three sources for the origins of the text: s 2(b) of the Canadian Charter of Rights and Freedoms (Canadian Charter); art 19 (and 20) of the ICCPR; and certain paragraphs in New Zealand's ICCPR Report.

Interestingly, while the "Introductory Note" says that "many" of the draft provisions in the White Paper are "closely based" on the Canadian Charter. However, that is not the case for section 14. The protection for free expression in s 2(b) of the Canadian Charter is worded differently:¹⁴³

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Both provisions use the word "everyone" to denote the possessor of the rights and freedoms in question. And, in ways, s 14 of the NZBORA mirrors the structure of s 2(b), in that it protects freedom of expression and then clarifies the scope of that freedom, with the use of the term

140 "White Paper", above n 110, at 65 (Introductory Note).

141 "White Paper", above n 109, at 65 (Introductory Note).

142 "White Paper", above n 109, at 65 (Introductory Note). See New Zealand Ministry of Foreign Affairs *Human Rights in New Zealand: The Presentation of New Zealand's Report under the International Covenant on Civil and Political Rights, Geneva, November, 1983* Information Bulletin No 6 (January 1984) [*Human Rights in New Zealand*].

143 NZBORA, above n 15, long title.

"including" along with additional clarifying terms (freedom to seek, receive and impart in section 14).¹⁴⁴

However, as noted, s 2(b)'s protection includes "freedom of the press" and "other media of communication", while section 14 speaks to an additional freedom to "seek, receive and impart information..." expressed "in any form". The "in any form" could be said to be the equivalent of the "other media communication" language in section 2(b) – both speak to the *form* of the medium in which the expression is communicated. Still, nothing in section 2(b) speaks to the freedom to "seek, receive, and impart information".

Article 19 of the ICCPR offers much more insight into the origins of this unique language in s 14. Generally speaking, the ICCPR goes to the very heart of the NZBORA project. The Long Title of the NZBORA indicates it aims to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".¹⁴⁵ However, as already noted, it was also key to the White Paper's (and thus the NBORA's) drafting. Section 14 is no different, as art 19 provides the source for its unique language:¹⁴⁶

Article 19

[...]

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Though there are some differences, art 19(2) is clearly the source, as indicated in the White Paper, for the unique language in s 14, which reads:¹⁴⁷

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

In addition to these textual similarities, New Zealand's ICCPR Report, which discusses art 19, is explicitly referred to in the White Paper as a source document for drafting s 14.¹⁴⁸

So art 19 of the ICCPR and s 14 of the NZBORA are inextricably linked. This raises an important question – at the time of the White Paper, how was art 19(2) of the ICCPR understood?

144 NZBORA, above n 15, s 14.

145 NZBORA, above n 15, s 14.

146 ICCPR, above n 54, art 19.

147 NZBORA, above n 15, s 14.

148 See Ministry of Foreign Affairs *Human Rights in New Zealand*, above n 142; "White Paper", above n 110, at 78.

What was its history and what were its principles which the drafters were aiming to invoke in s 14? There is little in the White Paper's commentary to answer to these questions. The next section explores both the broader legal, historical, and social understanding and context of art 19(2) to inform s 14.

B Broader Historical, Social and Legal Context

Understanding the purpose of the "freedom to seek, receive, and impart information" in s 14, requires understanding the legal and historical context underlying its language, drawn from art 19(2) of the ICCPR. In other words, the history and principles of former are no doubt informed by those of the latter.

In this section, I argue that when framing s 14 of the NZBORA, the drafters were faced with two broader international legal paradigms relating to freedom of information and expression: the "free flow of information paradigm", and an emerging competing paradigm, that represented different principles and aims, which I call the "state interventionist" paradigm. By choosing to incorporate the broad language of art 19(2) into s 14, while leaving out much of art 19's additional limiting language, I argue that the drafters clearly chose the free flow of information paradigm, and thus invoked its aims and principles in s 14.

The origins of the free flow of information paradigm in international law and politics go back to at least the Second World War, when the movement to adopt international covenants and bills of rights gained momentum.¹⁴⁹ The right to "seek, receive, and impart information" codified in the UDHR and ICCPR and re-invoked in the NZBORA emerged from within this paradigm.

1 Historical & Legal Context: A Tale of Two Paradigms

(a) The Free Flow of Information Paradigm

Freedom of information and expression "figured prominently" in Post War efforts to draft international covenants and bills of rights.¹⁵⁰ This was due in large part to American influence and its allies in the West. Spurred on by the United States Congress and the First Amendment values of

¹⁴⁹ Hamelink *World Communications*, above n 32, at 153.

¹⁵⁰ Hamelink *World Communications*, above n 32, at 153. See also Fred Cate "The First Amendment and the 'Free Flow' of Information" (1989-1990) 30 *Va J Intl L* 372 at 373-374 ["Free Flow of Information"]; Muhammed Ayish "International Communications in the 1990s: Implications for the Third World" (July 1992) 68 *International Affairs (Royal Institute)* 487 at 490 ["Third World Implications"]; Philip M Taylor *Global Communications, International Affairs and the Media Since 1945* (Routledge, London, 1997) at 30-31 [*Global Communications and Media*]; K Venkata Raman "Towards a New World Information and Communication Order: Problems of Access and Cultural Development" in Ronald St J Macdonald and Douglas M Johnston (eds) *The Structure and process of International Law: Essays in Legal Philosophy* (Martinus Nijhoff, Dordrecht, 1983) at 1035-1036 ["Problems of Access"]; Marian Koren "Human Rights of Children: Their Right to Information" (2001) 2 *Human Rights Review* 54 at 60-61 ["Human Rights of Children"].

the growing American media – that a free press and free exchange in the "marketplace of ideas" was essential to determining truth and the preservation of other fundamental rights – freedom of information became a key element of United States foreign policy in the 1940s and 1950s.¹⁵¹ Of course, media and newsgathering was essential to this project, given its role in transmitting information and ideas around the world. Indeed, newspapers and other media groups also promoted these ideas abroad.¹⁵² For example, as early as 1945, the American Society of Newspaper Editors travelled to various countries to promote the "unrestricted" free exchange of ideas and information around the world, calling it the "free flow doctrine".¹⁵³

But this new international focus on freedom of information was not just a product of American influence; it also had to do with the difficult challenges facing the international community in the Post-War period. Two central issues for a world community that was war weary and longing for peace and stability was war propaganda and state censorship.¹⁵⁴ War propaganda was used extensively in the First World War and that use only intensified in the Second World War with the rise of mass media, particularly propaganda via shortwave radio.¹⁵⁵ And as governments used propaganda on their own citizens to ensure national support for war efforts and on foreign countries for psychological warfare, they also took steps to censor both national and foreign media – radio frequency "jamming" of international broadcasts was used by many countries during the war.¹⁵⁶ If the Post-War world community was serious about keeping preserving and promoting peace, they would have to do something to address these problems.

The consensus solution, successfully promoted internationally by the United States and its Western allies at the UN and its newly created agencies, was to promote the free and unrestricted flow of information and ideas globally.¹⁵⁷ Guaranteeing this, it was believed, would address both state censorship and war propaganda at the same time: promoting the free flow of information would not only outlaw media restrictions and state censorship, but also resolve the problem of war

151 Cate "Free Flow of Information", above n 150, at 373-374; Hamelink *World Communications*, above n 32, at 153; Ayish "Third World Implications", above n 150, at 490; Koren "Human Rights of Children", above n 150, at 54.

152 Hamelink *World Communications*, above n 32, at 153.

153 Hamelink *World Communications*, above n 32, at 153.

154 Hamelink *World Communications*, above n 32, at 137; Raman "Problems of Access", above n 150, at 1035-1036.

155 Hamelink *World Communications*, above n 32, at 137.

156 Ibid.

157 Ibid, at 153; Altaf Gauhar "Free Flow of Information: Myths and Shibboleths" (1979) 1 *Third World Quarterly* 53 at 53 ["Myths and Shibboleths"].

propaganda, as the diversity of expression, ideas, and opinions ensured by the flow of information across borders would render propaganda ineffective.¹⁵⁸

The consensus that a free flow of ideas would best battle war propaganda and censorship reflected this broader Post-War free flow of information paradigm that emphasised the unrestricted international flow of information and expression.¹⁵⁹ In this paradigm of international law and politics, freedom of information was promoted not simply as a means to fight war propaganda and censorship, but as a foundational right in and of itself, linked to other important rights, freedoms and interests, like free expression, progress and peace.¹⁶⁰

(i) The Free Flow Principle and Freedom of Information as Foundational to Other Freedoms

There were a few ideas or principles important to this paradigm. The first was the idea that freedom of information was a foundational freedom, and essential to promoting and facilitating other important rights, interests, and freedoms, like free expression, progress, and peace.¹⁶¹ The second key idea is the free flow principle,¹⁶² which followed logically from the first principle. The free flow principle mandated that the free and unrestricted flow of information across borders and around the world should be maximised.¹⁶³ Both of these ideas or principles are apparent in Resolution 59(I), the United Nations Declaration on Freedom of Information, which was adopted unanimously by UN General Assembly in its very first session in 1946.¹⁶⁴

Freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated;

158 See John B Whitton "The United Nations Conference on Freedom of Information and the Movement Against International Propaganda" (1949) 43 *Amer J of Intl L* 73 at 74.

