IP in the Corridors of Power

A study of lobbying, its impact on the development of intellectual property law, and the implications for the meaning of democracy

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Ben Adamson

School of Law
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<tr>
<td>ACTA</td>
<td>Anti Counterfeiting Trade Agreement</td>
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<tr>
<td>ALDE</td>
<td>Alliance of Liberals and Democrats for Europe</td>
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<td>APG</td>
<td>All Party Group</td>
</tr>
<tr>
<td>BPI</td>
<td>British Recorded Music Industry (formerly British Phonographic Industry)</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>DEA</td>
<td>Digital Economy Act</td>
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<tr>
<td>DRM</td>
<td>Digital Rights Management</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EPC</td>
<td>European Patent Convention</td>
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<td>EPO</td>
<td>European Patent Organisation</td>
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<tr>
<td>EPP-ED</td>
<td>European People’s Party-European Democrats</td>
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<tr>
<td>FFII</td>
<td>Foundation for a Free Information Infrastructure</td>
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<td>FOSS</td>
<td>Free and Open Source Software</td>
</tr>
<tr>
<td>IFPI</td>
<td>International Federation of the Phonographic Industry</td>
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<td>IPO</td>
<td>Intellectual Property Office</td>
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<td>ISP</td>
<td>Internet Service Provider</td>
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<tr>
<td>JURI</td>
<td>European Parliament Committee on Legal Affairs</td>
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<tr>
<td>OIN</td>
<td>Open Innovation Network</td>
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<tr>
<td>PCRC</td>
<td>House of Commons Political and Constitutional Reform Committee</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>USPTO</td>
<td>United States Patent and Trademark Office</td>
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<tr>
<td>VPN</td>
<td>Virtual Private Network</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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Abstract

The University of Manchester
Ben Adamson
Doctor of Philosophy
IP in the Corridors of Power: A study of lobbying, its impact on the development of intellectual property law, and the implications for the meaning of democracy
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This thesis will demonstrate that, while generally seen as a non-democratic activity, lobbying should in fact be viewed as an important part of democratic policymaking, providing valuable input into law and policy, particularly in areas where expertise is at a premium.

Constructing a theoretical model of democracy and using the field of intellectual property as a focal point, the role of private actors will be examined across a series of case studies: the 2011 Hargreaves Review of Intellectual Property and Growth, the 2010 Digital Economy Act, and the proposed 2002 EU Computer Implemented Inventions Directive. Each case study is based upon a combination of secondary sources and the first-hand experiences of certain actors involved and in each case the lobbying activity is critically evaluated in light of the features and normative conditions of the democratic model.

This study will ultimately show both the positive aspects and negative aspects of lobbying from a democratic viewpoint, noting that the importance of stakeholder input into the law and policy that will affect those stakeholders is essential. It will also be shown, however, that equality of access to, and influence over, policymakers is far from satisfactory and that until such inequalities can be resolved, lobbying cannot be fully justified under my model of democracy.
Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.
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Acknowledgements

First and foremost, I must thank my primary supervisor, David Booton, for his support and guidance over the course of this project. Always on hand whether for the most substantive of feedback or the most vital of reassurance, David has been invaluable and I count myself as being very lucky for having him as part of my supervisory team. My sincerest thanks also to Professor Alan Hamlin, my second supervisor until his departure from the University of Manchester in 2013, and to Dr Carolyn Abbot, who bravely stepped up to the plate as his successor. I say ‘bravely’, for Carolyn joined my team at a crucial time when the end was approaching and the tension mounting. Her input and fresh perspective on the project have been of tremendous value and I can safely say that this thesis is all the richer for her contributions.

I would like to thank the University of Manchester School of Law for creating an environment in which I have always felt welcome, valued, and supported, not only in the context of my research, but also in the form of opportunities to develop my knowledge and experience of the academic world, not least through teaching. My thanks also to fellow PhD student and good friend, Dr Craig Prescott, not only for being an ever-present beacon of common sense, but also for his valuable insights into the political aspects of my work.

Outside of the world of academia, I would like to offer my thanks to Sacha Khamnei, a lifelong friend the likes of which I can scarcely believe I deserve. Without his support, the thesis in your hands now would not exist. In more ways than one, I truly owe my success to him.

Last, but by no means least, I must thank the two people who have spent the past several years wondering if their son will ever stop being a student: my parents! Rosemary and Mike Adamson have never stopped encouraging me to pursue my dreams and to make the best possible job of whatever it is I set my mind to. I can only hope that this work does justice to their faith in me.
For Grampha Geoff
Chapter 1
Introduction

As a term, ‘lobbying’ does not sit well alongside the concept of democracy. Quite the contrary in fact: the term conjures thoughts of anti-democratic behaviour, of large corporations determining the shape of law and policy, leaving the ruins of smaller interests and individuals in their wake. Indeed, comparatively few conceptions of democracy consider the activity to be legitimate. This thesis seeks to challenge this view, however, by providing a model of democracy in which lobbying can be justified. This is not to say that lobbying can be fully justified in its current form, however. Rather, a model of democracy based around a number of normative conditions will be presented; conditions which, if satisfied, would increase the democratic legitimacy of an important source of input into the crafting of law and policy.

Intellectual property has been selected as a frame of reference for this examination of lobbying for a number of reasons. Firstly, and perhaps most importantly, the world of IP is one of broad-ranging interests, from the individual consumer to the multinational corporation with many actors of varying sizes in between. The interests of those myriad parties will frequently cross paths, whether in a positive or negative way. One change to online copyright enforcement, for example, stands to affect internet users as a whole, those who choose to pirate content, those who prefer to purchase it legitimately, those who wish to parody or otherwise adapt well-known works, businesses sharing their internet access with employees or customers, internet service providers, rights holders, and many others besides. What’s more, the differences in resources – both financial and otherwise – to which those parties may commit to lobbying efforts are significant, making for an ideal forum in which to examine the equalities and inequalities of access and influence.

Secondly, IP represents a specialist policy area – one of which the average policymaker will have little knowledge or understanding. This allows one to explore the role of private actors as experts, demonstrating that they not only
input their own wants and needs into the policymaking process, but also helpful knowledge that lay policymakers may lack. In turn, this gives rise to further questions of subjectivity and objectivity and whether such knowledge can or indeed should be presented in a neutral way.

Thirdly, while many policy areas allow for the examination of both UK and EU law, IP presents the opportunity to examine both realms using three different examples that are somewhat temporally proximate and that illustrate well the high degrees of complexity and diversity at work in the policymaking landscape. Differences in the proverbial playing field may still be observed between the 2002 CII Directive and the 2011 Hargreaves Review, not least perhaps in the role of the Internet as a lobbying tool, however the subject matter – broadly speaking the challenges of twenty-first century IP policy – remains consistent.

The aim of this thesis, then, is to take an obvious premise: lobbying shapes IP law and to explore it in the context of three case studies from the world of IP, drawing conclusions from the lobbying in those case studies with reference to my own model of democracy that will be constructed on the basis of a detailed examination of prominent conceptions of democracy and governance. This will lead to the ultimate conclusion that lobbying, provided it is conducted properly, is a legitimate, valuable, and necessary part of democratic policymaking. The problem that will remain, however, is that the principal element that would make the activity proper is often absent: equality of access and influence.

It is within this context that the originality of this research and its contribution to knowledge lies. The empirical study of IP lobbying is not new in itself, but the consideration of the activity within the framework of a model of democracy built upon multiple conceptions is. Many studies highlight the fact that IP lobbying takes place, and examine how. Few have asked why, however, and whether it can be considered a democratic activity by re-examining one’s definition of democracy in light of contemporary policymaking realities. It is the goal of the research presented herein to do just that – to examine the meaning of democracy, presenting a model built upon pluralist traditions that
seeks to justify the input of stakeholders on the basis of that model, subject to a number of conditions.

The foundation of this conclusion centres around three key themes:

1. A model of democracy;
2. The importance of stakeholder input into the policymaking process; and
3. Equality of access and influence.

The case studies considered are as follows:

2. The 2010 Digital Economy Act; and

1. What is Lobbying?

Many will be familiar with the word, *lobbying*, however there is considerable debate over what the term truly means. Generally, however, lobbying is considered to be any attempt (whether successful or otherwise) by individuals or organisations to influence the form and/or content of policy and/or legislation. The focus of this study is the work of stakeholders and representative groups in a specialist area of law. Consequently, the emphasis on lobbying is as a component of *governance* and an important input into (not to say component of) the democratic policymaking process. Moreover, it is not a phenomenon that is necessarily limited to any one stage of that process. Indeed, it may be what brings about new law and policy, it may prompt or otherwise contribute to changes to existing law and policy, it may even result in the dismantling of existing law and policy. In short, *lobbying* may feed into the process at any stage, and in a variety of forms. Rather than viewing lobbying as a source of external pressure on policymaking, then, it may perhaps be better viewed as a part of it. Indeed, as the analysis in this thesis develops, this view will become clearer.

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Two other broad terms will be used throughout this thesis in reference to the lobbier and the lobbied: private actors and policymakers, respectively. A private actor is any party whose activities fit within the classification of lobbying as described above. The term private is used here to differentiate essentially between governmental and non-governmental actors and does not necessarily refer to a profit-making organisation. Thus, a private actor may be an organisation or an individual. They may be a third party consultant lobbyist, an in-house lobbyist, a lawyer, an individual representing their own interests, or anything in between. No distinction is made, for the purposes of definition at least, between corporations, charities, other voluntary groups, or individuals. A policymaker will be one falling into a similarly broad category. For our purposes, policymakers will principally refer to Members of either house of Parliament, senior civil servants, Members of the European Parliament, European Commissioners, or those representing member states in the Council of the European Union in its various configurations. In essence, therefore, a policymaker is one with an official role in crafting policy and/or legislation.

2. Setting the Scene

The practice of influencing policymakers through various channels has existed since long before the term ‘lobbying’ was used. Indeed, one can reasonably say that efforts by stakeholders to influence the law and policy governing them have persisted for as long as there has been law and policy. Indeed, a great deal of literature can be found which traces the practice through time. The fifteenth century, for example, saw a rise in the efforts of business and industry to influence policy, efforts spearheaded in particular by the long-standing London Livery Companies. Perhaps unsurprisingly, however, the interests of the lower social classes found little representation. Nevertheless, the history of lobbying is not least a story of increasingly open access to policymakers. It is evident from the accounts by those such as Peacey that by the mid-

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1 Although it must be noted that no such individuals were interviewed and limited discussion is thus given over to them.
3 See, for example, Gwilym Dodd, Justice and Grace: Private Petitioning and the English Parliament in the Late Middle Ages (Oxford University Press 2007), 208-216.
seventeenth century, public access to policymakers had increased substantially, prompted in no small part by the increasing availability of information. Furthermore, the role of the press, however hampered it may have been in its early years by censorship, must not be underestimated.

The growth of what we would now recognise as lobbying continued apace, with the increasing use of private bills and the active involvement in politics of those with outside interests – a particularly prominent example of such being those MPs with an active involvement in the growth of the railways throughout the 1800s. If the levels of lobbying seemed significant in the lead-up to the twentieth century, however, they were nothing compared to what would grow over the coming hundred years. Over the first half of the century, the number of lobby groups grew significantly. Finer notes that by the late 1950s there were some 2500 trade associations active in the UK. The early twentieth century, it seems, was also a period of amalgamation; resulting in stronger groups which were clearly better equipped to pack a more powerful political punch. Much of the story of lobbying in the twentieth century is also one of increasing cooperation between public and private actors – a theme particularly prevalent in IP policymaking today, as will be seen in the case studies that follow.

What, then, of the history of private influence over IP law and policy? The notion that an idea could become a form of property lies at the very heart of intellectual property. It is surprising, therefore, that the origins of IP law, which certainly predate the term itself, lie much further back. The arrival of the printing press in the fifteenth century heralded significant change in the law, for while mass copying had still been possible before mechanisation, each

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manuscript copy could be seen as unique – a piece of personal property in itself.\footnote{Harry Ransom, The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710 (University of Texas Press 1956). 21.}

A monopoly right thus emerged out of the printing industry, at least in part, some submit, due to the need to protect the right to make copies of works in order to ensure profits.\footnote{Thomas B Morris, ‘The Origins of the Statute of Anne’, 12 Copyright Law Symposium (1963). 229.} As against this, however, it should also not be forgotten that the Crown oversaw strict policies of censorship.\footnote{For a more detailed discussion, see ibid.}

The long-held monopoly of the printing trade, not least in the form of the Stationers’ Company, would eventually be broken by the Statute of Anne in 1710. One should, however, be wary of viewing it as a great endowment of rights upon authors. Indeed, as Feather observes, ‘the so-called Copyright Act of 1710 mentions neither copyright nor authors;’ describing it as ‘little more than a codification…of existing book trade practices’.\footnote{John Feather, From Rights in Copies to Copyright: The Recognition of Authors’ Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries’ (1992) 10 Cardozo Arts & Entertainment Law Journal 455. 472.} Moreover, it was not so much that the Statute of Anne gave copyright to authors but that it gave copyright to everyone. Indeed, as Patterson notes, throughout much of the Act, ‘the term “author”…was always used alternatively with the terms “purchaser of copy,” “proprietor of copy,” “bookseller,” or “assignee”.’\footnote{Lyman Ray Patterson, Copyright in Historical Perspective (Vanderbilt University Press 1968). 145.} Despite this, however, the voices of authors were in fact not merely present but significantly so.

Morris, for example, cites the legend that Jonathan Swift himself drafted the original Bill that would ultimately become the statute.\footnote{Morris (n11) 255.} Legend or not, we can at the very least assume that Swift had some considerable influence. Of other notable literary figures, Daniel Defoe is also said to have argued against the inclusion of an abridgements exception in the Statute.\footnote{Alexandra Sims, ‘Appellations of Piracy: Fair Dealing’s Prehistory’ [2011] Intellectual Property Quarterly 3. 6.} Unsurprisingly, this would not be the last time that notable authors’ names appear in the realm of copyright policy-making.
Moving forward through time, of particular interest is William Wordsworth. Like many of his contemporaries, Wordsworth was not at all satisfied with the law as it then stood under the 1814 Copyright Act. Whilst the 1814 Act had undoubtedly represented an improvement for authors, having increased the term of copyright protection, it still did not adequately serve the interests of authors who sought to leave something behind for their families, the term expiring as it did, on the death of the author.

In the 1950s, Zall brought to light a body of documentary evidence, hitherto undiscovered, showing the significance of Wordsworth’s role in the crafting of the 1842 Act. Far from being a mere lobbyist, one could almost describe Wordsworth as a co-author. The bill that would eventually become the 1842 Act had a far from smooth passage thanks in no small part to strong counter-lobbying from the various parts of the publishing sector, and would indeed be reintroduced on many occasions before it finally met with success. Throughout this time, the working relationship between Thomas Noon Talfourd – the bill’s chief proponent – and Wordsworth would be a close one with a considerable degree of mutual support in their efforts to make their vision of copyright a reality. As one may observe, the parallels with the involvement of the BPI in the crafting of the Digital Economy Act as shown in Chapter 4 are indeed quite remarkable. What’s more, the press – both in the realms of specialist trade publications and the broader mainstream – played a considerable role, many (perhaps unsurprisingly) taking the side of literary men rather than authors. Once again foreshadowing modern practice, not only did the press play a role as a reporting channel (and, it seems, a selective and biased one at that), but also as a lobbying tool.

Similarly, in the world of patents – the second IP right receiving significant focus in this thesis – history is replete with evidence of external influence. It is somewhat lamentable that the literature reveals few specific examples of such influence, leaving much to supposition and speculation; but the role of

17 Paul M Zall, ‘Wordsworth and the Copyright Act of 1842’ (1955) 70 PMLA 132.
18 Catherine Seville, Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act (Cambridge University Press 1999), 75-84.
19 ibid 133.
emerging technology and the growth of a system of monopolies is clear. What began as a monopoly system designed by the Crown to encourage the importation of new trades and industries, evolved over the centuries into one designed to encourage the domestic development and invention of the same. In its various forms, it is clear that the central influence has always been the advancement of the economy. In some cases, those with direct interests in the economy and its various facets – in particular trade and industry – would have certainly sought influence, whether directly or indirectly. Key themes of influence – responding to changes in technology, the role of external actors in informing and pressuring policy-makers, the disparity between large and small interests, and indeed the role of the press have clearly been present, albeit in sometimes embryonic and slowly evolving forms, throughout the history of law and policy development in IP.

3. Core Themes
Emerging from the foregoing discussions, the following core themes will emerge – themes which remain broadly consistent across all three policy contexts considered in this thesis. Each will be returned to in detail in the conclusion chapter, however a brief summary now serves as a useful introduction.