159 Hamelink *World Communications*, above n 32, at 153. See generally Achal Mehra *Free Flow of Information: A New Paradigm* (Greenwood Press, New York, 1986). See also Jan Servaes "Communication and Development Paradigms: An Overview" in Alfonso Gumucio Dagron and Thomas Tufte (eds) *Communication for Social Change Anthology: Historical and Contemporary Readings* (Communication for Social Change Consortium, New Jersey, 2006) at 286-287; Cate "Free Flow of Information", above n 150, at 373-374.

160 Koren "Human Rights of Children", above n 150, at 54.

161 *Ibid.*

162 I borrow this nomenclature from Herbert I Schiller: Herbert I Schiller "The Genesis of the Free Flow of Information Principle" in Jim Richstad and Michael H Anderson (eds) *Crisis in International News* (Columbia University Press, New York, 1981).

163 Koren "Human Rights of Children", above n 150, at 54.

164 *Declaration on Freedom of Information* GA Res 59(I), A/Res/1/59 (1946); Hamelink *World Communications*, above n 32, at 153; Taylor *Global Communications and Media*, above n 150, at 30-31.

Freedom of information implies the right to gather, transmit, and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world... .

Freedom of information is so foundational, the Resolution declared, that it touched *all* fundamental freedoms recognised by the United Nations. And, following from this, freedom of information must be guaranteed, including the "right" to "gather, "transmit" and "publish" news "anywhere" freely and "without fetters". In order to follow up on these declarations, that same resolution also announced an intention to "authorise the holding of a conference of all members of the United Nations on freedom of information".¹⁶⁵

These two principles were also apparent in UNESCO's founding constitution of 1945. UNESCO was founded as the UN's principal arm to carry out the aims of security and peace in the UN Charter,¹⁶⁶ and its constitution stated that signatory states:¹⁶⁷

... believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purpose of mutual understanding and a truer and more perfect knowledge of each other's lives.

Again, freedom of information, and the "free exchange of ideas and knowledge" are to be promoted, being linked to other fundamental goals and interests, including "objective truth" and "mutual understanding". Following its constitution, a special section was created in UNESCO's Mass Communication Division to deal with the "free flow of information".¹⁶⁸

Subsequently, two international agreements were concluded under the auspices of UNESCO, which promote international circulation of cultural, scientific, and educational materials.¹⁶⁹ These included the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, signed 10 December 1948; and the Agreement on the Importation of Educational, Scientific and Cultural Materials, Lake Success,

¹⁶⁵ Edward H Lawson and Mary Lou Bertucci *Encyclopedia of Human Rights* (Taylor and Francis, Washington, 1996) at 536.

¹⁶⁶ Taylor *Global Communications and Media*, above n 150, at 30-31;

¹⁶⁷ UNESCO's 1945 constitution as reprinted in Taylor *Global Communications and Media*, above n 150, at 30-31.

¹⁶⁸ Gauhar "Myths and Shibboleths", above n 157, at 55.

¹⁶⁹ Egon Schwelb "International Conventions on Human Rights" (1960) 9 ICLQ 654 at 662 (note 24) ["International Conventions"]. After noting the agreements, Schwelb notes "[t]he Agreement of 1948 is in force among 14 States. It has been signed, but not ratified, by eight. The Agreement of 1950 is in force among 33 States. It has been signed, but not ratified, by 9".

signed 22 November 1950.¹⁷⁰ Again, each agreement promotes the free flow of information and cultural materials.

These ideas appear again and again. Pursuant to the 1946 UN General Assembly Resolution noted above, a United Nations Conference on Freedom of Information was convened in Geneva in 1948 by the UN Economic and Social Council.¹⁷¹ Fifty-four countries participated in the Conference, including New Zealand.¹⁷² The "major objective" of the Conference reflected Resolution 59(I): being "the improvement in the means of sending information across frontiers in accordance with the view, solemnly affirmed by the Conference, that freedom of information is a 'fundamental human right...'"¹⁷³

The Conference issued a number of resolutions and authored three draft conventions on freedom of information.¹⁷⁴ The very first resolution issued, Resolution No 1, affirmed the following General Principles:¹⁷⁵

Freedom of information is a fundamental human right of the people, and is the touchstone of all freedoms to which the United Nations is dedicated, without which world peace cannot well be preserved; and

Freedom of information carries the right to gather, transmit, and disseminate news anywhere and everywhere without fetters; and

Freedom of information depends for its validity upon the availability to the people of a diversity of sources of news and of opinion; and

Freedom of information further depends upon the willingness of the Press and other agencies of information to employ the privileges derived from the people without abuse, and to accept and comply with the obligation to seek the facts without prejudice and to spread knowledge without malicious intent...

170 Schwelb "International Conventions", above n 169, at 662 note 24.

171 Lawson and Bertucci *Encyclopedia of Human Rights*, above n 165, at 536.

172 *Final Act of the United Nations Conference on Freedom of Information* UN Doc E/Conf 6/79 (1948) at 3 (listing the delegations attending); Hamelink *World Communications*, above n 32, at 153. See also generally Zechariah Chafee Jr "Legal Problems of Freedom of Information in the United States" (1949) 14 *Law & Contemporary Problems* 545 ["Legal Problems"].

173 As described by John B Whitton who attended the Conference: John B Whitton "The United Nations Conference on Freedom of Information and the Movement Against International Propaganda" (1949) 43 *American Journal of International Law* 73 at 73.

174 Hamelink *World Communications*, above n 32, at 154; *Final Act of the United Nations Conference on Freedom of Information* UN Doc E/Conf 6/79 (1948) (see Annex C).

175 *Final Act of the United Nations Conference on Freedom of Information* Chapter I, Resolution No 1, preamble, UN Doc E/Conf 6/79 (1948), at Annex C.

It was also at the Conference that freedom of information was linked more clearly to freedom of expression and opinion, which was a logical connection given that press freedom, and the free exchange of ideas requires free expression as much as a free flow of information, expression, and ideas. Thus, the draft Convention on Freedom of Information issued by the Conference's Final Act, declared "that the free interchange of information *and opinions*, both in the national and in the international sphere, is a fundamental human right",¹⁷⁶ Conference Resolution No 28 also hailed "free interchange of information *and opinions* promotes the welfare of all nations and is indispensable to the peace of the world". Finally, Resolution No 26, which dealt with "Measures Concerning the Free Publication and Reception of Information" recommended:¹⁷⁷

... that States should from time to time review their laws of libel, taking into consideration the general conclusions of this Conference, in order to remove anomalies, and to secure to all persons the maximum freedom of expression compatible with the maintenance of order and with due regard to the rights of others ...

And, returning to the free flow principle – which embodies the importance of freedom of information and expression – Resolution No 2, which concerned the challenge of war propaganda, affirmed:¹⁷⁸

Whereas the attainment of a just and lasting peace depends in great degree upon the free flow of true and honest information to all peoples and upon the spirit of responsibility with which all personnel of the Press and Other agencies of information seek the truth and report the facts ...

These principles reflected the ideas of the UN's General Assembly Resolution 59(I) by emphasizing, again, how freedom of information is connected to other important "freedoms", and the resolve to promote the unrestricted dissemination of information.

(ii) The Importance of the Means of Communication – Particularly Mass Communications – to Freedom of Information, and State Obligations to Promote them

However, there is another recurring idea or principle of the free flow of information paradigm that is implied or is apparent in this Resolution, and other documents, resolutions, and conventions of the period. That is, an emphasis on the importance of the *means* by which information and communications are transmitted; that is, how information mediums – particularly those providing mass communications – are essential to the realization of freedom of information. Thus, this second

¹⁷⁶ *Final Act of the United Nations Conference on Freedom of Information*, Chapter III, Draft Convention on Freedom of Information, preamble, UN Doc E/Conf 6/79 (1948), at Annex A [emphasis added].

¹⁷⁷ *Final Act of the United Nations Conference on Freedom of Information*, Chapter III, Resolution No 26, UN Doc E/Conf 6/79 (1948), at Annex C.

¹⁷⁸ *Final Act of the United Nations Conference on Freedom of Information*, Chapter I, Resolution No 2, UN Doc E/Conf 6/79 (1948), at Annex C.

idea or principle implies, almost by necessity, certain positive obligations states might have to promote the freedom and accessibility of such media. This is seen in the earlier Resolution 59(I), which implies the importance of media and mediums of information, when it spoke of the "right" to "gather, transmit, and publish news anywhere and everywhere without fetters". Publication or transmission of news and information "anywhere and everywhere" is a function of the mediums of information (in these case, mass communications) – there must be some medium through which to transmit, and publish material and news all over the world.

This same emphasis on the availability and importance of mass communications media is apparent in the Conference Resolution No 1, mentioned earlier, discussing the importance of the "Press" and "other agencies of information" upon which freedom of information is dependent. It is also implied in the affirmation that freedom of information "depends" on the "availability to the people" of a "diversity of sources of news and of opinion". Mediums of information that can reach a broad, even global audience, are essential to freedom of information.

Given the importance of communications mediums that transmit news and information, it is not surprising that several resolutions and conventions issued by the Conference implicitly or explicitly required an obligation for states to ensure the freedom of mass communications media, and in some cases, to even take steps to ensure citizens have access to mass media technology. Indeed, the UN Conference on Freedom of Information set down some of the first "normative standards for the mass media" in its various resolutions.¹⁷⁹

The Conference, for example, completed a Draft Convention on the Gathering and International Transmission of News, which affirmed that contracting states desired to "implement the right of people to be fully informed" and "improve understanding between their peoples through the free flow of information and opinion".¹⁸⁰ Resolution No 1 affirmed, among other things:¹⁸¹

That the right of news personnel to have the widest possible access to the sources of information, to travel unhampered in pursuit thereof, and to transmit copy without unreasonable or discriminatory limitations, should be guaranteed by action on the national and international plane ...