3.1 A Model of Democracy
The central theme of the thesis as a whole is the model of democracy set out in Chapter 2. Many conceptions of democracy are considered in order to draw up a contemporary model under which the involvement of private actors in the policymaking process can be satisfactorily justified as a democratic exercise. The second core theme of this thesis, the importance of such input, necessitates such a justification given that without a practice that is often considered anti-democratic, a great deal of specialist law and policy could not adequately serve those subject to it. As will be seen, the involvement of private actors in


21 Chapter 6, 251.
democratic governance is directly at odds with the classical notion of individual citizens being protected from the dominance of more powerful individuals or organisations by government. The task for my own model, therefore, is to illustrate the argument that such logic can no longer be applied in the modern multi-tiered, multi-national, multi-faceted world. Any piece of IP legislation must inherently favour the interests of one affected class of individuals or businesses at the expense of those of another, albeit at the same time striking as much balance as possible. To strictly adhere to classical conceptions of democracy, however, would preclude the possibility of those whose very survival is at stake (rights holders, creators and so forth) communicating their wants and needs to policymakers. The essence of this thesis’ approach to democracy, then, is emphasise the pluralistic nature of society and of the policymaking landscape. As will be seen, however, the model is not without qualification and imposes a number of conditions which seek to ensure that equality is preserved, that is, in essence to avoid the weak being dominated by the strong; the universal core of democracy.

3.2 The Importance of Stakeholder Input

As noted above, the need to explore a democratic justification of lobbying and this, the second theme, go hand-in-hand. The value of stakeholder input into the policymaking process, whether it is subjective or objective, will be shown to be of great value, particularly in a specialist niche like IP. Subjective input in this regard has great value as it provides what may be loosely termed an impact assessment which may subsequently be considered and factored in to policy and legislative decision-making. The risks of subjective input, however, must also be considered, not least the issue of inequality of such input. Subjective information can, it will be argued, only truly benefit democratic policymaking if policymakers are furnished with information from all classes of those affected. As will be acknowledged, the resulting law and policy may still need to favour the more economically powerful interests due to their value to the economy; but the assessment that arrives at such a conclusion can only be a balanced one if the wants and needs of those less powerful interests are also heard, listened to, and understood.
3.3 Equality of Access and Influence

If the second theme represents the present situation, and the first represents a solution, then the third theme most certainly emerges as the problem with the present situation. Equality, or perhaps inequality, forms the basis of the third core theme. As history shows, the story of access and influence is one of ever-broadening range. Nevertheless, it will be observed that the present reality is not one of universal access and influence. IP law and policy have significant implications for actors of all sizes, from the individual citizen to the largest multi-national organisation. Those implications, however, will differ significantly and what works for one may not work for the other. The evidence at present points to the proverbial scales tipping in favour of larger interests. This will often be a case of resources – strength in numbers, financial means, and political know-how. As will be seen, however, this is not the only reason for inequality. Indeed, some suggest that the lack of involvement of smaller private actors in the policymaking process may be something of a self-fulfilling prophecy: they do not think they will be heard, and thus do not try.

Transparency will be addressed under this heading too, not least because of its potentially useful role in highlighting inequalities in lobbying activity and, in so doing, input gaps that should be remedied. The notion that some form of regulatory framework for lobbying, on a statutory rather than self-regulatory basis, may not only assist in ensuring good conduct, but may also, if properly designed, provide an instructive element, with more formalised procedures for access to policymakers, that would assist those external actors with fewer resources in gaining more effective access and influence.

Of further importance in identifying remedies for such inequality is the observation that selecting the right target can be of great assistance, particularly to those who desire to influence the law and policy that affects their affairs, but lack the means to reach the most senior policymakers involved. As will be seen, particularly in the EU context when examining the ill-fated CII Directive, some doors will still be open to the less well-resourced actor and can be used to great effect; however, knowing where to look (or rather not knowing) can, it is argued, mean that barriers to entry effectively remain in place.
Within this theme, the importance of grouping together – strength in numbers – will also be considered. As is illustrated well in the case of the CII Directive, by grouping together in coordinated campaigns, myriad smaller voices can coalesce into one larger, louder one. Moreover, further positive steps can be seen in the form of the Hargreaves Review actively reaching out to smaller stakeholders, ensuring that their knowledge and experience was factored into policy recommendations. As will be seen in that example, however, in the absence of further controls on lobbying, business as usual may have nonetheless continued to tip the balance toward those stakeholders with more resources.

4. A Matter of Method

Having established the broad themes identified and addressed in this thesis the issue of methodology must now be addressed. As already explained, central to this piece is a series of case studies, examining three very different sides to IP law and the input of external actors into the policymaking process in each case. The notion of using case studies as a focal point was established from the very beginning, as was the desire to incorporate empirical research, gathering first-hand accounts of the experiences of those involved on both the external and internal sides of the lobbying and policy-making equation. Moreover, as will be seen, of central importance is the theoretical lens through which the case studies will be viewed: the model of democracy.

The goal in this case has been to provide an insight into the process of law making that will be of practical value and interest to all concerned and, most importantly, evaluating a practice that, while common and useful, is scarcely considered a valid component of democracy. As is noted above, particularly within the realm of IP, while there is considerable material examining lobbying, there is little which evaluates its democratic merits in that context. Many, particularly in the press, remark, for example, on the influence of media corporations on copyright policy but the examination often stops there. Motives are not questioned, the true balance of the debate is scantily addressed,

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and the academic focus generally rests more on substantive IP law and policy aspects than on the democratic implications (and indeed justification) of lobbying as a practice in the realm of IP.

4.1 **Quality vs. Quantity**

A key decision to be made when designing research is whether to use qualitative or quantitative methods. Means of distinguishing the two are many. Two particular distinctions of relevance here are drawn out by Bryman. Quantitative research tends to view the social world as something which is pre-constructed – a static social reality which exists independent of the actors within it. Qualitative research, on the other hand, takes the view that reality is constructed socially. Qualitative research, then, focuses on how the social world is constructed or – in this case – the *whats, wheres, hows* and *whys* of IP policymaking and the influence that external actors have upon the process.

Other distinctions can be made, such as those made by David & Sutton. Qualitative research focuses on words; quantitative on numbers. Qualitative research generally eschews coding systems unlike its numerical counterpart and focuses more on ‘feelings, values and attitudes’ as opposed to data which can be recorded and manipulated in numerical form. Perhaps most significantly of all, qualitative methods suit an inductive approach to one’s research as opposed to one which is deductive.

A deductive approach to research begins with a theory and/or hypothesis, which then requires evidence in order to prove it. An inductive approach, in essence, turns the formula on its head and begins with an observation, moving upwards through data gathering and analysis, finally concluding with a hypothesis and a theory. In this instance, a deductive approach will be taken; starting with a theoretical model of democracy that seeks to justify lobbying, then critically examining the lobbying taking place in each case study in light of that model.

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This is not to say that quantitative methods and social research are inherently at odds – far from it. Nevertheless, a further distinction, or at least a choice, has been based upon the number of respondents or – to put it in quantitative terms – the size of the sample. A case study approach, such as the one adopted for this study, would seem to naturally lead to smaller samples. Far from being an investigation of a broad social phenomenon requiring the gathering of responses from a large sample of the population, the case study approach taken for this thesis focuses on three contrasting yet related examples of IP policy-making and on figures who each played a significant role in those examples.

The aim of the research presented in this thesis is not, then, to produce a broad set of data that can be compared, contrasted, and reported via a series of algorithms. Rather, the nature of the case studies and the questions designed to underpin them have been designed to yield responses which are varied and unique, each based upon the experiences and opinions of those interviewed.

### 4.2 Why Case Studies?

In simple terms, this question can be answered with the following passage from David & Sutton: ‘Case studies are distinguished from surveys in that they are primarily designed to investigate specific cases in depth’.

When examining the case study as a method, Yin notes that a case study can be explanatory, exploratory, or descriptive. Defining the case study approach as a whole, Yin offers a technical definition: ‘A case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context… The case study inquiry copes with the technically distinctive situation in which there will be many more variables of interest than data points…’

How, then, does this technical definition fit with the examination of external influence in the IP law and policy-making process? External input of many forms and from a broad range of interests is ever-present in the process and the

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25 See also a similar justification noted by Bryman, citing Scase and Goffee’s work: R Scase and R Goffee, The Entrepreneurial Middle Class (Croom Helm 1982), 198, as cited in Bryman (n23) 106.
26 David & Sutton (n24) 111.
case study represents the best way in which to examine this phenomenon by learning more about the experience of those involved in that process. Furthermore, one may in fact argue that the phenomenon (lobbying and its impact on the shape of IP law and policy) and the context (the policymaking process itself) can be seen as integral. The all-encompassing nature of the case study approach, therefore presented itself as uniquely fit for purpose given the overall goal of this thesis.

Returning to Yin’s reference to variables outweighing data points, this has indeed proved to be the case in this study. It is the variables, in this instance, that provide the insight into the world of IP lobbying. It is the unique experiences of each participant that provide richness to each narrative. As is inevitable in the realm of empirical research, requests for interview participation did not in every case yield a positive result. Whilst this may have deprived the case studies of certain degree of background and quite certainly of richness, it has not, it is submitted, resulted in any loss of insight. The overall view of lobbying presented in the chapters that follow is, in the broad view, a uniform one – of a practice that is, and indeed needs to be, part and parcel of policy and law making. The *colouring* of that view is what varies. A greater number of interview respondents would, therefore, have been particularly desirable; however only insofar as the stories told through the case studies would have been richer in personal experiences.

Turning to the matter of multiple sources of evidence, this study relies not only on the first-hand accounts of those involved in the case studies, but also on a range of secondary data, upon which further discussion into issues raised by the primary data is based. Most importantly, the theoretical background provided in the following chapter enables a normative examination of the issues raised in the case studies. Furthermore, not only is the data underpinning the discussions drawn from different sources, it is drawn from different contexts. In so doing, not only is one able to compare the influences at work in a policy review, in a piece of domestic legislation, and in a piece of EU legislation, but one may also observe that, despite the inherent differences in these forums, consistent themes arise.
4.3 Gathering Data

The empirical element of each case study was a two-stage process. Documentary research was undertaken in the first instance in order to provide not only the back story presented at the beginning of each chapter, but more importantly as it pertained to the empirical work, to identify those external actors and policymakers whose involvement would place them in a suitable position to provide useful insights into the process. In so doing, the aim has not been to produce a comprehensive account in any one case, but rather to paint a broader picture of the influences at work in the area.

For the Hargreaves Review, respondents were drawn both from the Review’s panel and from MPs who had had some form or role in, or interaction with the Review. Those who submitted evidence were not approached in this instance as the very nature of the Review made their contributions highly transparent. It was thus preferable that the inside accounts gathered should bring about new evidence and information not otherwise available. Some eleven individuals were approached with requests for interviews, of which four agreed to participate.

In the case of the Digital Economy Act, both policy-makers and external actors were sought out, each category offering insights from both sides of the lobbying equation. Fifteen requests for interviews were made in this case, including one to the man responsible for initiating the bill, Lord Mandelson. Of the four that agreed to give interviews, regrettably he was not one.

For the CII Directive, the initial preference was to duplicate the approach taken for the Digital Economy Act; however, it soon became apparent that individuals involved on the policy-making side would be spread widely across the European Union and time consuming to locate. Moreover, in light of the discovery of the comprehensive account of the lobbying surrounding the Directive given by lobbyist Florian Mueller, it was decided that the more interesting story surrounding the Directive in fact lay in the bitter lobbying battle surrounding it and that that in itself would provide not only a clear illustration of the lobbying which took place, but more importantly the differences in approaches taken by two very different economic classes of
external actors. Taking account of the foregoing, including the lower response rates from the previous two case studies, both of which were conducted before this one, fewer individuals were approached – a more focussed approach was taken. The result, however, was again less than expected with only one individual agreeing to an interview. The focus on external actors notwithstanding, it is with some regret that the Directive’s first rapporteur, Arlene McCarthy MEP, was among those who declined. The resulting narrative, therefore, whilst still providing considerable detail on the EU policy-making landscape, draws on secondary material for such commentary.

4.4 Style and Substance

Qualitative interviewing as defined by Mason is characterised by an informal style and is more of an open conversation than a structured interview. The chief benefit of such a style is that it allows for depth and breadth in the data gathered. Its flaw, however, is that data may end up being too difficult to compare and contrast. The interview design ultimately chosen, therefore, guards against such an eventuality by adopting a semi-structured approach.

From an epistemological perspective, interview design required an inherent flexibility to allow for differences in personality, background, role and experience. Some respondents, for example, were both warm and enthusiastic in their approach and freely offered opinion alongside fact. Others were notably more guarded, occasionally verging on defensive – perhaps inevitably, one might suggest, given the arguably poor image of lobbying in the minds of the general public. From an ontological perspective, obtaining accounts of respondents’ views and opinions was vital – exploring, in an inductive manner, the central premise that lobbying forms a key part of the policy-making process and forming the basis for the central themes identified throughout.

The form and format of the interview questions thus presented a challenge insofar as the questions had to be sufficiently uniform to yield data that could be compared and contrasted both within each narrative and between each narrative, yet sufficiently open to enable a degree of free and frank discussion.

Such design would not in itself present a significant difficulty, save for the correct assumption that a time frame in the region of twenty minutes would be all that most participants would be prepared to offer. This indeed proved to be the case for the most part, however by fortunate happenstance, two interviews continued for more than twice that time. The resulting interviews, therefore, all sought to extract information based around the same broad themes. Policymakers were asked the same questions as one another; external actors were asked the same questions as one another, which, in turn, were broadly similar to those, asked of policymakers. Some interviews followed the structure more closely than others; however, all yielded information that has been invaluable to providing rich first-hand detail in each case study.

4.5 Objectivity and Subjectivity – The Balance of Fairness

A key issue to be aware of both when designing interviews and when conducting them is bias. Bias, or rather the avoidance of it, is of importance and relevance when considering the viability and reliability of data, not to mention the ethics of collecting and using it. Nevertheless, it should be made clear that one type of bias was both welcome and crucial in this study – the subjective opinions and experiences of different respondents.

Most importantly, bias must be avoided in the construction of the interview questions. Whilst one’s own opinions and arguments will form an important component of one’s critical analysis of the data gathered, they must be set to one side when preparing to collect that data. Questions were therefore designed in as neutral-a-way as possible.

Following directly on from the issue of question design, is the importance of conducting interviews in a fair manner. The open interview format can be extremely beneficial; however, notwithstanding Mason’s contention that it can produce fairer and fuller answers, there is a risk that bias can have an unwitting influence. Without meticulously thought-out pre-defined questions an interviewer’s own bias may sneak up on them during an interview, resulting in questions (and thus answers) leading to data that is unfair and unbalanced.

30 ibid 42.
Indeed, as Payne & Payne observe, structured questionnaire-style interviews use standard questions to the effect that no bias is introduced whereas ‘Interviewer bias is a frequent accusation made against depth interviewing’.

In light of such concerns, the interviews themselves were conducted in a manner designed to engender trust and confidence. Lobbying is, as noted above, something of a touchy subject – more so for the lobbied, perhaps, than the lobbyists – and was therefore handled with care. Personal views which, it should be noted, were in fact modified over the course of this research, were kept out of the interviews and questions were asked in a neutral fashion, avoiding any biased or provocative edge to their content and tone.

4.6 Questions by Design

Taking into consideration the factors discussed above, then, we come to the design of the interview questions. Prior to designing the questions themselves, it was important to consider the desired outcome. Each interview aimed to deliver the following information:

- Details of the respondent’s overall role in the case study;
- An account of the respondent’s role in shaping and/or influencing the relevant legislation (or review);
- Details of the respondent’s interaction with other actors (whether external or internal);
- Recollections of the actions of other actors from the respondent’s perspective;
- Details of the respondent’s motivations for their actions;
- Details of the respondent’s views on the external influences on policymaking; and
- Details of the respondent’s views on the regulation of external influence on policymaking.

The information listed above was thus sought using a series of standard questions with an open format and the possibility of free form, conversational...
follow-ups. Such follow-ups were not always pre-planned and instead were based upon the answers given to the opening questions. Model question matrices used as the foundation for each case study are included in this thesis as Appendix 1. Given the open form of the interviews, some followed the question format more closely than others. In many cases, it was the interviewee that opened up the conversation, providing useful insights particularly into their views on the role and importance of lobbying. Interviews, whether conducted by telephone or in person, were recorded and are now stored securely, along with the written transcripts and while no such material is included in its full form in this thesis for reasons of anonymity, all will be kept on file for no more than five years from the date of creation.