That in order to prevent abuses of freedom of information, governments in so far as they are able should support measures which will help to improve the quality of information and to make a diversity of news and opinion available to the people ...

179 Cess Hamelink "MacBride with Hindsight" in Peter Golding and Phil Harris (eds) *Beyond Cultural Imperialism: Globalization, Communication and the New International Order* (Sage, London, 1997) at 92, n 3.

180 *Final Act of the United Nations Conference on Freedom of Information*, Draft Convention on the Gathering and International Transmission of News, preamble, UN Doc E/Conf 6/79 (1948), at Annex A.

181 *Final Act of the United Nations Conference on Freedom of Information*, Chapter I, Resolution No 1, at [2], [4] and [7], UN Doc E/Conf 6/79 (1948), at Annex C.

That encouragement should be given to the establishment and to the functioning within the territory of a State of one or more non-official organisations of persons employed in the collection and dissemination of information to the public, and that such organisation or organisations should encourage the fulfilment inter alia of the following obligations by all individuals or organisations engaged in the collection and dissemination of information ...

Moreover, Chapter II of the Conference's "Final Act" set out a number of the Conference's resolutions that specifically addressed "Measures to Facilitate the Gathering and International Transmission of Information".¹⁸² This included Resolution No 13, which set out measures to fight state censorship, also affirmed positive obligations on states to promote the freedom of mediums of mass communications:¹⁸³

Solemnly condemns the use in peace-time of censorship which restricts or controls freedom of information, and

Invites Governments to take the necessary steps to promote its progressive abolition ...

Finally, Chapter III of the Conference's Final Act set out a number of resolutions that addressed Measures Concerning the Free Publication and Reception of Information.¹⁸⁴ Many of the resolutions required or recommended that states take certain steps to promote information flows via mass media. For example, Resolution No 25 recommended that:¹⁸⁵

... all Governments should, to the extent that they make available materials and facilities for the mass media, undertake not to discriminate on political or personal grounds or on the basis of race, nationality, sex, language or religion, or against minorities.

And Resolution No 27 recommended:¹⁸⁶

... that Governments should undertake to put no obstacles in the way of persons or groups wishing to express themselves through the means of mass communication, and should ensure in so far as they are able that persons do not suffer discrimination in the use of the media on political or personal grounds or on the basis of race, sex, language or religion ...

182 *Final Act of the United Nations Conference on Freedom of Information*, Draft Convention on the Gathering and International Transmission of News, preamble, UN Doc E/Conf 6/79 (1948), at Annex A.

183 *Final Act of the United Nations Conference on Freedom of Information*, Chapter II, Resolution No 13, UN Doc E/Conf 6/79 (1948), at Annex C.

184 *Final Act of the United Nations Conference on Freedom of Information*, Draft Convention on the Gathering and International Transmission of News, preamble, UN Doc E/Conf 6/79 (1948), at Annex A.

185 *Final Act of the United Nations Conference on Freedom of Information*, Chapter III, Resolution No 25, UN Doc E/Conf 6/79 (1948), at Annex C.

186 *Final Act of the United Nations Conference on Freedom of Information*, Chapter III, Resolution No 27, UN Doc E/Conf 6/79 (1948), at Annex C.

In other words, this third idea or principle – that accessible and free mediums of mass communications and information – are inextricably linked to the two other principles: that freedom of information is a fundamental freedom, and the free flow principle, that is, the promotion of the unrestricted flow of information nationally is a paramount aim. Though certainly not encapsulating all ideas, or policies, or principles discussed at this time, these three principles or elements reflected the heart of the free flow of information paradigm.

So, what does any of this have to do with s 14 of the NZBORA? It was from within this free flow of information paradigm that the right to "seek, receive, and impart information" emerged, and found its way into art 17 of the UDHR and Article 19(2) of the ICCPR, two documents central to the drafting and wording of the NZBORA's s 14 itself. The freedom to seek, receive, and impart information, I will argue, invokes the key principles and ideas of the free flow of information paradigm, and so these principles must also inform our interpretation of s 14 of the NZBORA too.

(b) The Free Flow Paradigm and the Origins of the Right to Seek, Receive, and Impart Information

The right or freedom to seek, receive, and impart information emerged from within the free flow of information paradigm of international law and politics. The UN's Economic and Social Council (ECOSOC) established a Commission on Human Rights in February 1946 with the responsibility to oversee the drafting of an "international bill of rights" and "international declarations or covenants" on civil liberties, which would ultimately include the UDHR and the ICCPR, respectively.¹⁸⁷ In early 1947, the Commission set up a Sub-commission on "Freedom of Information and the Press", which spent considerable time planning the UN Conference on Freedom of Information that the General Assembly had called for in 1946.¹⁸⁸ The Commission held off finalising language for provisions concerning freedom of expression and information in either the UDHR or the ICCPR, in order to receive input from the Conference.¹⁸⁹

In fact, the very first international document to use language later reflected in the UDHR, ICCPR and s 14 of NZBORA, was Resolution 59(I), the UN's 1946 Declaration on Freedom of Information, which, in addition to the principles already discussed above, actually used this

187 NL Gupta *Crosscultural Communications: Global Perspective* (Concept, New Delhi, 1998) at 302; Ramesh Chandra Thakur *The United Nations, Peace, and Security: From Collective Security to the Responsibility to Protect* (Cambridge, New York, 2006) at 103.

188 Chaffee "Legal Problems", above n 172, at 545; *Declaration on Freedom of Information* GA Res 59(I).

189 Chaffee "Legal Problems", above n 172, at 545. Joseph L Kunz "Freedom of Communications" (1954) 49 *Am Socy Intl L Proc* 99 at 100.

language to call for an international conference on freedom of information that would ultimately be convened in 1948:¹⁹⁰

All states should proclaim policies under which the free flow of information within countries and across frontiers will be protected. The right to seek and transmit information should be insured in order to enable the public to ascertain facts and appraise events ...

Indeed, two early drafts of provisions for freedom of expression and information formulated by the Sub-Commission and referred to the Conference for consideration – one drafted by the British delegation and one drafted by the United States (by Eleanor Roosevelt herself) – tracked the language of Resolution 59(I):¹⁹¹

Draft 2: Draft Proposed by the Representative of the United States (Mrs. Roosevelt).

Every one shall have the right to freedom of information, speech and expression.

Every one shall be free to hold his opinion without molestation, to receive and seek information and the opinion of others from sources wherever situated, and to disseminate opinions and information, either by word, in writing, in the press, in books or by visual, auditive, or other means.

The US draft offered no limitations to the right, preferring instead to advocate for one general limitation provision (much like the scheme of the NZBORA).

The 1948 Conference on Freedom of Information, in addition to the numerous draft conventions and resolutions already discussed, would produce draft provisions for freedoms of information and expression that would ultimately find their way into both the UDHR and the ICCPR.¹⁹² These drafts would also incorporate the language of Resolution 59(I), and include elements of the Sub-Commission's drafts. To say the Conference's draft provisions would prove influential is an understatement. In fact, the Conference's draft provision for (then) arts 17 and 18 of the "Draft Declaration on Human Rights" (which would become the UDHR) would be fully adopted, with little change, as the official text of the UDHR's article 19.¹⁹³ Here is a comparison of the provisions. First, the 1948 Conference Draft:¹⁹⁴

¹⁹⁰ *Final Act of the United Nations Conference on Freedom of Information*, Chapter I, Resolution No 1, preamble, UN Doc E/Conf 6/79 (1948), at Annex C.

¹⁹¹ Chaffee "Legal Problems", above n 172, at 545-546, 581-582 (Appendix I).

¹⁹² *Final Act of the United Nations Conference on Freedom of Information*, Draft Article 17 & 18, UN Doc E/Conf 6/79 (1948), at Annex B.

¹⁹³ Kunz "Freedom of Communications", above n 189, at 103; Chaffee "Legal Problems", above n 172, at 545-546, 581-582 (Appendix I).

¹⁹⁴ Chaffee "Legal Problems", above n 172, at 545-546, 581-582 (Appendix I).

Everyone shall have the right to freedom of thought and expression; this right shall include freedom to hold opinions without interference and to seek, receive and impart information and ideas by any means and regardless of frontiers.

And now, the strikingly similar final version of art 19 of the UDHR:¹⁹⁵

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The ICCPR's 1948 Conference draft provisions would prove similarly influential, with the ICCPR's draft for art 19 closely tracking the language of the 1948 Conference draft provision. Again, a comparison of the provisions, starting with the ICCPR 1948 Conference draft:¹⁹⁶

Every person shall have the right to freedom of thought and the right to freedom of expression without interference by governmental action; these rights shall include freedom to hold opinions, to seek, receive and impart information and ideas, regardless of frontiers, either orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices.

The final text for art 19(2) of the ICCPR is again, strikingly similar:¹⁹⁷

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In other words, we can draw a direct line from the ideas and principles of the 1948 Conference on Freedom of Information to the final drafts of art 19 for the UDHR and art 19 of the ICCPR, both of which were essential to the drafting and formulation of s 14 of the NZBORA.

In fact, if we return to art 19 of the UDHR, we can see the three principles of the free flow of information paradigm reflected in its language:¹⁹⁸

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The first principle, which emphasised freedom of information as a foundational freedom that is inextricably connected to expression, is clearly reflected in the first two lines, which indicates that

195 UDHR, above n 54, art 19.

196 Chaffee "Legal Problems", above n 172, at 545-546, 581-582 (Appendix I).

197 ICCPR, above n 54, art 19(2).

198 UDHR, above n 54, art 19.

"freedom ... to seek, receive, and impart information and ideas" is included in the broader right to "freedom of opinion and expression".

The second principle, which emphasised the free flow of information, is reflected in the language codifying the "freedom" to "seek, receive and impart information and ideas". The use of "seek", "receive" and "impart" together aptly reflects the multi-directional and communicative nature of information flows that are free and unrestricted; they are not static, but multi-directional and interactive give – and – take.

The third principle, recognising the importance of free and accessible mass media to freedom of expression and information, is reflected in the final wording, which guaranteed the flow of information "through any media". Given that mass media was understood as essential to carrying information and ideas across the globe, the nod to "regardless of frontiers" is also a nod to such media, and its essential role in the project of free expression and information.

Similarly, all of these principles are reflected in the language of s 14:¹⁹⁹

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Again, the connection between the right to seek, receive, and impart information and free expression is retained, as is the language recognising the free flow principle – the importance of the free flow of information ("seek, receive, and impart information"). Finally, language guaranteeing the flow of information and opinions through any media might even be broader: "any kind" of information and ideas can be sought, received, or imparted "in any form" (or media).

My argument is simple. These essential principles of the free flow of information paradigm, in which the language and understanding of the freedom to seek, receive, and impart information was forged, are also essential to understanding the principles and purposes of s 14, which invokes the same language and principles.

In fact, drafting s 14 based primarily on art 19 of the UDHR and ICCPR, had even more significance in the 1980s when the White Paper was first written, because by then a new competing paradigm concerning the international law and politics of media, information and expression had emerged.

(c) Section 14: Choosing Between Competing Paradigms

Indeed, the free flow of information paradigm, which was largely advocated by the United States and Western countries, remained influential at the international level for decades after the

¹⁹⁹ NZBORA, above n 15, s 14.

Post-War years.²⁰⁰ However, by the 1970s, a new paradigm began to emerge to challenge its predominance, and UNESCO would be the main battleground in which these competing paradigms would clash.²⁰¹

The Soviet Union and its Eastern Bloc allies, who saw freedom of information as a threat to its security, and a powerful tool of Western influence, were the first to challenge the ideas of the free flow of information paradigm in the 1960s, but largely failed to gain any kind of international consensus or traction for its own ideas or proposals.²⁰² Rather, it was a related but different movement driven largely by developing countries, which gained much more international momentum in the 1970s. The role and participation of Third World nations in international politics grew throughout the 1960s, and by the end of that decade, these countries focused on what they perceived as an "imbalance" in global mass communications between wealthier and poorer countries.²⁰³

This emerging paradigm rejected the unrestricted flow of free information and instead advocated state regulation of information and expression to guarantee more "balance" and to achieve certain social, political and economic goals.²⁰⁴ These ideas were reflected in the movement's notable call for a "New World Information and Communication Order"(NWICO), which was essentially a collection of proposals.²⁰⁵ While the NWICO movement originated among third world countries,

200 Cate "Free Flow of Information", above n 150, at 373-374 (noting the paradigm went "virtually unchallenged" before the late 1960s). See also Hamelink *World Communications*, above n 32, at 173.

201 Cate "Free Flow of Information", above n 150, at 375-381; Hamelink *World Communications*, above n 32, at 173; Ayish "Third World Implications", above n 150, at 490; Gauhar "Myths and Shibboleths", above n 157, at 55; Colleen Roach "The Movement for a New World Information and Communication Order: A Second Wave" (1990) 12 *Media, Culture & Society* 283 ["Second Wave"]; William Fitzmaurice "Note: The New World Information and Communication Order: Is the International Programme for the Development of Communication the Answer?" (1982-1983) 15 *NYU J Intl & Pol* 953 ["New World Information Order"]; Stephen Raube-Wilson "Note: New World Information and Communication Order and International Human Rights Law" (1986) 9 *BC Intl & Comp L Rev* 107 ["Note"].

202 Cate "Free Flow of Information", above n 150, at 375-381; Gauhar "Myths and Shibboleths", above n 157, at 55-56.

203 Ayish "Third World Implications", above n 150, at 492; Raube-Wilson "Note", above n 201, at 107; Gauhar "Myths and Shibboleths", above n 157, at 55-56; Cate "Free Flow of Information", above n 150, at 375-376. See generally Fitzmaurice "New World Information Order", above n 200.

204 Cate "Free Flow of Information", above n 150, at 375-376; Ayish "Third World Implications", above n 150, at 492; Raube-Wilson "Note", above n 201, at 107-108.

205 Raube-Wilson "Note", above n 201, at 107-108; Fitzmaurice "New World Information Order", above n 201, at 954-955; The term is largely attributed to Tunisian UNESCO delegate and MacBride Commission member Mustapha Masmoudi: Cate "Free Flow of Information", above n 150, at 377.

some of its proposals on issues of media concentration and monopoly did gain support from other countries, including Canada, Australia and New Zealand.²⁰⁶

Still, the United States and many other western countries saw similarities between the NWICO movement's criticisms of the free flow paradigm and those of the Soviet Union, and thus saw it as a threat to freedom of information and free expression.²⁰⁷ Though out the 1970s, UNESCO became the battleground in which the ideals and principles of these competing paradigms clashed.²⁰⁸ The NWICO movement would reach its apex in the early 1980s, with UNESCO's release of the MacBride Commission Report on a "New World Information and Communication Order".²⁰⁹ Though the report did not adopt the more radical NWICO proposals, it did endorse many of the movements' ideas – including recommending regulations on media to promote certain "social, cultural, economic and political goals".²¹⁰ Despite its more moderate proposals, the MacBride report proved controversial, leading the United States, which viewed the report as an attack on press freedom and the free flow of information, to withhold funding for UNESCO in 1982, and withdraw from the organization in 1984.²¹¹

So, when the drafters of the White Paper set out to formulate a provision for the New Zealand Bill of Rights concerning freedom of information and expression in 1984, they were faced with an important choice. Would they choose language that reflected the early Post-War consensus of the free flow of information paradigm? Or would they support the emerging NWICO paradigm, which advocated a state role in regulating media and controlling information? The clear answer is the drafters chose the former, not the latter. In fact, s 14 reflects the broader language of art 19 of the UDHR and omits the many explicit limitations on expression and information set out in art 19(3) of the ICCPR.²¹²

206 Gough Whitlam "Living with the United States - British Dominions and New Pacific States" (1991) *Austl Intl L News* 59 at 5-6. Whitlam, a former Australian Prime Minister, notes that NWICO proposals received support at times from various countries, including Australia, Canada, and New Zealand.

207 Roach "Second Wave", above n 201, at 284-285; Gauhar "Myths and Shibboleths", above n 157, at 56-57; Raube-Wilson, above n 201, at 108-109; Cate "Free Flow of Information", above n 150, at 388-390.

208 Gauhar "Myths and Shibboleths", above n 157, at 56; Ayish "Third World Implications", above n 150, at 492-493; Raube-Wilson "Note", above n 201, at 107-109.

209 Cate "Free Flow of Information", above n 150, at 384; Ayish "Third World Implications", above n 150, at 492; Raube-Wilson "Note", above n 201, at 107-108.

210 Cate "Free Flow of Information", above n 150, at 384-385; Raube-Wilson "Note", above n 201, at 107-108; Ayish "Third World Implications", above n 150, at 492;

211 Cate "Free Flow Information", above n 150, at 388-392; Raube-Wilson "Note", above n 201, at 107-108; Ayish "Third World Implications", above n 150, at 493-494.

212 ICCPR, above n 54, art 19.

At this point, the critic might say – so what? Is there any evidence that the drafters of s 14 were aware of any of this history? And if not, how is any of it relevant? My response to this is two-fold. First, even if the drafters of s 14 were unaware of the broader social, legal, and historical context that I have set out, it does not mean this context is not relevant to interpreting the purpose and scope of section 14. As Lamer CJC of the Supreme Court of Canada has noted, a purposive interpretation cannot be confined to knowledge or intentions of a "few individual public servants, however distinguished".²¹³ The same can be said of the NZBORA. Indeed, drawing on the broader "historic, social and legal context" of a right or freedom in the NZBORA is not novel, but an expected and accepted interpretive method.²¹⁴

And second, in any case, there is clear evidence the drafters of s 14 were, in fact, aware of all of this history. First, several of the key sources listed in the White Paper as its key international authorities discussed "freedom of information" as it was understood in the Post-War period, including the background to arts 19 in both the ICCPR, UDHR and the 1946 UN Conference.²¹⁵ Second, is the simple fact, already noted, that the White Paper, in explaining the "purposes" behind s 14 explicitly cite the free flow paradigm, saying that "government by the free public opinion of an open society" demands the "the conditions of a virtually unobstructed access to and diffusion of ideas".²¹⁶

Indeed, around the same time that the White Paper was being drafted, the UN Human Rights Commission (UNHRC) would issue a General Comment interpreting art 19 of the ICCPR (one of the key materials for drafting of s 14). Before 1992, when the UN Human Rights Committee began issuing specific comments on the various reports submitted by individual countries concerning their ICCPR compliance, the UNHRC's General Comments were widely published and essential

213 *Re BC Motor Vehicle Act* [1985] 2 SCR 486 at [51] per Lamer CJC.

214 Butler and Butler *NZBORA: A Commentary*, above n 88, at 75; Rishworth and others, above n 88, at 46-47. See also: *R v Jefferies* [1994] 1 NZLR 290 (CA), per Richardson J: "[a]long with other provisions affecting human rights and fundamental freedoms, s 21 is to be understood in its historical, social and legal context. That is not to diminish its importance".