4.7 Confidentiality & Anonymity

Given the politically sensitive nature of the case studies, certain respondents requested anonymity. Through the use of appropriate documentation and technical methods – including the storage of interview recordings in encrypted file containers – and compliance with the University of Manchester’s UREC requirements,33 anonymity was assured on what one may call a technical level.

From a practical standpoint, however, additional issues arose. While ensuring that the reality and truth of a particular narrative remains as unaffected as possible, in certain cases the names of participants have been anonymised as, in one particular instance in the case of the CII Directive, has the name of an organisation. Further care was also taken to ensure that identification by deduction would be rendered difficult. An anonymised MP, for example, is quoted as telling lobbyists that he would not be standing in the 2010 general election. He was, however, one of over 140 MPs standing down at that time. In the case of the CII Directive, a large multinational software company has been re-christened Initech. The homage to the cult classic Office Space notwithstanding, the company in question was one of many such multinationals lobbying in favour of software patentability at the time and it was thus determined that this would provide sufficient anonymity both for the

33 Current at the time of application for UREC approval, September 2011.
company itself, and for the individual interviewed. Anonymised names bear no relation to the real names of the individuals concerned.

5. Thesis Outline

Serving as something of an icebreaker into the topic of IP lobbying, the story begins – perhaps a little unconventionally – with the background to English IP lobbying included in this introduction. While brief and largely confined to copyright, this section demonstrates that influence of some form, whether direct or indirect, has always been at work in shaping IP law and policy, from the emergence of printing technology, through to the deep involvement of well-known literary figures in the crafting of legislation.

Chapter 2 forms the basis for the central element of this thesis: my model of democracy. Founded upon a range of literature on definitions of democracy and governance, the focus of the model is to justify lobbying from a democratic perspective. As will be seen, the justification is heavily qualified and imposes a number of conditions that are yet to be fully realised in the real world. This will ultimately lead to the conclusion that while the involvement of private actors in the policymaking process is a vital element of democracy, the way in which it currently takes place leaves much to be desired.

Chapter 3 considers the Hargreaves Review from the perspective of those involved, with particular focus on how the evidence upon which the review’s recommendations were founded was gathered. As will be seen, while the review sets a useful example in terms of balancing out some of the inequalities in the lobbying landscape, ample opportunities for traditional lobbying remain.

Chapter 4 looks at the IP provisions of the Digital Economy Act and the lobbying surrounding them. Not only will this chapter illustrate something of a lobbying deadlock between rights holders and internet service providers – one since resolved outside the scope of the hard-fought legislative framework – but also the missing pieces of the puzzle: input representing individual consumers.
The third and final case study, the CII Directive, is addressed in Chapter 5. Taking a moderately different empirical perspective, based on accounts from opposing sides of the lobbying battle over the ill-fated legislation, topics of particular interest include an exploration of the motives of one of the Directives key proponents, IBM, the lobbying landscape of the EU, and the differences in lobbying approaches taken by the opposing camps, benefitting in particularly rich detail courtesy of a unique account written by noted open-source advocate, Florian Mueller.

Finally, Chapter 6 concludes the thesis, drawing together and considering in more detail the themes running throughout, as summarised above. In each of the three different contexts – a policy review, a piece of domestic UK legislation, and a piece of EU legislation – many common issues arise, contributing to the overall view that lobbying could be justified as a vital component of democratic policymaking but that whilst the inputs currently made by private actors should remain, in the absence of further measures to improve equality of access and influence to policymakers, the contemporary lobbying landscape cannot fully satisfy the normative conditions established in the Chapter 2 model.

In many ways, this thesis represents not only an examination and critical analysis of key themes surrounding lobbying in a specialist policy area, but also a journey of discovery. While the opening premise of the thesis has remained constant throughout, my own stance on that premise has evolved from one not entirely dissimilar to the widely-held public cynicism, to one seeing lobbying as a valuable component of the policymaking process – indeed one that intellectual property and many other law and policy areas – could not do without. The failure of real-world lobbying practice to satisfy the normative conditions imposed in the follow chapter, however, will not ultimately lead to the most celebratory of conclusions.
Chapter 2
Conceptions of Governance and Democracy: A Contemporary Model of Democracy

The concept of democratic governance is an old one, and one which has taken many different forms as it has evolved. At the centre, however, is the key notion that the weak must be protected from domination by the powerful and that government should exercise its power (as authorised by the demos) to achieve that end. As will be seen, classical models of democracy emphasise the role of the individual citizen, and do not allow for the notion that any other kind of private actor can be viewed in quite the same way. This indeed remains a keystone of democracy but as will be seen, what was once a relatively simple hierarchical arrangement, has evolved over the centuries to become a great deal more complex, both in terms of the actors involved and the subject matter of law and policy.

This chapter begins by exploring governance, then proceeds into a detailed examination of democracy, what it has meant historically, and what it means (and is) today. The ultimate goal is to draw upon a number of prominent definitions of governance and democracy with a view to presenting a model that not only allows for lobbying, but that positions it as an important and necessary part of democratic policymaking. The model will reflect current practice in many ways, while also imposing a number of conditions, many of which are regrettably yet to be realised.

1. Governance
To begin, then, what is governance? The first part of this chapter will explore multiple conceptions, but at the core, governance is the action of government. It is, in essence, both what government does and how it does it. The concept of governance goes beyond the simple formulation of government overseeing the
governed, and shows how involved the governed have become in the work of
government, not only from the point of view of law- and policymaking – the
focus of this thesis – but also with respect to service provision (in other words,
privatisation). Rather than viewing government simply as a body that sets
rules for the rest of society to follow, some conceptions of governance prefer to
view government as steering society, indicative of a lighter touch perhaps, but
also allowing for the fact that the governed will have a say in shaping the rules
under which they will live and work.

In the policymaking context, private involvement is significant. Private actors
play a key role in the shaping of policy and legislation (intellectual property
policy and legislation in the context of this thesis). As Kooiman has argued,
the traditional ‘one-way’ or top-down operation of government, the
government governing the governed, has given way to a ‘two-way’ model. Ultimately, I will argue, this is both necessary and positive, particularly given
the increasing range and complexity of matters over which our policymakers
now preside. As will be seen, in order for law and policy to work for those
subject to it, and to be accepted by them, it must be formulated in such a way
that factors in and balances their wants and needs.

Another key concept that must be understood at the outset is that of policy
networks. As with the term governance itself, the different definitions given to
policy networks are numerous; however, Rhodes provides a useful, general
definition as a starting point:

Policy networks are sets of formal institutional and informal
linkages between governmental and other actors structured
around shared if endlessly negotiated beliefs and interests in
public policymaking and implementation. These actors are
interdependent and policy emerges from the interactions
between them.²

² RAW Rhodes, ‘Policy Network Analysis’ in Robert E Goodin, Michael Moran and Martin Rein (eds), The Oxford Handbook of
Rhodes has also outlined some key points which help to explain the importance of policy networks in the study of governance:

- They limit participation in the policy process.
- They define the roles of actors.
- They decide which issues will be included and excluded from the policy agenda.
- Through the rules of the game, they shape the behaviour of certain actors.
- They privilege certain interests, not only by according them access but also by favouring their preferred policy outcomes.
- They substitute private government for public accountability.

It is, then, the relationships between the actors in the process that are important. This applies not only to those which may be termed vertical relationships – for example, the policymaker and the private actor – but also horizontally, between private actors, and between policymakers. The policy network approach, with its focus on the links between institutions has been criticised for this insofar as it excludes the actual policy outcomes that result from the process. Far from excluding the outcomes, however, it is submitted that in order to understand the output of a process, one must also understand both the inputs and the process itself. A typical account of policy networks, then, may not lend focus to the resulting policy; but the insights that it provides into the process behind it will result in a greater understanding of it.

It is also helpful to consider different types of state, in order to categorise the more horizontal relationships. Jørgensen suggests a number of different types: the hierarchical state; the autonomous state, the negotiating state, and the responsive state. The latter has three further sub-categories: the supermarket state, the service state, and the self-governing state. Of these, the types one and three merit further detail in the context of this thesis.

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4 ibid 12.
The *hierarchical state* is that which we would most instantly recognise in the United Kingdom. Parliamentary government, bound by constitutional rules on elections, parliament, and government lies at the centre (or indeed the top) of this model. Below government, citizens are treated as subjects (except during elections when their role is to elect politicians). Ostensibly, this is the model in place today. In reality, however, subjects are at the very least multi-tiered and the relationships between government and private actors, more horizontal in nature. Many individuals and organisations exert influence on government (or at least seek to do so), often having a very active role in shaping law and policy. What, then, can the other types of state offer to better reflect this?

The *negotiating state* arguably reflects reality rather better. This type of state, according to Jørgensen, ‘is up against many interests such as industrial organisations, labour-market organisations, and employee organisations’ and its task is to negotiate with (and between) these diverse interests. This model also portrays public organisations (such as the IPO or EPO in the IP context) as mediators for the multitude of private actors. The model is inherently less hierarchical, and horizontal relationships play a significant role. As will be seen in the case studies presented in this thesis, this model presents an attractive portrayal of the policymaking landscape and one which will provide an important foundation for my own model, detailed below. Ultimately, however, one must argue that the true picture of policymaking lies somewhere between the hierarchical and negotiating models, in some cases varying from one policy area to another or indeed from one piece of legislation to another within the same area (indeed Jørgensen himself acknowledges this).

With a considerable amount of literature on governance focusing on privatisation or public-private partnerships, it is not surprising to see suggestions that the dividing lines between the public and private sectors are becoming increasingly blurred. Kooiman, for example, suggests that while this may not mean that the role of government is shrinking, it is perhaps shifting.

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6 ibid 220.
7 ibid 222.
8 ibid 224.
Such a shift is in reference principally to service delivery rather than policymaking, however it is perhaps arguable that a similar trend is evident. Ultimate responsibility for creating and implementing law and policy remains with government, however the degree to which private actors contribute to that process is significant.

A further area of importance is whether private actors are actually effective. While their role in governance is emphasised throughout, it must first briefly be considered in broad terms how effective such actors are in that role. It is clear at the outset that some are more effective than others, and indeed this will be a recurring theme throughout the case studies. Young considers the effectiveness of international institutions and in so doing, provides some insights that may also be applied to lobbying. An institution, suggests Young, ‘is effective to the extent that its operation impels actors to behave differently than they would if the institution did not exist…’ The same can arguably be said of private actors, for if the actions of policymakers are changed as a result of lobbying by a particular actor (or group thereof), one can say that that lobbying has been effective. Another measure takes a problem-solution approach and can be particularly useful in evaluating the effectiveness of a group or organisation formed in response to a particular issue. Indeed, a clear example of such a group will be seen in Chapter 5 in the form of a campaign movement which formed in opposition the issue of software patentability. For Young, the important question here would be: ‘Has the operation of the institution solved or alleviated the problem that led to its formation?’ Looking at interest groups or individual actors subjectively, such questions provide useful answers. From a democratic perspective, however, one must consider the impact on others likely to be affected the law or policy in question. As Young points out, effectiveness and equity are not the same thing.

As will be discussed in greater detail below when considering democracy, an important part of the problem is not the practice of lobbying per se. Indeed, as my own model will posit, lobbying should be viewed as an important and

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11 ibid 162.
12 ibid 164.
necessary component of democratic policymaking, not as the antithesis of it, and certainly the various modes of governance discussed in the first part of this chapter illustrate this role well, along with the accompanying change in the shape of governing. That position, however, is subject to several provisos, many of which are yet to be realised in the real world. Indeed, Young makes the important point, equally applicable to lobbying, that ‘Sharp asymmetries in the distribution of power (in the material sense) among participants circumscribe the effectiveness of international institutions’.\footnote{ibid 185.}

The asymmetry of power can result in those with greater resources tipping the balance in their favour while smaller concerns and individuals may struggle (or indeed fail) to make themselves heard by policymakers. The more symmetrical the power balance, the more difficult it will be initially to establish what Young refers to as institutional arrangements but, he suggests, those arrangements will be more effective once they are established. Symmetry increases transaction costs owing to the need to reach consensus, but it helps to safeguard against any one entity having sufficient power to tip the balance in their favour (and, thereby, against others).\footnote{ibid 186-187.} Such reasoning can similarly be applied to lobbying and, as my own model will emphasise, equality of access and influence is of vital importance if lobbying is to be democratically legitimised.

### 1.1 Definitions of Governance

The deceptively simple general definition of governance provided above notwithstanding, the literature in this area offers up a range of different conceptions of governance. Among these, as will be seen, some are more positive than others when it comes to the involvement of private actors in the work of government.

One view on modern governance is that we are witnessing a ‘hollowing out of the state’\footnote{RAW Rhodes, ‘The Hollowing out of the State’ (1994) 65 Political Quarterly 138.} or, put simply, that government is having its key policymaking roles usurped by private actors. Models of governance and democracy today must,
therefore, take this into account and it must be considered whether this is a negative or simply the next stage of democratic evolution. Pierre phrases the question thus:

Is it the decline of the state we are witnessing, or is it the transformation of the state to the new types of challenges it is facing at the turn of the millennium?

Similarly, Zacher questions whether non-state actors could eventually replace states on the world stage. While Zacher suggests not, or at least not in the near future, it is submitted that the global influences on policymaking in areas such as IP suggest that this may in fact already be well underway. Rhodes, meanwhile, notes Held’s argument that internationalisation has contributed to the hollowing-out of the state, particularly where it comes in the form of international law, the existence of international organisations, and hegemonic powers and power blocs.

To an extent, it is submitted, the answer to such questions turns entirely on one’s view of the state and on governance. If the state can only be perceived as a vertically-oriented, hierarchical entity, then we have been witnessing its decline for quite some time. If, on the other hand, the state can be defined as an entity that evolves along with the wants and needs of its subjects, then its role remains important, albeit in perhaps a more horizontal relationship with those subjects. How this question is answered forms a key element of the model of democracy upon which this thesis is based in light of my aim to provide a model that emphasises the value and legitimacy of lobbying without undermining the importance of democratic governance.

Pierre highlights two overarching conceptualisations of governance. The first he labels state-centric and argues that under this approach, the key question

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asks, ‘to what extent the state has the political and institutional capacity to “steer”’. The second approach, the *society-centred* approach, focuses on ‘co-ordination and self-governance…manifested in different types of networks and partnerships’.” In other words, option one sees the role of government as steering through law and policy while option two sees government more as an arbitrator weighing up competing interests through policy networks.

Some go beyond *steering* and *hollowing-out* to suggest that the idea of governance is anti-democratic. Hirst, for example, notes that many see governance as anti-democratic – as a threat to classic democratic government – and something that is particularly relevant in technocracies where elite actors are dominant.” Given the extensive involvement of private actors in complex policy areas such as IP, this is arguably quite applicable in the present context. Whether or not the anti-democratic criticism is justified, however, is not so clear.

Anti-democratic or not, Hirst considers governance in some detail. Five different meanings of governance are considered in his work *Democracy and Governance*, of which the first and fifth are of particular interest here. The first meaning is *good governance*, ‘creating an effective political framework conducive to private economic action’. To be *good*, the state must limit the scope of its own actions to what it can actually accomplish or, in simpler terms, the state should provide the essential framework, and allow the market to take care of the rest. Hirst’s fifth meaning of governance refers to the coordination of activities ‘through networks, partnerships, and deliberative forums’ encompassing ‘labour unions, trade associations, firms, NGOs, local authority representatives, social entrepreneurs and community groups’, an interpretation which in no small way points toward policy networks.

The first of Hirst’s types of governance is particularly interesting as it appears to denote an almost laissez-faire approach. This would not perhaps apply in

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29 Pierre (n16) 3.
31 ibid.
32 ibid 14-19.
33 ibid 14.
34 ibid 18-19.
all areas and the essential services required by a society would surely still be in public hands (although given the prevalence of privatisation this is not a certainty). In the IP world, arguably a sort of hybrid has arisen. Far from being free from regulation, IP is subject to a great deal of legislation, both international and domestic. The level of involvement of IP stakeholders in the crafting of that regulation, however, is significant. In a manner of speaking, therefore, the market still has considerable flexibility to do as it wishes as it has an active hand in shaping the rules by which it will ultimately be bound.

The importance of the market having such an active hand, exercised through private actors, comes into play when considering issues which prompt changes in the law which often come from without, rather than from within the policymaking process. Hirst’s fifth type of governance applies here as it helps to explain how private actors play their role in the process. As can be seen throughout this thesis, IP law and policy provide a prime example of such influence. Of particular importance for Hirst is the power of global markets.25 Whilst Hirst’s focus is on economic policy, the similarly international nature of IP makes his points equally relevant. Unlike some areas of policy, domestic IP policy will still very much feel the influence of global concerns and multinational interests, not to mention public organisations such as the WIPO and EPO. In light of such realities, Hirst suggests that ‘democracy needs to be rethought on the assumption that it has no primary locus and no single demos’.26 This will be addressed in greater detail below.