215 The White Paper's "Bibliography" offers a "very selective list" of five "International" sources. This implies that while other sources were consulted, only a few would be listed: "White Paper", above n 110, at 122. Among the five international works cited, the very first listed is H Lauterpacht *International Law and Human Rights* (Stevens & Sons, London, 1950) at 269. It discusses the United Nations "Sub-Commission on Freedom of Information" of 1946, the 1948 UN Conference on Freedom of Information, and the various instruments and resolutions issued at the Conference. Also cited is Lous Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia, New York, 1981) at 216. The text discusses the 1948 Conference and its role in helping influence the text of art 19 of the UDHR. Another authority listed is JES Fawcett *The Application of the European Convention on Human Rights* (Oxford University Press, New York, 1969).

216 "White Paper", above n 110, at 79.

materials for interpreting the meaning and scope of articles in the ICCPR.²¹⁷ The General Comment stated:²¹⁸

2. Paragraph 2 requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.

The General Comment's interpretation of art 19 of the ICCPR itself reflects many of the principles and ideas of the free flow of information paradigm: the importance of the free flow of information and free and accessible mass media.

The conclusion that New Zealand, and the key public servants and their expert advisors who drafted the White Paper, would be aware of these changing currents of international law and politics should be obvious – the country has long been an active participant at the international level. As noted, New Zealand was there in 1946 as a participant at the 1946 UN Conference on Freedom of Information,²¹⁹ and was active in UNESCO when it the site of clashes between the NWICO and free flow paradigms on information law and politics.²²⁰

In the end, s 14's text, its drafting history, and the broader social, legal, and historic context behind its language and the context in which it was drafted reflects a commitment to the ideas and principles of the free flow of information paradigm, from which its language was forged. These principles should inform our interpretations of its application and scope, including the question of whether it includes a right or freedom to Internet connectivity

217 Francisco Forrest Martin and Stephen J Schnably *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press, New York, 2006) at 204. The authors noted that HRC comments are persuasive, but not binding authorities for interpreting the ICCPR. Also see Shiyun Sun "The Understanding and Interpretation of the ICCPR in the Context of China's Possible Reputation" (2007) 6 *Chinese Journal of International Law* 17 at 25 (discussing General Comments as the 'second most important basis' for interpreting the ICCPR, after the text itself).

218 Office of the United Nations High Commissioner for Human Rights *General Comment No 10: Freedom of Expression* (29 June 1983).

219 *Final Act of the United Nations Conference on Freedom of Information*, UN Doc E/Conf 6/79 (1948) at 3 (listing the delegations attending); Hamelink *World Communications*, above n 32, at 153. See also generally Chafee "Legal Problems", above n 172.

220 Gough Whitlam "Living with the United States - British Dominions and New Pacific States" (1991) *Austl Intl L News* 59 at 5-6. Whitlam, a former Australian Prime Minister, notes that NWICO proposals received support at times from various countries, including Australia, Canada, and New Zealand.

IV TWO DIMENSIONS OF SECTION 14 OF THE NZBORA AND THEIR LEGAL AND POLITICAL IMPLICATIONS

A Open Connectivity: Section 14, Internet Freedom

1 Text, social-legal-historic context, and purpose

The text, the broader social, legal, and historic context, and the purposes of s 14 lead inevitably to the conclusion that it protects a kind of "freedom to connect", or negative right to Internet access or connectivity. That is, s 14 does not confer a positive right to Internet access, but does protect citizen's access or Internet connectivity from governmental interference.

First, this is clearly consistent with the text of s 14. As seen, the provision was drafted in broad language, and kept that way, despite clear objections raised as its potential breadth and scope. Section 14 protects the right to "freedom of expression", which includes the "freedom" to "seek, receive, and impart information and opinions of any kind and in any form". The Internet is a mass communications medium for information, opinions and ideas, so it is a "form" through which citizens could seek, receive, and impart such information. Thus, section 14 would seem to preserve peoples' "freedom" to access the Internet in order to seek, or receive, or impart information or opinions "of any kind".

Secondly, this is also consistent with the broader social, legal, and historic context of s 14, set out at length in the previous section. Section 14 is inextricably tied to the principles of the free flow of Information paradigm, and those principles must inform its interpretation. Recognising that section 14 includes a right to Internet connectivity is consistent with each of these principles.

To begin with, it advances the free flow paradigm and the idea that freedom of information and free expression are foundational freedoms, in the sense that they provide an essential foundation upon which other important rights can arise, develop, or thrive. The Internet is has become the most powerful tool for communication and expression in the world, connecting people all over the globe, regardless of borders or national ties.²²¹ Interpreting s 14 to ensure people can freely express ideas and opinions, while freely exchanging them and other information through the Internet, advances the free flow of information, and preserves the foundational nature of free expression and freedom of information. It is also consistent with the third principle, which recognised the importance of

²²¹ Schneider, Evans and Pinard, above n 95, at 2: "[i]n just over 30 years, the Internet has become one of the most amazing technological and social accomplishments of the century. Many people born after 1990 cannot even conceive of a world without the Internet. The World Wide Web has made information on the Internet so accessible that users can access this information without the need to know much about computers and how they work. This ease of access has shrunk out world, opened international borders, and enabled people to connect and share information on an unprecedented scale. You continue your research for Roland by investigating some of the ways the Internet has changed society." Indeed, recent studies by Statistics New Zealand show that 80 per cent of New Zealanders use the Internet today. See Interactive Advertising Bureau New Zealand "Kiwi Internet Usage Soars" (2010) <www.iab.org.nz>.

mass media and the state's obligation to promote accessible media to promote the free flow of information. Preserving the people's freedom to access the Internet promotes this principle too.

Thirdly, interpreting s 14 this way is entirely consistent with the right's purposes. Of course, the purposes of s 14 are tied to the principles just discussed; but just to be clear, this reading of the provision fully promotes the purpose of "democratic self-government" which, as the White Paper recognised, requires the virtual unobstructed flow of information and ideas.

Finally, interpreting s 14 as involving a *negative* right to Internet access or connectivity, as opposed to a positive socio-economic right, is entirely consistent with the clear history of the NZBORA's drafting; social-economic rights were explicitly omitted from the Act. So, the right to Internet access or connectivity in s 14 only prevents the Government from interfering with people's access, such as passing laws that would limit or abrogate their Internet access or connections.

2 *Precedent: Moonen and Federated Farmers*

Such an interpretation of s 14 is also consistent with key judicial precedents. In one of leading decisions on s 14 of the NZBORA, the Court of Appeal in *Moonen v Attorney General of New Zealand* found:²²²

Under s 14 of the Bill of Rights, everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. This right is as wide as human thought and imagination. Censorship of publications to any extent acts as a pro tanto abrogation of the right to freedom of expression. The rationale for such abrogation is that other values are seen as predominating over freedom of expression.

Certainly, recognising that s 14 protects peoples' freedom to access the Internet is consistent with the Court of Appeal's recommendation. In fact, interpreting the provision does not even require a "wide" or imaginative reading; it just requires courts and lawyers to follow the text, history, and purpose of the provision itself.

Further, it is consistent with other cases interpreting s 14 to protect people's access to other kinds of mediums so they can seek, receive, or impart information. Though the High Court judge in *Ransfield v Radio Network Ltd* ultimately found that the NZBORA did not apply to the relevant defendants, it did recognise the possibility of rights to media access under s 14.²²³ And in *Federated Farmers of NZ Inc v New Zealand Post*, the High Court found that s 14 included a right to seek and receive information via mail, citing its "intrinsic importance as a means of communication and

²²² *Moonen v Attorney General of New Zealand* [2000] 2 NZLR 9 (CA) at [15].

²²³ *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at [39]-[44].

information".²²⁴ That case was decided in 1992. Since then, the Internet has likewise taken on "intrinsic" if not central importance as a means to communicate and share information.

Taking all of these factors into account, including s 14's text, purposes, principles, and broader social, legal and historical context, as well as prior judicial precedent, I believe there is a strong case that right includes a "freedom to connect", that is, it protects citizen's right to Internet access or connectivity.

B Open Data: Section 14 and Freedom of Information

A second dimension to s 14 is what I call "open data". Freeing up government information and data is related to Internet access rights, as one of the great innovations of the Internet has been the emergence of e-governance and the open government movements, which promote democratic self-government by providing greater access to government information and data so citizens can make more informed decisions, and provide more direct input via e-governance and e-voting initiatives.

What does this have to do with s 14? Prior discussions of the right's background and history will probably make this obvious. Indeed, an issue that appears over and over again in s 14's history, purposes, and broader social, legal, and historic context, is its connection to freedom of information, and the importance of ensuring people's access to that information..

Section 14, if we are to take its history, principles, and purposes seriously, would also seem to require greater access to information. This would not be *any* information – as s 3 of the NZBORA makes clear that it only applies to state actors – but information possessed by the Government. This makes sense. The entire spirit of the free flow paradigm is to prevent states from restricting information flow; and it only makes sense that states might have an obligation to free up greater access to information and data that they possess. In fact, media scholars like Steven Price and Andrew Geddis have suggested that s 14 ought to be interpreted this way.²²⁵

Of course, one might now ask: what does this mean for freedom of information in light of s 14? And how might these two dimensions of s 14 impact on issues of Internet access rights or access to information, in more concrete ways? In the next section, I briefly outline some of the more concrete political and legal implications for my analysis.

V POSSIBLE LEGAL AND POLITICAL IMPLICATIONS

Section 14's text, its drafting history, the broader social, legal, and historic context behind its language and the context in which it was drafted, all reflect a commitment to the ideas and principles of the free flow of information paradigm, from which its language was forged. These

²²⁴ *Federated Farmers of NZ Inc v New Zealand Post* [1990-1992] 3 NZBORR 339 (HC).

²²⁵ See Steven Price "Law Commission looks at suppression laws" (2009) Media Law Journal <www.medialawjournal.co.nz> ["Suppression Laws"]; Steven Price "The right to receive information revived..." (2010) Media Law Journal <www.medialawjournal.co.nz> ["Right to Receive"].

principles should inform our interpretations of its application and scope. In this section, I outline three concrete legal and political implications for New Zealand that can be derived from this s 14 analysis.

I argue, first, that a proper interpretation of s 14 and its principles – mainly its protection of a (negative) right to Internet connectivity – may raise questions about the legality of Internet account suspension provisions in the enacted Copyright (Infringing File Sharing Amendment) Act 2011 (assuming the suspension provisions are activated by Order in Council).²²⁶ Secondly, I also explore how the "open connectivity" dimension of section 14 might provide some foundation for making *political* arguments about why the New Zealand Government should recognise a *positive* right to Internet connectivity. Finally, I suggest that the open data dimension of s 14 may have concrete implications for interpreting and applying the Official Information Act 1982.

An exhaustive exploration of each of these issues is beyond the scope of this paper. However, a brief exploration of how s 14 might impact these three areas is helpful not just because it is timely—given recent copyright reforms—, but it should also provide a foundation for understanding how s 14, or at least this dimension of it, may apply in other contexts, with different laws or legislative schemes.

A The Legality of the Internet Account Suspension Remedy

As noted, the recently passed Copyright (Infringing File Sharing Amendment) Act 2011 provides for Internet account suspension as a remedy for repeat copyright infringement, although its enactment is delayed until a date set by Order in Council.²²⁷ Unlike earlier drafts that would have implemented a "three strikes" policy (mandatory account termination after three instances of copyright infringement) if the account suspension remedy is activated, it would give courts the power to suspend a person's Internet access as a remedy, among several others, for repeated copyright infringement.²²⁸

Lawyers and commentators have raised the language of s 14 as relevant to issues of Internet account termination or suspension in New Zealand.²²⁹ And though the New Zealand Attorney

226 The Act provides for account suspension, but delays its implementation: if notice and takedown provisions prove unable to deter illegal online file sharing, then the provision could be activated by an Order in Council: Copyright (Infringing File Sharing Amendment) Act 2011, above n 94.

227 Copyright (Infringing File Sharing Amendment) Act 2011, incorporated into the Copyright Act 1994, s 7 (sections 122O and 122PA).

228 Copyright Act 1994, above n 227, s 7 (sections 122O and 122PA).

229 Cox "Access as a Human Right", above n 13 (generally); Ministry of Economic Development "Cabinet Paper: Illegal Peer to Peer File Sharing" (14 December 2009) at [93] (concluding that MED's recommendations for the new Section 92A is consistent with the right in section 14); Appleby "Internet not a right", above n 14 (citing the same language in the UDHR).

General issued a report in February 2010 concluding that the Bill, in his view, is consistent with the NZBORA,²³⁰ I believe that in light of my earlier argument, a proper interpretation of s 14 would lead a court to conclude account suspension as a remedy for copyright infringement would be inconsistent with the NZBORA.

But a complete analysis of this question, which would involve discussion of foreign and domestic intellectual property and public law jurisprudence and several more international instruments and international laws addressing copyright, goes beyond the scope of this article. However, I still plan to outline an argument, or perhaps more accurately a series of reasons, as to why I believe Internet account suspension would constitute an unreasonable limit on s 14 rights.

1 Account Suspension as a Prima Facie Infringement

First, Internet account suspension surely constitutes a prima facie infringement of s 14 protections. In light of prior precedent, as well as s 14's text, its broader social, legal, and historic context, and its purposes, the section must be understood to protect a kind of freedom to connect, or negative right to Internet access or connectivity. And a law that would confer on a state actor – a judge – the power to impose a remedy for copyright infringement that would suspend a person's Internet access or connectivity – would constitute a clear prima facie infringement of s 14's protections. The natural meaning of account suspension to remedy or deter copyright infringement, is to terminate a person's Internet connectivity, in this case for a set period of time. This, I have shown, would violate s 14's meaning and principles. In fact, this was the conclusion of New Zealand's Attorney General, he believed that the infringement was justified under s 5 of the NZBORA.²³¹

2 Account Suspension Fails Minimal Impairment

Once account suspension is found to be a *prima facie* infringement, the question becomes what remedy, if any, is available as a result, in light of ss 5 and 6 of the NZBORA. The proper application of ss 5 and 6 of the NZBORA remains an ongoing debate both among scholars and the courts.²³² Thankfully, New Zealand Supreme Court in *R v Hansen (Hansen)* at least refined the approach to

230 *Attorney General's s 7 Consistency Report*, above n 94.

231 *Attorney General's s 7 Consistency Report*, above n 94, at [11].

232 For example, see *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 [*Hansen*]; *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 (CA); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA). See also Andrew Geddis and Bridget Fenton "Which Is to Be Master – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 *Ariz J Intl & Comp L* 733; Claudia Geiringer "The Dead Hand of the Bill of Rights - Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate" (2005-2008) 11 *Otago L Rev* 389; Kris Gledhill "The Interpretative Obligation: The Duty to Do What is Possible" (2008) *NZ L Rev* 283; Rishworth and others, above n 88, at 117-120 (discussing the impact of the sections, and debates and dilemmas in their interpretation and application).

applying the rights in the NZBORA along with ss 5 and 6 together, where there is a prima facie case of infringement. In *Hansen*, the Supreme Court set out the proper procedure to apply these terms:²³³

If the natural meaning of a statutory provision does appear to limit a guaranteed right, the appropriate next step is to consider whether that limit is a justified one in terms of s 5. If it is, the meaning is not inconsistent with the Bill of Rights in the sense envisaged by s 6, and should be adopted by the Court. It is only when that natural meaning fails the s 5 test that it is necessary to consider whether another meaning could legitimately be given to the provision in issue. If the words of the provision in their context are not capable of supporting a different and Bill of Rights-consistent meaning, s 4 requires the Court to give effect to the provision in accordance with its natural meaning notwithstanding the resulting inconsistency with the Bill of Rights.

That is, if the natural meaning of a provision appears to limit a right, the next step is to decide if that limit is justifiable under s 5. If not, and if the words cannot reasonably be read or interpreted in a rights-consistent way, then under s 4, the provision must be held as inconsistent with the Bill of Rights.²³⁴ This means that while the statute remains valid and in force, it has been declared inconsistent with fundamental rights protected by the Bill. But as also noted in *Hansen*, when deciding justified rights limitations under s 5, New Zealand courts have "commonly adopted" the Supreme Court of Canada's test set out in *R v Oakes (Oakes)*,²³⁵ which includes both a "rational connection" and "minimal impairment" requirement.²³⁶ The rational connection test requires that the purpose of the statute in question is an important one, and that the statutory scheme is "rationally connected" to that purpose. As noted, the Attorney General found that the earlier proposed bill, which included account suspension, was a justifiable limit on s 14 rights. Among the Attorney General's findings were that the proposed Bill's objective, to "provide for an enforcement regime for instances of file sharing that infringe copyright" was an "important and significant objective".²³⁷ It is hard to disagree with these points. Deterring large scale online copyright infringement – and thus protecting the interests of copyright holders – is an important objective and certainly the proposed copyright reforms are rationally connected to that aim.

²³³ *Hansen*, above n 232, at [60].

²³⁴ *Hansen*, above n 232, at [60].

²³⁵ *R v Oakes* [1986] 1 SCR 103; *Hansen*, above n 232, at [65]. For a critique of *Oakes* and a much different approach to right limits and justifications, see Grégoire CN Webber *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, London, 2009).

²³⁶ *R v Chalk* [1990] 3 SCR 1303 at 1335-1336 (the Supreme Court summarizing the *Oakes* test for ease of application).

²³⁷ *Attorney General's s 7 Consistency Report*, above n 94, at [11].

However, it is hard to see how account suspension could pass the *minimal impairment* aspect of the s 5 justification analysis. This is the requirement, derived from the *Oakes* test, that a limit in the legislative scheme must, in the words of Tipping J in *Hansen*, "impair the right as little as possible".²³⁸ Put another way, if the objectives or aims of the legislation can be achieved while also limiting or infringing a right to a lesser extent, then the legislation fails to limit the right as little as possible, and thus fails this aspect of the s 5 justification test.

If the proposed account suspension remedy is ultimately activated by Order in Council, it would be imposed by a District Court for repeated copyright infringement.²³⁹ If successfully obtained by a copyright holder, a court would order that an infringer's Internet account be suspended for "up to 6 months".²⁴⁰ Account suspension is neither a limit nor a minor impairment of the right in question (the right to connectivity). Instead, it is a suspension of that right, in literal terms, because the remedy involves an Order issued to suspend the defendant's Internet account.²⁴¹

This raises an important distinction for any analytical framework for rights justification, including s 5 of the NBORA. There is a difference between abrogating a right, and limiting it. For example, a limit on free speech might be limiting the places that political advertisements could be placed during an election (for example, advertisements are allowed only on private property) while abrogation of free speech could be banning political advertising altogether. The abrogation involves negating, removing, or suspending the right while a justifiable limitation involves a kind of encroachment upon the right – such as a limit on the outer boundaries or aspect of the right or interest – whilst the right itself remains largely or entirely intact in other areas or aspects. Sections 8 (right to life), 9 (right not to be subjected to torture), 10 (right against medical experimentation), and 11 (right to refuse medical treatment) of the NZBORA all provide examples of rights where a mere limit or encroachment would constitute a full abrogation of the right in question. If you deprive someone of life, for example, their right is fully abrogated. By contrast, freedom of expression is often said to have limits.²⁴²

If rights are to be impaired as minimally as possible, limiting a right would presumably be preferred over abrogating it. Indeed, this very point was raised by Anderson J in *Hansen*, pointing out that if a provision can be interpreted in a way that provides for a *limit* on a right, rather than an abrogation of that right altogether, the former interpretation should be used by courts.²⁴³

238 *Hansen*, above n 232.