For Hirst, government has four primary functions: governments define powers and responsibilities for themselves and other institutions, they regulate social affairs, they serve as ‘orchestrators of social consensus’, and they oversee defence.27 It is the third role that is of particular relevance in this case. According to Hirst, this role may in fact be seen as obsolete in some neo-liberal market economies; however, he also points out that ‘the more complex and multi-centred forms of negotiated governance still require the public power as a co-ordinator and source of constraint to keep partners at the table when

25 ibid 23.
26 ibid 24.
27 ibid 26.
disagreements occur’. In the context of IP policymaking, this view is particularly applicable. It is not the role of government to control day-to-day activities or to have a direct hand in how individuals and organisations use and exploit their IP, but nor is it the role of those individuals and organisations to freely determine the rules under which they carry out their activities. In basic terms, the case study examples considered in this thesis help to demonstrate that government gathers opinion, evidence, and influence, ostensibly from all sides, and draws it together to form law and policy. As will be seen, government does not always succeed, but the importance of the function remains.

The theme of government as an orchestrator of consensus can also be observed in Rosenau’s work, Governance, Order, and Change in World Politics, particularly when it comes to the acceptance of rules by those subject to them. Rosenau suggests that governance is a system of rule that will only work ‘if it is accepted by the majority or, at least, by the most powerful of those it affects’. In the IP lobbying context, one can observe Rosenau’s logic at work. If IP governance is a framework shaped by the wants and needs of those subject to it, it is arguable that the most powerful of those actors are the ones that will have had the greatest hand in shaping it. Thus, it is accepted by that majority. The problem that will arise with this reasoning when considering models of democracy, however, lies in the second part of the quoted statement above: the most powerful of those it affects. While this is well-reflected in reality it does foreshadow the discussion of one of the most problematic barriers to the democratic justification of lobbying, namely inequality of access and influence.

In a similar vein, one finds the concept of new governance. Under this model of governance, society (and therefore, by extension, private actors) plays an important role. New governance, as described by Peters, is based upon the notion that ‘citizens know better what they want and need than does the state’. New governance tells us that both individuals and groups in society have the

28 ibid.
30 ibid 4.
capacity to resist state intervention while also having the capacity to shape policy. When it comes to an area of policy such as IP, it is arguable that the latter is more important although one could arguably equally construe the lobbying described in this thesis as resistance: the lobbying against the ISP obligations contained in the Digital Economy Bill by ISPs, for example.

The positive view of new governance portrays private influence as an asset for governance, with actors shaping policy decisions to meet their needs and by assisting government in implementing policy. As a corollary, Peters posits that this does not result in policy that is coordinated across multiple sectors, but within each sector (IP in this case). Effective governance emerges ‘with most of the actors involved agreeing on the nature of the problem as well as the solutions’. This is an attractive notion; however as will be observed in the case studies that follow this chapter, such agreement is often not reached, not least due to the imbalances inherent between those with more and less resources to commit to lobbying. Nevertheless, it does at the very least present a target to strive for and one that, if met, would help to support the democratic legitimacy of stakeholder input in policymaking.

The prevailing theme that has emerged thus far is that of an altogether lighter touch on the part of government, particularly in the shape of a more horizontal relationship between government and the governed. As noted above with reference to Pierre’s work, the concept of steering is an important aspect of this. Rather than serving as the sole director of its subjects, government is said to steer. Self-regulation is a significant topic in this regard, albeit one that largely falls outside the scope of this thesis. The involvement and influence of private actors in the policymaking process, however, may arguably be seen as equally significant.

Dunsire points to increasing diversity in society and an accompanying decentralisation of power. Indeed, this argument ties into my earlier observations regarding the increasing complexity of law and policy; not only is the subject-matter becoming more complex, but so is the machinery of

32 ibid.
33 ibid.
policymaking (the latter, in part, necessitated by the former). If one considers elected government exercising power free of interruption as the norm, such diversity may be seen as a disruption. The role of governance, in this context, is to limit that disruption and to ‘steer change away from undesired and towards desired directions’. In order to do this, it is important that those charged with governing understand the wants and needs of the governed.

Regulation plays an important role in steering; however, Dunsire suggests that it can be ‘implementation-intensive and enforcement-expensive’, and therefore points to the value of self-regulation or at least the self-governing nature of the populous, meaning that most people will comply with the law because it is law. It is not necessary to ‘enforce their compliance; they will adjust their behaviour themselves’. What is of particular interest when considering the issue of lobbying, is that those subject to the law also have an active role in the making of it. This is not self-regulation, but nor is it top-down management. On the face of it, this hybrid – those subject to law having a say in how it is formed – appears quite democratic. The imbalances in such involvement, however, will give rise to further questions and concerns.

1.2 Complexity and Multiple Actors

Before considering policy networks directly, the discussion will first consider the background against which the policy networks concept has emerged. As observed above, the subject matter of law and policy has become more complex as society has advanced, requiring increasing levels of expert input of both subjective and objective varieties.

Kooiman examines the involvement in law-making of those subject to the law in the context of interactions necessitated by a ‘complex, dynamic and diverse’ world, observing an increase in the involvement of private actors in the policymaking process and a move ‘away from one-way steering and control to two or multi-way designs’. The evidence of such an approach to policymaking

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35 ibid 22.
36 ibid 24.
37 ibid 26.
39 ibid.
is abundant, not least in the IP context, but the key question must be whether or not this can be considered democratic and if so, how? For Kooiman, just as the world is complex, dynamic, and diverse, so too must governing and governance be.

To illustrate, Kooiman breaks down interactions between private actors and policymakers into three types: interferences, interplays, and interventions. Interferences are described as the ‘basis of natural and human life’; interplays are highly organised, taking place in formalised patterns; and interventions, while seemingly less organised than interplays, may also be organised and directed. How, then, can these differences work in lobbying? Such differences may help to determine what level of private actor involvement in policymaking may be deemed democratically acceptable. It may be arguable that the more organised and formalised an interaction is, the more a particular actor could be said to be an integral component of the policymaking process. Depending upon the model of democracy in play, this could be taken as an unelected, private entity having control over law and policy. On the other hand, it could also be taken as an entity subject to a particular area of highly-technical law and policy having a role in how that law and policy is shaped. The importance of this distinction is central to this thesis and to the important goal of justifying lobbying as a democratic activity.

The apparent two-way character of interactions seems to imply that one side has one thing and the other side, the other. In other words, policymakers have the ability to create policy and private actors have the desire to influence that policy. The balance of needs, however, is somewhat more complex. Considering governance and governability, Kooiman finds a lot of interdependency. Needs are not seen as being exclusive to society nor capacity seen as being exclusive to government. Moreover, ‘No single actor, public or private, has the knowledge and information required to solve complex, dynamic, and diversified problems...’ This arguably underscores the importance of horizontal relationships and, by extension, the role of policy

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43 Kooiman (n9) 142.
networks, in the policymaking process. When considering highly specialist areas of law and policy such as IP, it may be argued that expertise among policymakers – at the very least among those serving as MPs and peers – will be lacking; indeed, this point is made by policymakers themselves in the case studies that follow. It must, however, be acknowledged that while horizontal relationships can fulfil a very useful function, the inherent information asymmetries can lead to an imbalance of influence. As Farrand points out, IP (and, by extension, similarly specialist areas of law and policy) may be ‘highly topical’ in academic circles, it is both highly complex, and of low political salience, ‘with the result that well-placed industry representatives that possess “expert” knowledge of both their business areas and legislative processes are more able to influence policy than other actors...’ Such concerns notwithstanding, policymakers place considerable reliance on the input of private actors for information and understanding, and such actors are similarly dependent upon policymakers for law and policy that support their own goals.

Such complexity and interdependency is also evident in other definitions of governance. Stenvall, for example, considers that governance by definition involves multiple actors. The term refers not only to policymaking; it is broader than that. In Stenvall’s definition, ‘governance is connected to any kind of situation in which we are able to produce a reliable understanding of human interaction’.

Governance, therefore, provides an important lens through which to view the interactions between policymakers and private actors. Much the same point is made by Prins, who cautions against more traditional views of governance that viewed the governance of society as taking place from a single central controlling point, i.e. government. An interactive approach, suggests Prins, ‘allows more actors to play an active role in the decision-making process’. The model of democratic governance used for this thesis will take such an approach. A particularly important aspect of the interactive approach arguably serves to underscore the value of stakeholder involvement in policymaking: if changes are not desired and tolerated by

46 ibid.
48 ibid.
society, the state cannot ultimately impose and enforce those changes. This is not to say that the world of IP would collapse into anarchy should Government attempt to implement undesirable change, but it does mean that those subjected to changes that they neither sought nor approved will seek to have those changes overturned. Taking the example of the Digital Economy Act 2010, it is arguable that the entertainment industry was largely successful in persuading policymakers to see their point of view. Internet Service Providers, on the other hand, were not so satisfied, and later resorted to judicial review. As will be considered in detail in subsequent chapters, it is perhaps not private input into policy that should be of concern, but imbalanced input and the resultant imbalanced output. The issue of equality, therefore, will be carefully considered throughout this thesis.

The involvement of multiple actors may also displace the notion of a single sovereign authority under the socio-cybernetic approach. Under this model are many actors in each area of policy, both public and private, with a great emphasis on interdependence or, in short, networks. As is the case with much of the literature in this area, discussions of blurred lines between public and private often tend to look at service delivery or, in other words, privatisation. Nevertheless, the models can be similarly applied to private involvement in policymaking, and certainly the interdependence aspect is well-represented, as will be explored more fully shortly with reference to policy networks. As previously noted, policymakers benefit not only knowledge and expertise from private actors, but also a form of impact assessment – feedback on how existing or proposed law and policy affect or will affect those subject to it. Private actors, in turn, require policymakers to implement the rules and regulations they require in order to function effectively.

Interdependence is particularly well illustrated in the context of policy planning, as the Hargreaves Review case study, considered in Chapter 3, will demonstrate. Stenvall highlights the importance of objectivity and neutrality in policy planning, something which is arguably found wanting in many instances of what one may call traditional lobbying. Indeed, as will be seen in

49 ibid 77.
50 Rhodes (n18) 58.
51 Stenvall (n45) 65.
Chapter 3, the Hargreaves Review stands apart from the other examples considered in this thesis due to the broad range of actors consulted, including those who might have otherwise gone unnoticed had the eventual policy outcomes been left to industry-led lobbying efforts. Whether or not the proactively inclusive approach succeeded in redressing the balance, however, will be questioned.

Having acknowledged the shift from a vertical relationship between government and the governed to a horizontal one, and noting well the high levels of interdependence, the concept of policy networks, embodying these features, must now be considered.

1.3 Relationships Between Actors & Policy Networks
When considering the role played by private actors in the policymaking process, two models of government-interest group relations examined by Rhodes in his work Understanding Governance are of particular interest: pluralism and corporatism. The pluralist model focuses on ‘multiple, voluntary, competitive, non-hierarchically ordered and self determined (as to type or scope of interest) categories [of actors]’ that are not licensed or otherwise authorised or controlled in any official capacity by the state. The corporatist model turns this formula around and is based around a smaller number of actors that are granted some form of official capacity by the state and which are ‘singular, compulsory, non-competitive, hierarchically ordered and [divided into] functionally differentiated categories’. In the context of IP lobbying, it is clear that the former model will be the more common (and will be considered in more detail in the following section on democracy); however it can be argued that a limited number of interested actors may still fit within the corporatist model – organisations such as the European Patent Organisation and the World Intellectual Property Organisation being perhaps the most obvious examples.

Leading into the idea of relations between actors in the form of networks, it may also be helpful to consider the notion of sub-systems or sub-governments."

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52 Rhodes (n3) 10.
53 ibid 30.
54 ibid 33.
A sub-system may be defined as the interactions between actors within a specific area of policy. Each sub-system will incorporate policymakers in their executive and legislative capacities, and a number of private actors. Critics, however, refer to such sub-systems as iron triangles, emphasising the heavy interdependency of actors within them and the absence of effective central coordination. Restricted access to policymakers is a suggested corollary of sub-systems and indeed, as will be seen in the chapters that follow, there is considerable evidence of this. Proponents of the sub-systems approach argue that the value of communication and shared expertise are considerable and that such collectives should instead be viewed as issue networks, which are more open in nature – often including not only large industry players and professional lobbyists, but also academics and journalists. As will be seen, this is indeed a useful perspective and one that is well-reflected in reality. Within the realm of IP, however, the weight given to the input of this broad range of actors falls short of equal, and this will inevitably give rise to difficulties when it comes to justifying the current IP policymaking landscape against a sound model of democratic governance.

It is clear, then, that communication lies at the heart of the networks concept. The means, opportunity, and ability to communicate underpins the functioning of a policy network and without it, the relationships between government and the governed discussed in this chapter could not function effectively. Indeed, as will be discussed throughout the case studies in the following three chapters, it is the lack of such means, opportunity, and ability that effectively shuts many private actors out of the policymaking process.

Vilet, in common with his contemporaries addressed herein, has observed the shift from a monocentric administration to a polycentric one. Vilet’s focus is on environmental regulation as opposed to IP, however the following points discussed in relation to networks are arguably equally applicable: complexity, interdependence, negotiation, and learning processes.

Complexity, as noted previously, is strongly evident in both the subject matter of policymaking and in the process itself. In Vilet’s definition, complexity ‘refers to the multitude and diversity of the parts and the interactions between these parts’. As observed in the preceding section, interdependence is strong between both policymakers and private actors and, Vilet states, is a result of complexity. Negotiation ‘is seen as the normal way of governance’. Moreover, Vilet suggests that ‘governance is more and more seen as a process of learning’. These factors combined reflect a realistic picture of contemporary IP policymaking and one that will form an important aspect of the model of democratic governance presented at the end of this chapter; however, it must be also acknowledged that not all actors that should be party to such negotiations currently are.

Related to Vilet’s process of learning, is the concept of communicative rationality:

…communicative rationality is based on the interaction of human beings; truth and knowledge are based on a (temporary) intersubjective understanding. In this view communicative rationality flourishes and prospers in a process of intersubjective interaction, clear of domination, strategic behaviour and deception, in which actors are equally communicatively competent and there are no restrictions on the possibilities of participation in the debate or dialogue…the only remaining authority, is that of ‘the good argument’…”

This certainly presents an appealing ideal situation in which all actors have an equal opportunity to participate in the debate with equal skill and on equal terms. The reality, however, is less balanced. As will be seen in the context of the case studies, it is the lack of equality of access to policymakers that presents perhaps the single greatest problem with lobbying and the most significant barrier to justifying it from a democratic perspective. Vilet makes a similar

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99 ibid 106-107.
100 ibid.
101 ibid.
102 ibid 109.
observation, pointing out that power, strategy, opportunism, and deception are commonplace in policymaking. From the perspective of my own model of democratic governance, however, if such balanced conditions were to be realised – the good argument taking precedence above other factors – this could perhaps make lobbying a more democratically palatable exercise were all relevant actors given the opportunity to speak and be heard.

In his work on communicative rationality and the public sphere, Jürgen Habermas considered the related topic of deliberative democracy. For Habermas, the key to legitimacy in law and policy appears to emanate from a discursive law and policymaking process that has been legally constituted.

Indeed, as he states in *Between Facts and Norms:*

> ...the production of legitimate law through deliberative politics represents a problem-solving procedure that needs and assimilates knowledge in order to program the regulation of conflicts and the pursuit of collective goals.

In tune with other observations and models considered here, Habermas did not see the people as being all one and the same, emphasising the diversity of public spheres and the important processes of bargaining and compromise. Indeed, in a complex modern society, Habermas acknowledged, a simple two-tier system consisting of a straightforward division between experts and laypersons no longer sufficed. He did, however, envisage two tracks, suggesting that deliberative politics ‘lives off the interplay between democratically institutionalized will-formation and informal opinion-formation’.

An important aspect of Habermas’ model (and indeed one that is well-reflected in the examples considered in this thesis) is the transformation of

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63 Ibid.
66 Scheuerman (n64) 157.
67 Habermas (n65) 308.
communicative power into administrative power. Parliament, may be seen both as a means of focusing the process of political discourse and as being steered by it. The problem, however, as is quite clear throughout this thesis, is the imbalance in such power. Indeed, if communicative power is to be effectively (and fairly) translated into administrative power, there must be some means of addressing asymmetries. In his consideration of deliberative politics, Habermas recounts Bobbio’s observation that large organisations and interest groups, along with the domination of experts, can make ‘impartial will-formation difficult.’

Habermas acknowledged that the political system remains subject to the pressures of social complexity and that even where such pressures are already taken into account, one must ask at what point power becomes illegitimate and independent of the democratic process. While seemingly emphasising the need for a system that reduces the undermining of democratic deliberation by capitalist domination, however, as Scheuerman observes, Habermas offered little by way of a solution.