239 Copyright Act 1994 (as amended), above n227, s 7.

240 Copyright Act 1994 (as amended), above n227, s 7 (referring to the proposed s 122O(2)).

241 Copyright Act 1994 (as amended), above n227, s 7 (referring to the proposed s 122O(2)).

242 Butler and Butler *NZBORA: A Commentary*, above n 88, at 304.

243 *Hansen*, above n 232, at [266].

Suppose that on one interpretation an enactment would abrogate a right or freedom, and on another interpretation it would have a limiting but not abrogating effect. If, on the second possibility, the limitation were reasonable, and could be demonstrably justified in a free and democratic society, s 6 would mandate that interpretation.

Rejecting laws, or interpretations thereof, that would allow the Government to abrogate rights, makes sense. It is consistent with the principles of minimal impairment and proportionality in the *Oakes* test, which provide the essential analytical framework for justification analysis under s 5. And it is consistent with the text of s 5, which speaks to "reasonable limits" that can be "justified"; an abrogation of a right is fundamentally different from limiting it.²⁴⁴ The account suspension remedy would give courts with the power to suspend the freedom at issue entirely, and thus constitutes a departure from constitutional principle that has exemplified post-war constitutional documents like the NZBORA. So, on its face, account suspension is hard to justify, as it can arguably be understood as an abrogation or suspension of a right, rather than a kind of limit.

There are a few obvious responses to this argument, however. First, account suspension in the legislative scheme is not truly a suspension of a right in question, as it only suspends a person's Internet connectivity. Since the broader right is freedom of expression, the person can exercise that freedom in other ways and through other mediums. And nothing stops the person from going to another Internet provider and getting a different account. Indeed, as the New Zealand Court of Appeal recently noted, restrictions involving "temporality" and "locality" have often been held to be reasonable limits on free expression.²⁴⁵ For example, procedural restrictions on speaking at a City Council meeting have been held to be reasonable limits on expression.²⁴⁶

This is a fair response, but I believe it fails to take into account the special status that s 14 confers on *mediums* for expression, like the Internet. Section 14 protects the right to freedom of expression, but goes on to clarify that this includes the freedom to "seek, receive, and impart information and opinions of any kind and in any form". My exploration of the history and purpose behind this language showed that freedom of expression is of little worth if the *means* and *mediums* of expression can easily be restricted. Rather than simply creating a right to free expression, s 14 goes further to also codify explicit protection for the mediums or conduits through which that freedom would be exercised including "of any kind and in any form".

In other words, a law, like Internet account suspension as a copyright remedy, which terminates or suspends access to a specific *medium* is not a small restriction or inconvenience on a broader right of free expression, but a suspension of the explicitly codified *freedom of access* to mediums of

244 NZBORA, above n 15, s 5.

245 *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [67] [*Commerce Commission v Air NZ*].

246 *Bright v Police* [2009] NZCA 187, [2009] 3 NZLR 132.

expression, or as I have called it in the context of the Internet age, a *freedom to connect*. Interpreting s 14 any other way, ignores its history and purpose, and would render key parts of its text largely redundant.

I recognise this is a new way of characterising s 14 and its protections, much different from the way New Zealand courts have interpreted it in the past. But I believe this approach shows the greatest fidelity to s 14's text, history, structure, and purpose. A central tenet of the free flow paradigm, the school of thought underlying the language of s 14, concerned the importance of the *means* of mass communication to freedom of information and expression.

However, even on a more traditional understanding of s 14, it is hard to see how account suspension is minimally impairing. One can think of several other ways to deter repeat infringers that would impair the s 14 connectivity rights less than Internet account suspension for six months. Perhaps a shorter maximum period of suspension might achieve the same aims? Why not placing a one or two month limit on a suspension order? Or what about other kinds of potential technical remedies, like ordering a data cap on the Internet account (though, admittedly, data caps may also infringe on the right to connectivity)? Ordering the Internet user from accessing sites or networks used for copyright infringement, like peer-to-peer networks? The Court could also order throttling an Internet account (reducing the speed of the connection for certain kinds of online activities like file transfers). Each of these alternative solutions and remedies may not only deter, but in some cases entirely stop, an offender's infringing activities, while also impairing s 14 much less than the current proposed scheme.

So, a plain and natural reading of the proposed account suspension remedy for repeat copyright infringement arguably limits s 14 more than is reasonably necessary, as either a suspension of the freedom to connectivity, or, in light of these lesser impairing alternatives.

3 The Difficulty in Reading Account Suspension Consistently with Section 14 of the NZBORA

It is difficult to see how a reading can be given to the proposed account suspension remedy under s 6 that would render it consistent with s 14. Section 6 does not give the courts discretion to rewrite statutes through interpretation. In *Hansen*, the Court warned that if "the words of the provision in their context are not capable of supporting a different and Bill of Rights-consistent meaning" the Court must say so, and invoke s 4 to apply the natural meaning of the law, despite being inconsistent with the NZBORA.²⁴⁷ In this case, it is just not possible to interpret account suspension in any other way than a clear power conferred on courts to suspend Internet connectivity for up to six months. The wording leaves no doubts about its plain and natural meaning.

²⁴⁷ *Hansen*, above n 232, at [60].

This seems to be a case where a court would have to invoke s 4 of the NZBORA, which directs a court to apply a natural reading of a provision, even though it is inconsistent with a right in NZBORA. This raises the controversial issue of whether a court should, in applying s 4, issue a kind of informal declaration of inconsistency with the NZBORA, by making its finding as to its inconsistency clear from its reasons. McGrath J in *Hansen* made clear that making such informal declarations are an essential part of the courts responsibility in adjudicating claims under the NZBORA.²⁴⁸

Yet, as scholars like Claudia Geiringer have documented, lower courts have yet to fully embrace this responsibility.²⁴⁹ While tackling this controversy also goes beyond the scope of this work, I tend to be less pessimistic about the possibilities of courts exercising the implied jurisdiction for declarations of inconsistency underlying *Hansen*. Geiringer recommends "clear legislative authority for the courts to grant formal declaratory relief" to push shift the current judicial mindset about these practices.²⁵⁰ She may be right that a shift in a judicial approach to the NZBORA may not be forthcoming anytime soon, but if Canada is any comparator it may be simply a matter of time before lower courts start to take strong direction from high courts to heart.²⁵¹ In Canada it likewise took time for the lower courts to embrace the powers articulated by the higher courts under the Canadian Charter. Section 14 and Internet account suspension may become an instance where New Zealand's courts finally embrace that role.

Whether a declaration of inconsistency would be articulated by a court or not, I believe this analysis shows how s 14's open connectivity dimension raises questions about the appropriateness of statutes that limit or restrict Internet access and connectivity. This discussion is not an exhaustive exploration of the question, and the issues involved. Rather, it is merely an attempt to demonstrate how account suspension may unreasonably infringe s 14 rights and, more generally, give some indication of the broader role that s 14 could play in Bill of Rights adjudication when interpreted properly.

A Section 14 and a Statutory Right to Internet Access

Another implication of my s 14 interpretation of concerns the political discussions that surround governmental obligations to provide Internet access to citizens. Despite the countries like Finland

248 *Hansen*, above n 232, at [266].

249 Claudia Geiringer "On the Road to Nowhere: Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 ["Road to Nowhere"].

250 Geiringer "Road to Nowhere", above n 249, at 646.

251 Gerry Ferguson "Impact of an Entrenched Bill of Rights: The Canadian Experience" (1990) 16 Monash UL Rev 211 at 222. Ferguson discusses how, at first, the lower courts in Canada took a much more restrained approach to *Charter* challenges than the Supreme Court. Eventually the High Court "buried that approach" and in subsequent years the "message has not been lost on lower courts".

and Estonia leading the way with statutory schemes guaranteeing citizen access to Internet – the New Zealand Government has been long resistant to such ideas. Indeed, the proposed copyright reforms providing for account suspension show that the New Zealand Government does not see Internet connectivity worthy of a statutory guarantee.²⁵² Indeed, the Government's broadband rollout plans across the country have been described as "political, not rights based".²⁵³

Section 14, however, may change the direction of this debate,²⁵⁴ or at least prove a different framework within which the debate might happen. It is difficult to argue for guaranteed statutory rights to any kind of good or service, given the costs; but s 14 provides a normative and legal framework upon which to base such claims. Of course, s 14 does not guarantee any kind of positive right to Internet connectivity; rather, it is a negative one – a freedom to connect, without government interference. But s 14 *does* link the noble aims and purposes of the NZBORA to the importance of Internet access; this makes it far easier for those supportive of the idea to make the case that a *positive* right to Internet connectivity itself has a basis in New Zealand's constitutional framework and tradition.

Again, I do not think s 14 has radical implications for this debate, but it may very well change its complexion, or offer some new directions. After all, a government that takes the bold step to guarantee citizen access to the Internet would be promoting and building upon the spirit and letter of the NZBORA itself, including the important purposes, principles, and interests embodied in s 14.

C Section 14 and the Official Information Act

Earlier, I discussed a second dimension to s 14, what I call "open data". Taking s 14's history, principles, and purposes requires greater access to information, specifically, information and data possessed by the Government. The free flow paradigm was about promoting information flow and preventing states from curtailing it. I also noted that media scholars have previously suggested that s 14 be interpreted this way.²⁵⁵

Yet, the point is not established so simply. In the only case where a New Zealand court turned its mind to this possibility, it refused to interpret s 14 in this way. In *R v Mahanga (Mahanga)*, a case concerning access to court records, McGrath J stated:²⁵⁶

252 Copyright (New Technologies) Amendment Act 2008; De Beer and Clemmer "Global Traneds", above n 11, at 394.

253 See for example Cox "Access as a Human Right", above n 13, at 11.

254 James Hefffield "Is internet access a human right?" (2010) PC World New Zealand <www.pcworld.co.nz>.

255 See Price "Suppression laws", above n 225; Price "Right to receive", above n 225.

256 *Mahanga*, above n 100, at [29].

Under s 14 of the Bill of Rights, freedom of expression includes "the freedom to seek, receive, and impart information and opinions of any kind in any form", but that does not confer any right to acquire information, let alone in the form in which a person wishes to use it.

These remarks suggest that s 14 imposes no such information access or rights; only when the third party – including the state – is willing to impart that information.

Notwithstanding this holding, however, I believe a strong case can be made that section does, indeed, confer a right to acquire information; or at the very least, confers greater access to information held by government. First, a requirement for greater citizen access to government data and information is reflected in s 14's text – again, the freedom to "seek" information implies a right of citizens to obtain information and opinions without interference from the state. These remarks in *Mahanga* do not allow the words of s 14 their plain meaning.

Secondly, the remarks of McGrath J were more in passing than the result of an in depth investigation by the Court into the scope and purpose of s 14. McGrath J did not look in depth at any background, or broader social, legal, or historic context, in coming to this conclusion. The finding ignored the free flow principles that s 14's language invokes, including the importance of "virtual unobstructed access to and diffusion of ideas".²⁵⁷

The finding ignored the fact that when drafting and enacting the NZBORA the New Zealand Government constantly tied the Act, and particularly s 14, to its corresponding efforts concerning freedom and access to information. The NZBORA was part of the Labour Government's broader "open government" platform upon which the party had won the 1984 election.²⁵⁸ Moreover, the White Paper cites certain passages in New Zealand's 1984 ICCPR Report as key materials to the drafting of s 14.²⁵⁹ Those passages in the 1984 ICCPR Report talk at length about New Zealand's efforts on improving freedom of information, including introducing the Official Information Act Bill that would make government information presumptively accessible.²⁶⁰

257 "White Paper", above n 110, at 79.

258 Rishworth and others *New Zealand Bill of Rights*, above n 88, at 6.

259 "White Paper", above n 110, at 78. See Ministry of Foreign Affairs *Human Rights in New Zealand*, above n 142.

260 Ministry of Foreign Affairs *Human Rights in New Zealand*, above n 142, at 54-55 (The Report states, for example, "A Committee on Official Information was set up recently by the Government to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available to the public and in particular to examine the purpose and application of the Official Secrets Act... Following the recommendations of the Committee, the Government has recently introduced an Official Information Bill which, if enacted, will repeat [sic] the Official Secrets Act, and enact a statutory presumption that official information is to be made available to the public unless there is a good reason for withholding it...").

In other words, a good faith interpretation of s 14 in light of its text, history, purposes, and principles, suggest a requirement for greater access and freedom of government information and data. Such an interpretation is not an outlier. In fact, the weight of international precedent is shifting – there have been both United Kingdom and European Court of Human Rights decisions implying similar informational access interests.²⁶¹

What does this mean in real terms? My purpose here was to set out a theoretical and normative foundation for future works and directions drawing on s 14 in relation to open data and access to information issue. But a few concrete points can still be made. First, s 14 should play a more central role in legal and political debates about open data and access to information debates in New Zealand than it has so far. A good example of this is the recent report issued by the Law Commission on the "Public's Right to Know", which explored issues concerning freedom of information in New Zealand, including a review of both the Official Information Act 1982 (OIA) and Parts 1-6 of the Local Government Official Information and Meetings Act 1987.²⁶² In the entirety of the 250 page report, however, s 14 of the NZBORA is mentioned only *once*.²⁶³ I hope this article will end this kind of neglect of s 14 in relation to these important issues.

Second, s 14 has relevance to the interpretation and application of the OIA. Earlier, I canvassed the many connections between s 14, and the origins of the NZBORA, and the OIA. While most of the "exceptions" to presumptive access under the OIA may very well withstand scrutiny under my "open data" interpretation of s 14, perhaps an argument can be made that in passing justification under ss 5 and 6, certain exceptions ought to be interpreted more narrowly in light of s 14 of the NZBORA. Media lawyer Steven Price has made a similar argument, but was sceptical as to whether s 14 could offer a foundation for such a claim.²⁶⁴ I believe I have persuasively shown how s 14 *does* offer the foundation he was looking for.

Third, my interpretation of s 14 will also be relevant in cases where *other* statutes may restrict the free flow of information by extending the scope of the enumerated *exceptions* to the presumption of information access in the OIA. For example, the New Zealand Court of Appeal found in

261 *A v Independent News et al* [2010] EWCA Civ 343. There, the Court departs from earlier precedent to find that art 10 of the ECHR, which includes a right to "receive information", confers greater access rights to information. The case of *Tarasag a Szabadsagjogokert v Hungary* (37374/05) Section II, ECHR 14 July 2009 also departs from earlier European Court of Human Rights precedents, to find that the media has a special interest in disseminating information; therefore under art 10's right to "receive and impart information", they have greater access rights to information.

262 New Zealand Law Commission *The Public's Right to Know: A Review of the Official Information Act 1982 and Parts 1-6 of the Local Government Official Information and Meetings Act* Issues Paper No 18 (September 2010).

263 *Ibid* at 31.

264 See Price "Suppression laws", above n 225; Price "Right to receive", above n 225.

Commerce Commission v Air New Zealand Ltd that a suppression order under the Commerce Act 1986, prohibiting disclosure of information given in the course of a Commerce Commission investigation, is a justifiable limit on s 14 rights.²⁶⁵ There, the Court acknowledged that the suppression power was an extension of the power contemplated in the OIA (the Act provides for more narrow suppression powers), but still found it to be a justifiable limitation. Moreover, the Court noted that the Commission had been using the suppression orders in a blanket fashion:²⁶⁶

We note that the s 100 orders in this case covered the whole of the interviews. The interviews we have been shown contained much that was trivial. In a pragmatic sense we can understand that it is easier to make a blanket suppression order covering the whole of the interview. This is not necessarily an erroneous approach as practicalities are a legitimate consideration. However, the Commission should consider when making an order whether the s 100 order can and should be made on a more limited basis.

The finding as to whether s 100 suppression orders are reasonable and justifiable could potentially be different on a proper interpretation of s 14; however, such an interpretation should at least prompt Courts to be more diligent in ensuring suppression powers are *not* used in an overly broad fashion. Only the information necessary to preserve the integrity of the Commission's investigation should be redacted from interviews, not whole interviews or other evidence. The *presumption* is the free flow of information; information should not be restricted simply out of mere convenience and practicality. Otherwise, the potential for abuse of suppression powers is made all the more likely; an outcome that runs counter to s 14's spirit and letter.

V CONCLUSION

This work has argued, among other things, that a proper understanding of s 14 of the NZBORA, and its text, history, purposes and principles, disclose two important dimensions to its protections that have been so far neglected. First, that s 14 offers a kind of "freedom to connect", a right to Internet connectivity protected from unreasonable or unjustifiable interference or abrogation by the New Zealand Government. Secondly, it provides a legal basis to argue for greater access to Government information and data across the board. I call these two dimensions open connectivity and open data. These dimensions, I have argued, embody an important Post-War paradigm of international information principles and politics – the free flow paradigm – reflected in the text of the s 14 itself.

These are not the only potential applications for this new and, in my view, proper interpretation of s 14. Indeed, one of my aims for was to provide a working a theoretical and normative framework or foundation for new directions in research. For example, one might be tempted to take my

²⁶⁵ *Commerce Commission v Air NZ*, above n 245.

²⁶⁶ *Commerce Commission v Air NZ*, above n 245, at [92].

arguments concerning open data quite further, beyond merely considering s 14 in light of the OIA, and its exceptions to its presumption of open access. One might also test other limits on Internet connectivity, such as limits on speech or informational access imposed or encouraged by governments; these, too, would be interesting to explore in light of the interpretation of s 14 I have set out here.

Neither of s 14's two dimensions is absolute; there will be instances where the Government has a justifiable reason for limiting these rights and interests. However, I have argued that an abrogation of such interests – like suspension of Internet access as a remedy for copyright infringement – should be precluded, or at least that it requires a strong justification to pass the muster scrutiny under the protections of the NZBORA.

In the end, I have attempted to show why s 14 of the NZBORA matters to both Internet freedom and information access in New Zealand, or at least matters much, much more, than previously thought. A proper interpretation of the section reveals two previously neglected dimensions – open connectivity and open data. I hope to have persuaded, or at least hope to have fostered a broader debate about, the role that s 14 should play in advancing these issues in both law and public policy.