Vilet suggests that public participation and ensuring the public nature of the process is evident in reality and that ‘communicative rationality in practice is pursued, not by way of making the dialogue “free from power” but by way of broadening the process of governance’. There is certainly some truth to this, however it must also be stressed that in the realm of IP, there remains a significant imbalance between the degree to which different stakeholders feel able (or even perhaps willing) to engage in the policymaking process. There may be more public engagement in many areas, and as will be seen below the proverbial playing field for private actors has levelled somewhat over the years; but the ideal communicative rationality model is far from realised.

Vilet also acknowledges the importance of involving relevant private interests in negotiation. Communicative governance is at its most effective when it is

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68 Scheuerman (n64) 159.
69 Habermas (n65) 300.
70 ibid 303.
71 ibid 327-328.
72 Scheuerman (n64) 161.
73 Vilet (n58) 110.
accepted that certain arguments may be more important than others. In Vilet’s example, economic and financial arguments are key when considering the impact of environmental regulation. To take an example from the IP world, while fair use (by consumers) is important, the arguments that are likely to dominate the discourse will be economic arguments advanced by rights holders, authors, and other creators. That being said, Vilet also concludes that communicative governance is not suitable where the competing interests are sharply contradictory. Might a similar view apply in IP? Taking the example of the Digital Economy Act, it is arguable that the interests of Internet Service Providers (“ISPs”) conflicted considerably with the interests of rights holders to the extent that they were polar opposites. In an ideal world, the competing players in such scenarios would find a happy medium (as, incidentally, they subsequently appear to have done). In reality, however, an ISP exists to provide a service to its customers in return for profit and has little to gain from becoming an instrument of copyright law enforcement. An additional point if concern raised by Vilet is that it may be in the interests of some players to obstruct the decision-making process and that finding consensus can be a time-consuming problem. Notwithstanding this, the information exchange inherent in communicative governance leads to learning among participants about each-others’ interests, whether or not consensus results. Moreover, if all interested parties are involved in the process, the eventual outcome may be more likely to receive support. In practice, however, as can be seen not only in the negotiation and lobbying leading up to the Digital Economy Act, but also by the end result which saw ISPs seeking judicial review, this will not always occur. Once again, this is an appealing component of a theoretical model, but one that may be difficult to realise in reality.

The concept of a policy network itself is, to a degree, flexible. While the overall definition remains, it is possible to subdivide policy networks into different types. Rhodes’ work illustrates this approach, breaking down the concept into several different categories. It is the producer network type that is of most interest in the IP context. Rhodes characterises a producer network as having

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74 ibid 117.
75 See Chapter 4, 177.
76 Vilet (n58) 118.
77 ibid.
78 For Rhodes’ complete set of policy network types, see Rhodes (n3) 38.
a fluctuating membership, limited vertical interdependence, and as serving the interests of producers. Economic interests (both public and private) dominate, and industrial organisations play a central role both in delivering goods and, perhaps most importantly in the present context, knowledge.\footnote{Rhodes concedes, however, that his own analysis focuses upon welfare state services and those actors, public and private, operating within that field. Consequently, the producer network model may be of limited use when examining industrial policymaking. Reliance, in the welfare context, on private interests may take the form of service delivery (i.e. privatisation) more than as a source of information and expertise. See ibid, 38-39, 45.}

As observed above, the complexity of IP law and policy, particularly combined with its sometimes comparatively low political salience, increases the role to be played by private actors – particularly those with high levels of expertise (although, as noted, the sources of such expertise are not as diverse as perhaps they should be). Policymakers have a degree of dependence upon key industry players for knowledge and other information. Coordination between large organisations is commonplace, but there is comparatively less vertical interaction, often to the exclusion of small and medium enterprises (“SMEs”). As Grant et al. illustrate with reference to the chemical industry, the relations between government and industry will vary considerably from one sector to another.\footnote{WP Grant, W Paterson and C Whitson, Government and the Chemical Industry: A Comparative Study of Britain and West Germany (Clarendon Press 1988). 58-67.}

Rhodes identifies several ideal conditions in which policy networks can be successful. Of those, several are particularly relevant in the IP world:

- Actors need reliable, ‘thicker’ information...
- Professional discretion and expertise are core values...
- …co-operation confronts disparate organisational cultures...
- Implementation involves haggling.\footnote{Rhodes (n18) 81.}

A qualification should, however, be added to the third point as co-operation between private actors is often far from all-inclusive. Indeed, it is quite evident in the case studies that follow that where organisational cultures differed, it was usually between organisations on opposite sides of the issues in question.
As to the advantages of networks themselves, among those identified by Rhodes are the fact that networks ‘bring together policymakers and implementing agencies’ (for example, the IPO and EPO), they ‘bring together many actors to negotiate about a policy, increasing the acceptability of that policy and improving the likelihood of compliance’, and they increase resources available by bringing together the ‘public, private and voluntary sectors’. The second point in particular is of key importance as it helps to underline the importance of stakeholder input into the law and policy that will ultimately govern their activities. It is perhaps unfortunate, however, that of the seven weaknesses of policy networks identified by Rhodes, all could arguably apply to IP policymaking:

- closed to outsiders and unrepresentative;
- unaccountable for their actions;
- serve private interests, not the public interest…
- difficult to steer;
- inefficient because co-operation causes delay;
- immobilised by conflicts of interest;
- difficult to combine with other governing structures.

It is clear that policy networks feature heavily in the IP policymaking landscape, however, as will be seen in the case studies that follow, those networks do not include players at all levels and the weaknesses identified by Rhodes are often evident. Taking a slightly different approach, Hancher and Moran examine regulatory arenas, considering ‘the outcomes of competitive struggles, the resources used in these struggles, and the distribution of those resources between the different involved institutions’. To characterise the examples studied in this thesis as competitive struggles is both accurate and useful. In each case, the policy outcomes desired by different sides can be clearly differentiated and are arguably often not compatible. This approach, questioning the balance of power within policy networks, adds an important

82 ibid 83.
83 ibid 81.
qualifying layer to the overall policy network approach, helping not only to identify what is, but also to suggest what should be.

Policy networks also take account of the role of the citizen – a particularly important component from the perspective of democracy, and one with an arguably increasing awareness and involvement in a number of areas of law and policy, including IP, thanks in no small part to the dramatic increase in the availability of information with the growth of the internet and, in particular, social media. Looking at the evolution of policy networks during the latter part of the 20th Century, Rhodes suggests that citizens may have gained a more significant role in governance through their participation in policy networks.85

Such an apparent rise in interest notwithstanding, however, it is clear from the examples considered in this thesis that the balance of power between private actors and their respective access and influence to and over policymakers remains far from equal. It must also be argued that while knowledge and understanding of IP among the citizenry may be on the increase, it is perhaps still not realistic to expect a significant involvement in the policymaking process itself. While IP is an area that affects the daily activities of many individuals, it is arguably not reasonable to expect that those individuals will possess a level of knowledge and understanding necessary to actively participate in the policymaking process. The importance of ensuring effective governance and fair policy outcomes is therefore remains high.

Citizen involvement receives attention in other examinations too. Fox and Miller submit that ‘networks of publicly interested discourse...transcend hierarchical institutions’,86 while Rosenau points to ‘...citizens [being] increasingly capable of holding their own by knowing when, where and how to engage in collective action’.87 Underlying such statements, however, is the idea that governance is replacing government (insofar as government can be said to steer, rather than rule) and one must question the degree to which this applies in the IP world, particularly given its continuing reliance on government

85 Rhodes (n3) 58.
86 CJ Fox and HT Miller, Postmodern Public Administration: Towards Discourse (Sage 1995). 149.
bodies and clear, unambiguous statutes. Perhaps more relevant is the notion that the information and influence input from private actors may be said to diminish the role of government insofar as it has perhaps become more of an arbiter of interests – the resulting policy and legislation being the outcome of that arbitration and bargaining process, rather than executive decisions.

A further important question raised about policy networks is whether they limit the number of losers. Rhodes considers the benefits of mutual dependence and the characteristic horizontal relationships between public and private actors when examining several works from the Max Planck Institute. He suggests that, compared to hierarchical and market-oriented models of policymaking, policy networks tend to ‘avoid not only the negative externalities…but also the ‘losers’ – that is, those who bear the costs of political decisions…produced by hierarchies’. In light of the case studies presented in this thesis, however, one must question whether this is in fact the case in an area of policy such as IP. The absence of many smaller actors from the process arguably results in a number of losers, many of whom are subsequently faced with policy decisions that favour those who did make their voices heard, sometimes to the cost of those that did not. Indeed, such problems are evident in Rhodes’ own list of weaknesses of policy networks.

### 1.4 Policy Networks in the EU Context

Given the inclusion in this thesis of both UK and EU IP policymaking, it is also important to consider the policy networks as it applies to the EU, particularly in light of the differences in the policymaking process. Moreover, as Sbragia has observed, EU policymaking concerns itself much less with matters such as welfare policy, than it does with economic and industrial policy, thus making it particularly important in an area like IP. The 1990s witnessed a rise in the use of the policy network concept to explore EU policymaking with a focus on the bureaucratic nature of politics in the EU and the role played by policy communities in that bureaucracy. Certainly, more recent works support this description, with the Commission in particular being the target of accusations

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88 Rhodes (n18) 63.
90 Rhodes (n3) 138.
of suffering from a democratic deficit. Moreover, some suggest that a relatively limited number of private actors participate in the process at such a direct level."

Peterson examined European technology policy using Rhodes’ policy networks approach. According to Peterson, the policy networks approach can be said to capture three key areas of EU policymaking: ‘the importance of relationships between a complex array of actors; variations in the degree to which technocratic rationality is unchallenged; and the EU’s patchy record of policy co-ordination and implementation’. Peterson’s reference to technocratic rationality in particular is of interest in this context, as it suggests the setting of policy goals by bureaucrats and administrators and the determination of how to achieve those goals being put in the hands of those whose activities the policy will govern. In the area of IP, this approach of broad goal setting by the European Commission, with the details filled in by industry players, is quite evident, as will be seen in the context of the CII Directive.

Sbragia views the EU as a network organisation, as distinct from the more traditional view of a state. The state itself is not the authoritative figure in this model. Indeed, this view is further evidenced below in section three, examining governance in the EU.

While the EU as an entity is far from the traditional state model, its executive and central nexus, the Commission, is not unlike the executive of a nation state (although as will be noted below, from a democratic perspective, it is quite different). From a policy networks point of view, it is the central point to which information flows and from which it is distributed to other bodies and actors. Indeed, as Sbragia observes, it is ‘the cross roads of information flows in Europe’.

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91 See, for example, S Mazey and JJ Richardson (eds), Lobbying in the European Union (Oxford University Press 1993), 139.
94 Sbragia (n89) 220.
95 Chapter 2, 106.
96 ibid.
97 ibid 229.
1.5 Conclusions on Governance

Governance as a concept, and as an activity, is an important one when examining lobbying. It helps to explain how government carries out its role in planning, implementing, and enforcing law and policy. Governance, then, forms an important component of the case studies considered in this thesis. It is clear that modern law- and policymaking has moved away from a monocentric, one-way, hierarchical model of governance and instead reflects a two-way, horizontal approach in which communication, learning, and negotiation play a vital role.

Some may criticise this pattern, labelling it as a hollowing-out of the state. As I will argue throughout this thesis, however, the reality of interdependence, the need for expert knowledge, and indeed subjective feedback on law and policy can be employed in answering such criticisms. It remains the role of government to make law and policy, but it is perhaps more appropriate to consider that it uses those instruments to steer rather than to set rigid rules in a vacuum. It is important that those who are subject to the law also accept it. If the law is not accepted, it will not be followed. Particularly in a niche area such as IP, in order to formulate law and policy that are useful and acceptable to their subjects, policymakers need to fully understand what that law and policy needs to do (and needs not to do). The involvement of stakeholders in the policymaking process can assist in this process, and the concept of policy networks can be employed to illustrate the myriad actors and interactions that make such involvement a reality.

The principle problem identified thus far, and indeed one that will continue to be a central theme in the examination of democracy that follows, is inequality. While it must be acknowledged that the understanding and involvement of citizens in areas such as IP is perhaps on the rise, there is arguably still a case to be made in favour of others representing them – others perhaps, with more knowledge and understanding not only of the complexities of IP itself, but also of the policymaking process. Representative organisations, therefore, have an important role to play, as will be discussed in the case studies that follow this chapter. Smaller stakeholders, however, may also struggle to be effective and if the benefits of lobbying addressed here are to be
fully realised, this is a problem that must be addressed, hence the conditions imposed on the model of democracy presented at the end of this chapter.

Considering governance as a concept in its own right has provided a valuable starting point. It is, however, but a component of a much larger concept: democracy. The goal of this thesis is ultimately to justify IP lobbying as a legitimate part of democratic governance and policymaking. To that end, competing conceptions of democracy must now be addressed.
2. Democracy

The further back in time one looks, the easier it is to view society as an entity, consisting of the citizenry – a collective of equal individuals. As the examination which follows will demonstrate, however, while the demos itself (and the definition thereof) may remain unchanged, there are now many more interests to factor in. Indeed, given that many classical models of democracy are not fully inclusive (excluding, for example, women and slaves), it may in fact be arguable that this has never truly been the case. What this highlights, however, is the importance of identifying a model of democracy that recognises that not everyone is the same, while also ensuring that the wants and needs of all are taken into account by policymakers. The components, then, of the demos are not equal, but their treatment of them should strive to be.

In the traditional sense, the demos refers to the citizenry. Yet what is important for, and relevant to, the individual citizen may be markedly different to that which is important for organisations in a particular industry; IP in this case. Hirst suggests that democracy ‘is not only a matter of majority decision, nor need it involve a single demos’,98 referring instead to ‘organized publics’ with the means to ‘conduct a dialogue with government and thus hold it to account’.99 Similarly, Rhodes speaks of tribes in politics: ‘vocal minorities with a predilection for direct action over representation in ‘normal politics’.100 The question posed by Rhodes is one of legitimacy of government, and how to sustain it in light of the influence of such tribes.

While one must exercise caution in splitting the demos into multiple demoi, it is important to recognise the existence of what may be termed subdivisions within a broader society. Different subdivisions of society will have different wants, needs, and priorities. In some cases, those subdivisions will be made up of individual citizens; in others, they will be made up of organisations. Indeed, as Prins points out, decisions should not be made in isolation from the relevant social environment.101 An important aspect of the discussion that follows will be to address the question of how one may legitimise the view that influence

98 Hirst (n20) 27.
99 ibid.
100 Rhodes (n3) 197.
101 Prins (n47) 81.
over law and policy by organisations can be considered compatible with
democratic principles. Naturally, this will entail challenging classical
conceptions of democracy, but as will be seen, more recent models do not
necessarily foreclose such an argument.

As will be seen, modern approaches to democracy embodied, in particular, in
the pluralist school of thought will ultimately prove to be of considerable
support to the overall goal of this thesis. Before considering such approaches,
however, it is important to explore the origins of democracy.

2.1 Classical Models of Democracy

The first part of this section will draw from David Held’s work, *Models of
Democracy* in which democracy is defined at the outset as ‘a form of
government in which, in contradistinction to monarchies and aristocracies, the
people rule...in which there is some form of political equality among the
people’. As noted above, who the people are, varies according to which model
of democracy is under consideration. What’s more, practicalities may dictate
the degree to which the definition works: a small city-state can function if each
individual has the same democratic role as another, but as complexity increases
– a larger geographical area, a larger population, a more diverse economy, and
a place in the wider world – such models begin to look less practical.

Held’s exploration of models of democracy begins with the classic Athenian
approach in which public affairs and the common good took precedence over
private life. The role of the citizen in the political machinery of the day was
seen as central. While it may be argued that this model represents the starting
point of democracy, it also represents the start of the problem that persists
throughout this discussion: the question of who actually has a say; for Athenian
democracy was not in fact open to all. Only men over twenty years of age had
the right to participate. Moreover, only native Athenian citizens were eligible,
thus excluding even decedents of immigrants from several generations before
them. Even the most essential model, therefore, is not devoid of multiple

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303 ibid 1.
304 ibid 14.
305 ibid 19.
levels of privilege and participation. Early examples of other familiar aspects of political life are identified by Held, networks and the influential impacts of wealth and status among them.\textsuperscript{106} Republicanism is another classical model considered by Held and, in common with the Athenian model, portrays a world that for many, especially women and those without wealth, involvement in the democratic process was scarcely any better.\textsuperscript{107}

Considering government in the republican context, Held highlights, among others, the work of Marsilius of Padua in the 14th Century. For Marsilius, the emphasis was on the citizenry as a whole, rather than privileged divisions of it or, in other words, private interests. Given the inevitable divergence of interests among the population, ‘coercive authority is essential for the peace and prosperity of the community’.\textsuperscript{108} Here we can observe the drawing together of democracy and governance and the essential role played by the latter in upholding the former.

As to the elusive definition of a \textit{citizen}, however, Marsilius’ definition showed no improvement: an adult male who is neither an immigrant nor a slave.\textsuperscript{109} Much the same can be said of Machiavelli’s model, labelled \textit{protective republicanism} by Held.\textsuperscript{110} Given such inherent limitations, it is interesting to note that in his summary of the model, Held states the following principle of justification for it, and while such a definition is clearly not intended to refer to organisations and other stakeholders within a particular sector, it is important to acknowledge that it could: ‘Political participation is an essential condition of personal liberty; if citizens do not rule themselves, they will be dominated by others.’\textsuperscript{111,112}

This notion of self-rule is an important one. It should not, perhaps, be taken in the most literal sense, but the notion of those subject to law having a say in the

\textsuperscript{106} ibid 22-23.
\textsuperscript{107} ibid 32.
\textsuperscript{108} ibid 37.
\textsuperscript{109} ibid 39.
\textsuperscript{110} ibid 42-44.
\textsuperscript{111} ibid 44.
\textsuperscript{112} In a similar vein, Rousseau in the 18th Century also emphasised the importance of self-rule for citizens. It is perhaps not a coincidence that Rousseau hailed from Geneva, a city-state in which such an approach may be more suitable and one in which, Held observes, industrialisation was of little relevance (and is thus not reflected in this particular model). Not only does that make it less applicable for the present purposes, but it even made it weak at the time, given the dawning of the industrial revolution toward the end of the 18th Century. (See Held (n102) 44-49.
shape that law takes remains a key tenet of democracy. The issue of domination, however, should be viewed with caution, for it threatens to undermine that key tenet. Equality, however, is perhaps best described as *easier said than done*. Rousseau argued that equality cannot be maintained where there are significant differences in wealth and power, and that:

> only a broad similarity in economic conditions can prevent major differences of interest developing into organised factional disputes which would undermine hopelessly the establishment of a general will.\(^{113}\)

This is not to say that Rousseau believed in absolute equality. As Held is quick to point out, he did not.\(^{114}\) Nevertheless the point does demonstrate the danger posed by excess wealth and power to what may be termed *the greater good*. This theme is prevalent throughout many models of democracy. As the model within which the case studies in this thesis will be examined will show, therefore, safeguards against inequality are an important condition to the democratic justification of lobbying; not only inequalities of fiscal wealth, but more broadly of resources such as knowledge and information.

An important common theme in many early models is that every citizen should have a say in the rules that govern them. Leaving aside the semantics of *citizen* for a moment, the important point is that anyone considered a citizen should have the right be involved in the governing of their own lives. The rights of organisations to the same, however, are not so well-recognised. Indeed, for an organisation to have a similar right would be considered to be a distortion of democracy, rather than an important part of it. The degree to which an organisation can be considered a citizen is a topic of much contention and one which will be considered in more detail below (and indeed this thesis does not seek to argue that the primacy of natural persons in a democracy should in any way be displaced), but for now it is important only to emphasise again the importance of those subject to particular rules having a say in the shaping of

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\(^{113}\) ibid 47.
\(^{114}\) ibid.
those rules; something which features prominently in the model of democracy presented at the end of this chapter.

Moving forwards apace through time, Held considers models of liberal democracy. Many historical events conspired to create the modern liberal democracy, not least challenges to the power of monarchs, rebellions, the weakening influence of the church, the emergence of industry and technology, and the growth of markets and diverse economies.\textsuperscript{115}

Held notes Hobbes’s approach to democracy, observing that it ‘stands at the beginning of modern liberal preoccupations with the need to establish both the liberty of the individual and sufficient power for the state to guarantee social and political order’.\textsuperscript{116} On the face of it, this may appear to be not unlike the 	extit{steering} conception of governance considered in the previous section, however in reality Hobbes appears to have been advocating the surrender by individuals of their rights of self-government to a ‘powerful single authority – thereafter authorized to act on their behalf’.\textsuperscript{117} As Held observes, Hobbes envisioned ‘a virtually all-powerful sovereign to create the laws and secure the conditions of social and political life’ and failed to satisfactorily articulate a way in which state action could be delimited.\textsuperscript{118}

In his consideration of Locke and the natural rights basis of much of his work, Held highlights an important aspect which is of particular relevance to the present context: natural rights need to be safeguarded against infringement by others. To allow everyone to work things out amongst themselves would inevitably fail to produce a balance. A central authority – government – is needed to ensure balance.\textsuperscript{119} As with Hobbes, then, the role of a central authority is important. Unlike Hobbes, however, according to Locke, government is only a means to an end, enabling ‘the private ends of individuals [to] be met in civil society’.\textsuperscript{120} That being the case, the value of input from the governed that leaves government better informed as to the nuances of such private ends, must surely

\textsuperscript{115} ibid 56-60.
\textsuperscript{116} ibid 61.
\textsuperscript{117} ibid.
\textsuperscript{118} ibid 62.
\textsuperscript{119} ibid 62-63.
\textsuperscript{120} ibid 64.
be emphasised. Held is rightly critical of Locke and the many gaps in his model which render it quite inapplicable (not to say unrecognisable) in any contemporary context, however the underlying justification of government presented by Locke remains an interesting one.

Of the many models examined by Held, Montesquieu’s is of particular importance, not least because it recognises the key flaw in many older models of democracy that has already been noted above: they applied in small, close-knit communities and city states, but were not realistic for larger territories. Another important aspect of Montesquieu’s writing highlighted by Held is the importance of finding a system that takes account of the interests of different groups in society while also preserving the liberty of the community overall and safeguarding against the excess influence of the wealthy.

Rather than attempting to achieve complete equality, it is arguable that it is more important to recognise and accept inequalities and then to seek to address the resulting imbalances. Indeed, views advanced by those such as the 4th President of the United States, James Madison, and noted sociologist, Max Weber, support such an argument. For Madison:

...measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

...

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects [emphasis added].

As to addressing said causes, Madison suggested either ‘destroying the liberty which is essential to its existence’ or ‘giving to every citizen the same options,

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121 ibid 65.
122 ibid 66-67.
the same passions, and the same interests’—in other words, creating equality. Of the former option, Madison rightly described the remedy as being worse than the disease. Of the second, as suggested above, it was ‘as impracticable as the first would be unwise’. Once more, then, the importance for Madison was in controlling the effects of faction in society, not removing the causes— the causes being inevitable for they are ‘sown in the nature of man’, and indeed remain so to this day.

Weber’s examination of direct democracy yields similar insights. While equality between citizens is important, too much of it is not necessarily positive. Indeed, as Held observes, Weber understood that ‘in a heterogeneous society direct democracy would lead to ineffective administration, unwanted inefficiency, political instability and, ultimately, a radical increase in the probability...of oppressive minority rule’. Indeed, in tune with the recurring theme of complexity in this thesis, Held observes that the size, complexity, and diversity of modern societies renders direct democracy quite inappropriate as a model today.

Notable thinkers such as Marx felt that capitalism and democracy were inherently incompatible. By treating everyone in a democracy equally—that is, with the state behaving impartially—the ultimate result would in fact be partial in favour of those with property. Freedom could not be realised, argued Marx, if that freedom predominantly referred to the freedom of capital. As with Madison’s proposed and rejected solutions for addressing the problem of factions, then, we are left with the question of whether to eliminate or to manage the imbalances in society.

What is important in my approach, therefore, is accepting and managing inequalities in society instead of trying to eliminate them. As will be argued throughout this thesis, that same argument applies to the IP lobbying landscape. A wide variety of actors participate in the IP world ranging from

124 ibid.
125 ibid.
126 ibid.
127 Held (n102) 129-130.
128 ibid 129.
129 ibid 103.
individuals to multinational corporations. To *impose* equality would be impossible, not to say undesirable, but to *manage* it – at least from a policymaking point of view – is rather more practical, as the example of the Hargreaves Review, considered in Chapter 3\(^\text{130}\) illustrates well.

My own model seeks to justify private actors as active participants in democracy. This is not to say that it seeks to position the organisation as a citizen, or anything analogous to it, but at the very least, in line with the thinking discussed above, the influence of private actors must be accepted and managed. In short, the aim is to present democracy and the realities of a capitalist society as being compatible, albeit subject to a number of normative conditions. Before proceeding to examine pluralism – an important area of democratic theory which in no small way underpins my own assertions in this thesis – the question of the *place* of the organisation must be addressed. As is already quite clear, throughout history models of democracy have sought, at the risk of oversimplifying the formula, to protect the weak from the strong and in the modern context, the strong more often than not take the form of organisations. If we are, as suggested, to seek to manage inequality rather than eliminate it, the position of organisations as compared to citizens in a democracy must be given further consideration.

### 2.2 Organisations as Citizens?

At the outset, it must be established that this is a rhetorical question to an extent. The citizen is an individual, a natural person; and an organisation should not be considered in the same way. It is undeniable, however, that organisations have taken on more characteristics of individuals in some ways, particularly in the eyes of some legal systems, as will be seen shortly.

First, the issue of political salience will be briefly addressed. Held has suggested that there is a great deal of ‘evidence to suggest that for many people politics denotes an activity about which they feel a combination of cynicism, scepticism and mistrust’.\(^\text{131}\) This leads one to ask the question *do individual citizens have an interest in politics?* and the answer would seem, in many cases,
to be no. Indeed, it is arguable that the distance between the individual citizen and political affairs would grow yet further where specialist niches of law and policy like IP are concerned. This observation leads to problems reconciling modern realities with many models of democracy that seek to limit democratic participation to equal citizens. Not only do such models presuppose a desire for such involvement which may not always be present, but they would also restrict those stakeholders affected by particular areas of law and policy from having an input into the shape of the law and policy.

As has already been argued, once one considers a state larger than something akin to the Athenian city-state, the direct involvement of all citizens in the machinery of democracy ceases to be feasible. Moreover, one must not forget that even in such examples, not every person qualified as a citizen in any case. Representative democracy, therefore, becomes important. Schumpeter, for example, was keen to avoid excessive public involvement in politics. The public instead chooses leaders and decision-makers rather than being directly involved in decision-making itself. What is more, at first glance, it appears that Schumpeter may have had room in his conception of democracy for private actors. While this is not in fact the case (see below), the argument may still be used to support the notion of stakeholder involvement in policymaking. As Held highlights, ‘Most issues in domestic and foreign affairs are so remote from most people’s lives that they hardly have ‘a sense of reality’. The average individual citizen, therefore, views most political issues in ‘an infantile way’. The more specialist the niche, the less likely it is to be of relevance or interest to the individual. Nonetheless, Schumpeter argued against external influence by electors. Discussion and voting are the only forms of political participation permitted by Schumpeter’s model.

If the individual citizen is insufficiently engaged, can one justify extending their democratic privileges to those that have an active interest? As has already been established, lobbying is an activity undertaken by a wide range of actors, from individuals to multinational corporations. As has also been established, the goal here is to justify such activity on democratic grounds. By any

132 ibid 142-143.
133 ibid 144.
134 ibid 150.
reasonable measure of democracy, lobbying by individual citizens raises relatively few questions (although as has been seen, inequalities in wealth and resources between citizens plague many models of democracy). A citizen, that is, a natural person, is the principal ingredient of the demos. Moreover, the dominant view that must, it is submitted, be respected, is that organisations, whatever their size and purpose, cannot be reasonably considered as citizens in the same context. This is not to say, however, that their status in this regard has not shifted quite considerably over time.

In her work *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*, Anna Grear examines the issue of corporate legal personality. Much of her discussion utilises three conceptions of the law’s person devised by Naffine. Naffine’s first category, named \( P_1 \), is highly abstract; an analytical construct that amounts to ‘nothing more than the formal capacity to bear a legal right and…participate in legal relations’.

The second category, \( P_2 \), is ‘any reasonable creature in being…biological and metaphysical definitions of humanity’; and the third, \( P_3 \), is the ‘rational and therefore responsible human legal agent or subject – the classic contractor’. As Grear observes, while \( P_2 \) and \( P_3 \) narrow the definition, clearly focusing more tightly on humans, i.e. natural persons, the \( P_1 \) conception offers a ‘device of great plasticity’ and the legal subject need not be human at all, therefore easily encompassing organisations.

Different theoretical positions address the degree to which the corporate legal person can be considered *real*, ranging from being an entirely fictitious legal construct, all the way to being a natural entity. Grear points to Gierke in this respect, who argues that the corporation is just as much a natural legal person as a human being – a construct, in essence, of social reality with a will of its own that the state recognises, rather than creates. The degree to which Gierke’s corporate legal person is any more real than a \( P_1 \), however, is

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137 ibid 357.
138 ibid 362.
139 Grear (n135) 54-59.
140 ibid 60-62.
141 ibid 62.
questionable. Indeed, as Grear highlights, referring to Stoljar’s criticism of the theory, this entity makes ‘no less demand on our credulity than its fictitious rival’.

As a legal construct, conceptualising the organisation as a person *writ large* holds a certain appeal. As is demonstrated in the United States Supreme Court cases that follow, it enables existing rights (or remedies) to be extended to corporations without creating new ones and enables the courts to strike a certain balance between rights where they deem it appropriate. Indeed, as Grear observes, such concepts shift to ‘reflect underlying economic and political imperatives’.

Recent decisions handed down by the US Supreme Court illustrate the corporate legal person and the practical application of the concept well. In *Citizens United v Federal Election Commission*, the question surrounded the prohibition on corporations and unions using general treasury funds to make *electioneering communications* or for speech expressly advocating the election or defeat of a particular candidate. In this case non-profit corporation, Citizens United, had released a documentary that was critical of then-President candidate, Hillary Clinton. The Supreme Court held that the prohibitions in question, namely Section 203 of the Bipartisan Campaign Reform Act 2002 and Section 441(b) of the Federal Election Campaign Act 1971 (as amended by the 2002 Act) were unconstitutional and violated Citizens United’s First Amendment right to free speech. The prohibition could only be justified, the majority ruled, if it served a compelling state interest. In the present context, the state’s interest in anti-distortion is particularly relevant and in this respect, the prohibition enabled the government to assign different levels of free speech to different entities depending upon whether they were an individual or an organisation. Certainly, in light of the foregoing discussion in this chapter, this may not seem unreasonable; however the majority disagreed. The prohibition would allow the government to ban political speech by media corporations and to interfere with the open marketplace of ideas protected by the First

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143 Grear (n135) 64.
Amendment. The dissenting minority, on the other hand, contended that the majority had ignored the dangers of corporate domination of political speech.

In *Burwell, Secretary of Health and Human Services, Et Al v Hobby Lobby Stores Inc., Et Al,* the Supreme Court’s decision appears to humanise the corporation yet further. This case concerned religious freedom, specifically the ability of a corporation to exercise the same. The majority held that closely-held corporations (that is, those owned by a relatively small number of people, in this case a family) counted as legal persons for the purposes of the Religious Freedom Restoration Act 1993 and that it was thus permissible for them to refuse, on religious grounds, to include certain legally-mandated forms of contraception in their employees’ healthcare plans. The majority first referred to the Dictionary Act 1871, a statutory interpretation tool, which provides that the term “person” includes corporations and companies. Nothing in the wording of the Religious Freedom Restoration Act, it was held, suggested that Congress had intended to narrow this definition. The contraception mandate amounted to a substantial burden, the majority felt, because the corporations (and their owners) believed that to fund such contraception was against their religious beliefs. The majority opinion emphasised the importance of the corporation being closely-held. In short, the corporation could be viewed more realistically as an extension of its owners, and thus be able to embody their beliefs. It was, then, closer to being a person due to the close nature of the ownership. Nonetheless, the dissenting opinion expressed concern that the majority’s logic could be easily extended to corporations of any size and form.

Both cases attracted considerable criticism, with even former President, Barack Obama, expressing concerns that the ruling in *Citizens United* would ‘open the floodgates for special interests…to spend without limit in our elections’.°° Sepinwall contends that corporations are ‘not normative citizens’ and that while some (the media, for example) may enjoy greater free speech protections, in the absence of special reasons, those rights should not be conferred upon all corporations.°° Furthermore, the same author also notes a lack of consensus

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°° *Burwell, Secretary of Health and Human Services, et al. v Hobby Lobby Stores Inc., et al 573 US___ (2014)*


over what a “person” actually is (the Dictionary Act notwithstanding, it seems). Indeed, as has been pointed out, the Supreme Court did not in fact go as far as to say that corporations are persons in this case, although critics have argued that this is in fact the resultant effect. An alternative critique suggests that it is not the extension of personhood to corporations that is of greatest concern, but that *Citizens United* legitimised the political leverage resulting from wealth, rather than the corporate form *as such.* Rather than furthering free speech, some argued, the Supreme Court’s decision was to be criticised for distorting such rights, potentially ‘crowding out’ those without the resources to compete. Indeed, such impacts stemming from wealth and resources are, and should remain, the greater concern in this thesis.

The corporate person emerging from *Hobby Lobby* also became the subject of considerable commentary. Perhaps inevitably, the decision received criticism for placing the rights of the corporate person above those of the natural person, however much emphasis is placed on the importance of the *closely-held corporation* element of the decision, but that has been criticised for being insufficiently precise, with no clear test being set out. On the other hand, it may be arguable that the lack of a clear test provides a more useful, flexible definition which could even be used in some cases to limit the concept of corporate personhood.

As legal tool, then, the benefits of the corporate legal person are quite evident; but so too are the pitfalls. As Grear observes, ‘it is arguable…that it is the corporation rather than the human being who emerges as the ideal legal person of liberal law’ in light of the law’s ‘disembodied reading of legal personhood’ and the fact that the ‘the corporate actor reflects the ideological characteristics, in particular, of the P3 legal actor, almost seamlessly’. In Grear’s analysis the

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148 ibid 575.
155 Grear (n135) 89.
result of this is that such disembodiment allows corporations to escape the vulnerabilities to law’s accountability mechanisms to which natural persons remain subject.” Indeed, the two US case law examples above illustrate such concerns well. It is this point which calls into question the virtue of corporate personhood in a model of democracy. Normatively, such models seek to ensure equality, preventing domination and abuse of power. Given the impact of corporate personhood in the legal context, it is clear that similar problems would emerge in the democratic one.

The role played by organisations in the policymaking process is an inescapable reality – indeed this thesis would have no reason to be were this not the case. However, the place held by individual natural persons in a democracy does not need to be duplicated by those organisations in order to justify their current role, for that role does not duplicate the role of natural persons. Organisations may be comprised of natural persons and they may in many cases represent said natural persons, but there is, it is submitted, no need to view those organisations as natural persons themselves. Not only would this be difficult to justify in light of prevailing democratic theory, but it would also put one of the central normative tenets of those models into jeopardy. Moreover, as will be seen in the subsection that follows, modern conceptions of democracy make private involvement in policymaking more democratically palatable on other grounds, without needing to challenge the conception of the person in any case.

### 2.3 Pluralism

Having concluded that organisations have a place in democracy, albeit not one that is equal to natural persons, this examination of models of democracy must now turn to the pluralist school of thought, a place where interest groups, organisations, and similar intermediaries may find themselves more at home.

Robert Dahl, in one of his earliest works, *A Preface to Democratic Theory* states that, at a minimum, ‘democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders’.

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156 ibid 92.
158 ibid 3.
much later work, *A Preface to Economic Democracy*, Dahl set out the following criteria for a democratic process:

1. Equal votes…

2. Effective participation: Throughout the process of making binding collective decisions, each citizen must have an adequate and equal opportunity for expressing a preference as to the final outcome.

3. Enlightened understanding: In order to express preferences accurately, each citizen must have adequate and equal opportunities, within the time permitted by the need for a decision, for discovering and validating his or her preferences on the matter to be decided.

4. Final control of the agenda by the demos: The demos must have the exclusive opportunity to make decisions that determine what matters are and are not to be decided by processes that satisfy the first three criteria.

5. Inclusiveness: The demos must include all adult members except transients and persons proven to be mentally defective.

In the context of private actors’ involvement in the policymaking process, points two, three, and four are of particular importance, but that would arguably require the extension of Dahl’s fifth point to include interest groups and organisations affected by particular policy areas. Moreover, such an expanded model’s third point would surely factor in policy networks and the importance of their role. Such networks must, then, be inclusive in order to ensure that all stakeholders have the opportunity to learn and understand one another’s positions.

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160 ibid 59-60.
161 Dahl himself sought to expand the fifth point by exploring ‘an extension of the democratic process to economic enterprises’, however this exploration was confined to the governance of (i.e. within) such enterprises rather than questioning their wider role in democratic policymaking (see Dahl (n159) 61-62).
Interestingly, these criteria are very similar to the characteristics of polyarchies, as elaborated by Charles Lindbolm. A polyarchy, notes Lindbolm, is neither a social nor a political system. Rather, it is a part of a political system – a set of rules to limit the struggle for authority.\textsuperscript{162} The criteria, several of which (emphasis added below) are of particular relevance in the context of pluralism (and thus of support in this thesis), are as follows:

\begin{itemize}
  \item Freedom to form and join organizations
  \item Freedom of expression
  \item Right to vote
  \item Eligibility for public office
  \item Right of political leaders to compete for support
  \item Right of political leaders to compete for votes
  \item Alternative sources of information
  \item Free and fair elections…which decide who is to hold top authority
  \item Institutions for making government policies depend on votes and other expressions of preference.\textsuperscript{163}
\end{itemize}

Pluralism not only accepts the existence of factions (i.e. groups, organisations, multiple publics and so forth), but underlines their importance:

\begin{quote}
‘Elections and political competition do not make for government by majorities in any very significant way, but they vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices’.\textsuperscript{164}
\end{quote}

In contrast to the views of those such as Madison, then, for the pluralist, factions are in fact to be seen as integral to stability, rather than as a threat to it.

\textsuperscript{163} ibid 133.
\textsuperscript{164} Dahl (n157) 132.
Such a perspective provides considerable strength to my own model, which positions private actors as an integral component of democracy, rather than something incompatible with it.

Other important elements of pluralism include power, resources, and bargaining. Pluralism sees power as being competitively distributed and central to bargaining between different interests. Resources can take many forms, and need not only be financial; indeed, as can be observed throughout the case studies in this thesis, expertise, political intelligence, and know-how can be more valuable and influential for private actors than financial wealth alone. As Dahl has similarly observed:

...the long run prospects for democracy are more seriously endangered by inequalities in resources, strategic positions, and bargaining strength that are derived not from wealth or economic position but from special knowledge.  

Pluralism positions government as the central arbitrator, ‘trying to mediate and adjudicate between the competing demands of groups…the making of democratic governmental decisions involves the steady trade-off between, and appeasement of, the demands of relatively small groups…’ Most importantly, this statement is followed with the qualifier that not all interests will be fully satisfied. Indeed, this is well-reflected in reality, as shown in the case studies that follow in this thesis. For any model of democracy to justify the inclusion of private actors, then, it must seek to ensure a more balanced representation of competing interests.

None of this speaks for the behaviour of private actors, however. Indeed, such behaviour is often rightly criticised as being undemocratic. The fact that such actors are able to participate in the policymaking process, however, is an important part of democracy. Allowing for participation while also placing

166 Held (n102) 161.
certain normative controls and behavioural standards upon that participation is therefore also desirable.

For Dahl, continuous political competition among individuals, parties, or both is important as a method of social control. Structure is given to policy outcomes, and the democratic nature of a regime is enforced. Moreover, as Held observes, Dahl disagreed with Schumpeter’s assertion that elites steer democratic politics. Such statements are helpful and certainly supportive of the role of private actors, however one may perhaps accuse them of being somewhat normative and unrealistic. The reality is that elites can and do still exert a disproportionate amount of control in some cases. Such elites take the form of those actors that have greater resources and are capable of wielding a greater influence over law and policy.

The pluralist approach is criticised, in a sense, for its realism, not least because it answers normative questions with factually current answers rather than normative ones. From the perspective of seeking a normative framework, this criticism is perhaps correct. It is important to establish what is, but in order to provide useful insights into how to improve the status quo, one should also ask what should or could be. Nevertheless, it remains encouraging to see a model of democracy that includes the role of private actors, as opposed to the many that reject them as being undemocratic.

Drawing on Lively’s work, Held claims that classic pluralism fails to adequately grasp the nature and distribution of power and that the following problems arise as a result, some of which are apparent in the case studies that follow (particularly those dealing with inequality):

The existence of many power centres hardly guarantees that government will (1) listen to them all equally; (2) do anything other than communicate with leaders of such centres; (3) be susceptible to influence by anybody other than those in

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167 Dahl (n157) 132.
168 Held (n102) 164.
powerful positions; (4) do anything about the issues under discussion...

Moreover, ‘many groups do not have the resources to compete in the national political arena with the clout of, for instance, powerful lobby organisations or corporations’.\(^{169}\)

It is important, at this juncture, to note that Dahl himself is not oblivious to such problems, and it is interesting to note that, as Grugel and Bishop have observed, his view of pluralism became more cynical and what may be termed *power-wary over time*.\(^{170}\) It is conceded that expecting all citizens in a democracy to act in the interests of the common good (which in itself is particularly hard to define, it being difficult in complex and diverse societies to boil the concept of the common good down to one universal standard\(^{171}\)) is not realistic, and that the model may be somewhat optimistic. The presence of multiple associations and multiple *publics* can certainly help to ensure more balanced policy outcomes, but that the chief flaw – indeed one quite evident in this thesis – is that organisations will prevail over individuals.\(^{172}\) Nevertheless, it is precisely because of these problems, that pluralism with its recognition of multiple actors with multiple wants and needs has such a strong potential. One must accept the role played by multiple actors in a complex and diverse political marketplace if one is to examine and address the imbalances between them. Indeed, as Shakoori has argued, for all its weaknesses, pluralism nevertheless provides an ‘insight into the socio-political systems of modern democracies’ and that while it may not be quite such a ‘potent display of equality as originally put forth’, its recognition of the power of different pressure groups preserves its usefulness as a theory.\(^{173}\)

Inequality may be further addressed under the headings of corporate capitalism and neo-pluralism. As Dahl observes:

\(^{169}\) ibid 169.
\(^{171}\) Dahl (n165) 284.
\(^{172}\) ibid 295-296.
...both corporate capitalism and bureaucratic socialism tend to produce inequalities in social and economic resources so great as to bring about severe violations of political equality and hence of the democratic process...we ought to consider whether an alternative more congenial to democratic values might not be found.\(^{174}\)

Lindbolm places a high level of importance on two-way influence; however, in common with the criticisms outlined above, such influence is not all-inclusive.\(^{175}\) There will often be found inequality between participants in the democratic system and, as will be illustrated at certain points in the case studies that follow, disorganisation puts actors at a disadvantage.\(^{176}\) Reflecting the concerns addressed throughout this thesis, Lindbolm questioned whether polyarchies are dominated by the economically powerful and, thus, whether a polyarchy can in fact be considered democratic.\(^{177}\) Not only do those private actors with more resources find themselves with a lobbying advantage, as noted throughout this thesis, but, as is also observed in the context of the Hargreaves Review in Chapter 3, keeping business happy is vital for a state’s economy and thus most important to government.\(^{178}\) Ultimately, it is Lindbolm’s conclusion that ‘...the big corporations...command more resources than do most government units. They can also, over a broad range, insist that government meet their demands’.\(^{179}\)

Some critics have gone further. Zolo, for example, contends that democracy is ‘little more than a name for good relations between the ruling groups’.\(^{180}\) Not only are powerful interests considered an impediment to other, smaller interests (a criticism supported by the case studies that follow), but also to government. Miliband, for example, considered the capitalist class to be a ‘formidable constraint’ on government and other state bodies.\(^{181}\)

174 Dahl (n159) 60.
175 Lindbolm (n162) 139.
176 ibid 141.
177 ibid 168-170.
178 ibid 175.
179 ibid 356.
181 Held (n102) 174.
The need for balancing measures is clear, although even Dahl himself has previously posed something of an open question as to what those might actually be. It is not surprising that some actors will be more influential than others, but those that are inherently less influential should perhaps be given some means to ensure that they are heard along with their more powerful peers.

2.4 A Minimal Role for the State?

Looking at the shrinking influence of the state, Held considers the New Right (also known as neoliberalism and neoconservatism), favouring individual and market freedom in a minimal state. For Nozick, for example, political institutions must uphold freedoms and individual autonomy, supporting competitive exchanges between individuals. In short, this amounts to the right to pursue one’s own ends. From the perspective of lobbying, however, it is arguable that Nozick’s minimal state lends no helpful support as a model, not least because the state is simply too minimal. It does not need to be lobbied because subjects are free to do as they wish.

Hayek’s model follows a similar premise to Nozick’s, favouring a hands-off approach to government and a framework that allows greater individual autonomy. Rules and laws are necessary in Hayek’s view, to enforce certain principles and to define and limit the power of the state. In short, law and democracy exist to underpin liberty and the freedom of individuals to pursue their own ends and only the free market can determine what the people truly want. While there appears to be more emphasis on the rule of law in Hayek’s model, it remains too hands-off to work as a democratic framework in which to discuss lobbying. Rather than those subject to laws having a say in how those laws are shaped, this model appears to suggest that the laws are minimal, leaving stakeholders to pursue their activities largely free of restrictions. On the other hand, it could be suggested that the rules necessary to allow the free pursuit of one’s own ends in the IP world would still need to include rules governing terms of protection, enforcement of rights and so on. It is difficult

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183 Held (n102) 201.
184 ibid 201.
185 ibid 204-206.
to envisage how IP could function in a laissez-faire free-for-all. Unsurprisingly, Held is similarly critical of this approach: ‘The idea that modern society approximates, or could approximate, a world where producers and consumers meet on an equal basis seems, to say the least, unrealistic…’ noting that significant asymmetries of power and resources stemming both from the economy and from government make it so. The reality is considerably more complex and a system offering near-limitless freedom could not possibly hope to function.

Having considered The New Right, Held considers The New Left. The focus, however, is again on the individual. New left thinkers suggest that there is less equality between individuals than an ideal model may portray. While organisations are not specifically mentioned, arguably the same logic can be applied and when it comes to access to policymakers, it would be difficult to argue that all stakeholders are in an equal position. That said, while the logic may transfer, it is doubtful that the new left thinkers envisaged making stakeholder access (equal or otherwise) a component of any model of democracy. My model aims to portray government as a central arbiter, weighing up the competing wants and needs of interests. For Pateman, however, the state must remain separate from the associations and practices of everyday life if it is to be seen as such an impartial central authority.

Impartiality, however, is arguably a complex concept to apply where the state is concerned. As will be explained later, when Professor Ian Hargreaves was given the task of leading a review into IP law and policy, his team was tasked with evaluating the evidence received in the context of the UK economy, as if the UK economy were their client. Since the economy of a state is arguably that element which underpins all else, an impartial government must inevitably place a priority on that which benefits the economy the most. Such a suggestion immediately casts doubt on the prospects for equality and balance that have been mentioned thus far, however, and careful thought must therefore be given to accommodating both the health of the state’s economic interests and ensuring fair treatment of diverse interests.

186 ibid 206.
187 ibid 210.
2.5 Participation By All?

What, then, of participatory democracy? Many models place considerable emphasis on the involvement of the citizenry, yet simultaneously reject the notion of groups and organisations having similar involvement. It is not without irony that, as noted previously, many an average citizen has little or no interest in being involved, whereas groups and organisations, regardless of who or what they represent, actively seek involvement. Interest groups, suggests Held, can help to fill the gap left by the uninvolved citizen.

Drawing from both Pateman and Macpherson, Held sets out a model of participatory democracy, emphasising the ‘direct participation of citizens, including the workplace and local community’. Important features of relevance include the redistribution of material resources in order to improve the resource base of social groups, improved transparency to ensure more informed decision-making, and the minimising (or removal) of unaccountable bureaucracy in both public and private life. It is clear that Held’s model is, once again, focused on the individual citizen, however key lessons can be taken from this model. As previously observed, it is not always material resources that determine a private actor’s success or failure, but also those intangibles such as information and political know-how. While it may be difficult in practice to redistribute material resources (and difficult to justify), by putting this principle hand-in-hand with the next: improved transparency, information and knowledge imbalances perhaps can be addressed.

A great deal of time in Held’s volume is given over to historical models of democracy, models that should not be overlooked as, however inapplicable they might be in the modern context, they form the foundation of what we now think of as democracy. Having considered such models, Held asks an important question: ‘What should democracy mean today?’ In answering this question, Held concedes that no single model works on its own. Elements from different models, however, are helpful.

\[188\] ibid 215.
\[189\] ibid.
\[190\] ibid 257.
\[191\] ibid 259.
Equality, or rather a lack of it, forms a key concern. Most models function only if there is equality among participants. Note that I do not say among citizens, for as much as classical models emphasise equality, they also exclude many people from participation. The lack of equality, particularly among stakeholders in a niche like IP law and policy, is a significant impediment to the democratic legitimacy of lobbying.

Addressing equality, Held sets out his principle of autonomy:

Persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others.  

The most obvious problem with this conception is that people do not exist at the same level as one another, whether as a result of socio-economic status, intelligence, or plain simple interest (or not) in the democratic process. Individuals, in turn, will not be equal to groups and organisations, and those groups and organisations will not be equal to one another. Equal rights and opportunities are at least evident in the policymaking systems of the UK and EU, but only at the most ostensible level. As the discussions throughout this thesis will demonstrate, while equal rights and opportunities to influence law and policy may exist, the reality of exercising them is rather less equal, with individuals and smaller organisations often struggling to make an impact. It is here that the final part of Held’s conception comes into play as it is arguable that the current landscape shows that actors are indeed acting in such a way as to impede others. Consider, for example, the lobbying activities of many larger IP stakeholders during the course of the Hargreaves Review, discussed in

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264 ibid 264.
While Hargreaves and his team actively sought the input of individuals and SMEs in an attempt to balance the equation, there is evidence to suggest that the larger stakeholders were simply carrying on as normal, lobbying MPs alongside their responses to the Review’s call for evidence, potentially undermining the input of smaller players. For lobbying activity to be democratically justified, therefore, additional constraints may be required in order to prevent such imbalances.

Held similarly highlights this point, noting that in the liberal tradition, it has long been argued that ‘the liberty of the strong’ should be restrained. Who the strong are varies from one model to another, but the principle remains. In the present context, the strong are those who are able to persuade policymakers to favour their own agenda at the expense of those with fewer resources. Again, then, one can see the importance of taking steps to balance the equation, ensuring that the views, wants and needs of smaller interests are heard, listened to, and taken into account when formulating policy and legislation.

At this juncture, it is important to note that equality cannot only emerge from within. It must also be engineered from without. By this, I am referring, broadly, to the desire, will, and ability to participate in the democratic process. Held again addresses this issue in the context of individual citizens, however an important point is made which may help to support the legitimacy of the involvement of groups and organisations in the policymaking process, arguing that citizens should be able to participate ‘in decisions concerning issues which impinge upon and are important to them’. Just as this is an important aspect of Held’s principle of autonomy, so too will it form an important aspect of my own model. No actor, whether that actor is an individual or an organisation, should be denied the opportunity to participate in a decision that affects it. A problem that arises in the citizen context also arises when looking at private actors more broadly: If the right conditions do not exist to enable citizens to effectively participate, equality cannot be achieved and large groups will remain marginalised:

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193 Chapter 3, 136.
194 Held (n102) 265.
195 ibid 270-271.
If the ‘final control’ of the ‘political agenda’ is out of the hands of citizens, then ‘rule by the people’ will exist largely in name only, and Schumpeter’s technocratic vision is more likely to be the order of the day.«

The question, however, is how? Part of the problem, as discussed later in this thesis, appears to be that many choose not to get involved, possibly because they do not know how, because they do not think they will be listened to in any case, or because they think that someone else will, in effect, do it for them. Arguably this reasoning applies just as much to groups and organisations as it does to individuals. A lack of knowledge and understanding about the policymaking process combined with apathy stands to jeopardise the realisation of Held’s vision for a participatory democracy, and similarly presents a challenge to my own model, albeit one which may be more easily overcome since private actors, numerous though they are, are considerably less numerous and generally more motivated to get involved than the average individual citizen. Whilst it is certainly arguable that both problems need to be solved, it is submitted that they remain separate, at least in an area such as IP in which the average individual citizen neither seeks nor requires involvement.

Ultimately, the participation problem comes down to practical reality. Recalling Weber’s arguments, Held points out that a system of direct participation is unworkable in anything more than a small community.« A more pertinent question for Held, however, is whether participatory democracy can work either. How, for example, can such a system secure the conditions necessary for its own existence? As practical examples examined later illustrate, the more innovative participant will seek out more opportunities for influence than its counterparts, whether through brute force communication efforts, or seeking loopholes, or plainly ignoring the system. Returning again to the Hargreaves scenario, many respondents to the review chose to lobby parliamentarians anyway (and Hargreaves himself for that matter), thereby possibly undermining the intended equality of the system. Furthermore, participation does not necessarily guarantee that political

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296 ibid 272.
297 ibid 273.
outcomes will be either consistent or desirable. Indeed, as the discussion on governance in the first part of this chapter concludes, the art of compromise must necessarily be engrained in any successful system of democratic governance. To clumsily paraphrase Abraham Lincoln: you can please some of the people some of the time and some of the people all the time, but you cannot please all the people all the time.

2.6 Towards A Working Model?
The balancing exercise necessary begins to draw together the threads of democracy and governance, for it is only via the machinery of government that a model of democracy can make the transition from a theory to a workable system. Here, however, is where many models fall short. As discursive exercises, they function well. As templates for real governance and policymaking, as the preceding discussion shows, they are less effective. Held himself acknowledges this:

None of the models of liberal democracy is able to specify adequately the conditions for the possibility of a common structure of political action, on the one hand, and the set of governing institutions capable of regulating the forces which actually shape everyday life, on the other."

Even in discussing this problem, however, it is surprising that Held gives scarcely any attention to the influence of private interests, save for occasional references which appear to paint them as little more than obstacles to democracy, for example:

A democratic state and civil society are incompatible with powerful sets of social relations and organisations which can, by virtue of the very basis of their operations, systematically distort democratic outcomes. At issue here is the power of

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198 ibid.
199 ibid 275.
corporations to constrain and influence the political agenda, the restriction of the activities of powerful interest groups…and the erosion of systematic privileges enjoyed by some social groups…

From a practical standpoint, any model of democracy which sidesteps the all-encompassing influence and importance of economic factors is arguably the weaker for it. Focusing on the individual citizen alone is to effectively ignore policymaking in areas that are not directly relevant to the individual citizen but that greatly impact those in other fields including the financial and the industrial. This is not to say that discussion of direct citizen involvement is not worthy of discussion, but suggestions such as the establishment of voter juries, voter feedback and, the greater use of referenda, not only place a significant obligation upon ordinary citizens to determine matters of law and policy of which they would have little or no understanding, but also appear to preclude almost entirely the involvement of those most affected by such decisions.

Continuing on the theme of weaknesses, a particularly pertinent concern is identified by Held which applies to all models considered in his work: none of them pay much attention to the wider world. Particularly when considering an area of law and policy that is as global in nature as IP, this again calls into question their usefulness. Individual citizens could not be reasonably expected to have any knowledge or understanding of the issues relating to, for example, protecting patents in multinational manufacturing agreements. Not only does such policy inevitably pique the interest of affected organisations, but it will also likely involve key players such as the EPO, USPTO, and the WIPO to name but a few. Once again, the conflict between theory and reality is clear.

### 2.7 Wealth and Equality

As has been noted previously, wealth constitutes a significant influence on an actor’s ability to become effectively involved in the policymaking process. As has already been observed, wealth in this context does not necessarily refer
only to money. Indeed, throughout this thesis I will refer to wealth of many kinds, perhaps most significantly a wealth of information and of political know-how. While there is often undeniably a correlation between financial strength and the ability to lobby effectively, knowing how to gain access and influence is just as important.

It is also important to point out at this early stage that the relationship between wealth and influence goes far beyond the proverbial (sometimes literal) brown envelope. Indeed, as Rowbottom states, ‘influence secured through wealth arises not through buying votes or making backroom deals...’ Several possible ways in which wealth underpins influence are identified by Rowbottom. Of these, the second is the most relevant in the current context: structural bias. The importance to policymakers of economic growth (identified above as a significant lacuna in Held’s work) may mean that ‘politicians and other officials will give considerable weight to the views and interests of those businesses or actors that are seen as essential to that goal’. If a government needs to increase employment levels, suggests Rowbottom, it will need to keep employers happy and stimulate growth and investment. Not only that, but it will also be important to keep wealthy individuals happy, ensuring that their wealth and by extension their contributions to the economy, do not stray overseas. In some policy areas, this would seem to be more clear-cut than in others. IP is particularly interesting in this regard given that innovation is a key factor and innovation may not necessarily come from well-established, wealthy concerns. What is more, law and policy that favours innovative SMEs will often not be so palatable to the established market leaders, as will be observed in the context of both the Hargreaves Review and the CII Directive.

Of some concern early on in Rowbottom’s *Democracy Distorted*, is his observation that ‘none of this means that businesses are always successful in influencing policy...’ The concern arises not from the observation itself;
Indeed, from a democratic point of view this should be seen as a source of reassurance, but because Rowbottom appears not to differentiate between different sizes of business. An individual developing an innovative smartphone app is a business, just as much as a multinational software corporation is a business and such distinctions will be of great importance throughout this thesis.

When it comes to equality, Rowbottom considers the notion that the end result of decision-making procedures is just as important as the procedures themselves. Not only, therefore, should there be equality of access and influence, but the resulting law and policy must similarly reflect the best interests of all concerned. Citing Dworkin as an example, ‘the best form of democracy is whatever form is most likely to produce the substantive decisions and results that treat all members of the community with equal concern’. This is of particular importance in the IP context and the apparent imbalance evident throughout the case studies under consideration. A model of democracy that seeks to ensure equal participation must also seek to ensure a balanced result. As will be discussed, however, this normative position may be subject to certain practical caveats.

The practical reality of equality may inevitably be less glamorous than the theoretical ideal. Indeed, as Rowbottom notes, ‘while strict equality of input may be appropriate for voting…it is difficult to extend to other forms of participation’. From a practical perspective, suggests Rowbottom, it is not equality of involvement that should be sought, but rather equality of opportunity for involvement. This does not, of course, guarantee a balanced result. Arguably in the field of IP lobbying, every stakeholder has the opportunity to participate, but not necessarily the means or the ability.

Interestingly, Rowbottom suggests that the ability to persuade policymakers to see one’s point of view is a legitimate basis for unequal influence and that it is the non-legitimate sources of unequal influence that are in need of

210 Rowbottom (n203) 8.
211 Ibid 9.
redistribution (though one must again note that, like his contemporaries, Rowbottom talks in the context of the citizen, seemingly overlooking inequalities that exist between organisations). The difficulty, says Rowbottom, ‘lies in determining which political resources need to be equally distributed’.

The problem with such an approach, as noted above, is that the ability to persuade – the political know-how – is precisely what should be equalised, along with the opportunity to exercise that ability. The very thing that Rowbottom seems to suggest does not need redistributing is perhaps the most important thing that does need it.

Such distinctions aside, however, Rowbottom’s focus on opportunity is an appealing one. Knowing how to persuade a policymaker is vital, but without the opportunity to do so that knowledge is useless. While Rowbottom discusses the topic in the context of citizens, the arguments are no less relevant to addressing inequalities that exist between stakeholders. Two types of equality are contrasted: formal equality and substantive equality. Formal equality ‘prevents legal barriers to participation…but does not attempt to equalise the various other background conditions which might affect people’s opportunities to participate…it assumes that the background conditions…are fair’.

Substantive equality, on the other hand, entails people having both the means and the opportunity for access and influence. When considering the individual citizen, factors such as socio-economic status must be considered. For a private actor, the concerns will be broadly similar.

Equality of opportunity features in the model of aggregative democracy considered by Rowbottom. Interest groups are important under the aggregative approach, particularly in the context of interest-group pluralism under which ‘citizens organise into groups that promote particular sets of interests’. It is the group that is important, not the individual. Policy outcomes are the result of a balancing exercise carried out by policymakers, underpinned by balance in the bargaining power of the interest groups which, although not exact, should emerge from a kind of offsetting whereby one

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212 ibid.
213 ibid 10.
215 Rowbottom (n203) 15.
interest group’s strength in one particular resource should be offset by another’s strength in a different resource - political contacts vs. strength in numbers, for example. It must be noted, however, that this model is highly normative. As has been acknowledged by proponents (as observed above), and as is evident in the case study examples in this thesis, in reality inequalities between individuals and between interest groups are not so easily smoothed out.

My own model may be similarly normative and indeed bears more than a passing resemblance to interest-group pluralism. Solutions to the inequality problem are, however, required. Egalitarian pluralism is founded on the requirement of equality:

An outcome is legitimate only if it emerges from a process of representation and bargaining in which all interests have substantively equal chances of being heard and influencing the outcome.216

Again, this requirement is seemingly at odds with the present reality in which there is considerable inequality between interests both in terms of the chance of being heard and to influence policy outcomes. While reality presents a clear obstacle, however, this approach is an appealing one and solutions suggested by Cohen and Rogers including a form of affirmative action.217 A form of this can arguably be seen in the conduct of the Hargreaves Review, actively seeking the input of individuals and SMEs whose contributions might have otherwise not been made. Unfortunately, as will also be seen in the same example, more powerful stakeholders appear to have sought to restore imbalance to the restored balance by continuing to lobby as normal outside of the formal submissions to the Review.

Deliberative democracy, as considered in the first section of this chapter with reference to Habermas, is also considered by Rowbottom, however in common

217 ibid.
with many models of democracy, the preferred focus appears to be on the individual citizen with less room for organisations and groups.\textsuperscript{218} Once more, however, inequality is a prominent concern. Indeed, it could be argued that the more voices that seek to feed into the policymaking process, the greater the likelihood of inequality and, therefore, the more biased the end result may be.

Inequality of resources is a key theme when examining influence in democracy. As has been argued, inequalities in financial wealth are not the only issue; indeed, a lack of money can, for example, be offset by greater political know-how. An interesting argument raised by Rowbottom, however, is that wealth remains of great importance because, in essence, with wealth an actor is able to acquire those resources it does not already possess. With money, therefore, political know-how can easily be acquired by hiring a professional lobbyist.\textsuperscript{219} Care must, however, be taken when proposing redistribution as a means of redressing the balance of influence. It is submitted that redistributing wealth carries with it profound implications for the fabric of society and could not be realistically implemented in any case. What can be redistributed, however (if indeed redistribution is still the correct term) are the opportunities to gain access and influence, the abilities to use those opportunities effectively, and the eventual outcomes of the policymaking process.

An interesting question raised by Rowbottom addresses political freedom of expression and while much of the discussion appears to focus on individuals and elections, the reasoning is arguably equally applicable in the lobbying context. Affirmative action strategies designed to redress the balance between the ability and power of actors to access and influence policymakers may in fact be seen as limiting such freedoms. Improving the lot of the disadvantaged is one thing, but if such measures curtail the advantaged, might this be problematic? On the issue of positive obligations, Rowbottom usefully observes that simply enabling opportunity is not enough.\textsuperscript{220} Indeed, this can be seen in the lobbying landscape for there are no formal barriers to those with fewer resources and quieter voices. The question therefore turns to whether the state should be obliged to ensure that the disadvantaged have the necessary

\textsuperscript{218} Rowbottom (n203) 17.
\textsuperscript{219} Ibid 24-25.
\textsuperscript{220} Ibid 37.
resources to avail themselves of the opportunity to speak. For Rowbottom, such an obligation could quickly become unmanageable\(^{221}\) and if one is considering freedom of political expression at the individual level, it would be difficult to argue to the contrary. When dealing with private actors, however, it could be argued that with fewer distinct parties to deal with, and mechanisms already in place (reviews, for example) that have the potential to address some of the more significant imbalances between large and small actors, this becomes a more realistic prospect. In this vein, Rowbottom refers to the distribution of expressive opportunities, allowing for more inclusive political debate.\(^{222}\) As with most of the literature under consideration in this chapter, however, the focus remains on the individual citizen.

Also addressed by Rowbottom is the notion of equality of ideas as stated by Meiklejohn.\(^{223}\) What matters is not that everyone speaks, but that everything worth saying is said. In the context of individual citizens, arguably this notion makes more sense than it does in a specialist area of law and policy. Quantitatively there will be far fewer voices seeking to influence the debate on, for example, software patentability (as discussed in detail in the context of the CII Directive in Chapter 5\(^{224}\)) and those voices may all have something different to say. Groups may help to lower the number of voices substantially by aggregating the views and preferences of members into a single voice. Taking measures to ensure balance, therefore, becomes more realistic. Consultations and reviews represent useful practical examples, particularly if they are conducted taking a proactive approach to ensuring the participation of those actors with quieter voices.

Rowbottom considers a number of reform strategies aimed at reducing inequalities in political participation. While at least some emphasis appears to be on the electoral stage of politics and campaigning, there are nonetheless useful concepts that can be taken away and applied to lobbying. Rowbottom also offers a word of caution concerning the dangers of over-regulation. In

\(^{221}\) ibid.
\(^{222}\) ibid 46.
\(^{223}\) ibid 49.
\(^{224}\) Chapter 5, 210.
particular, administrative barriers may only deter those without the resources to comply, thereby increasing inequality.\textsuperscript{225}

Improving transparency is a particularly relevant measure considered in Rowbottom’s work. While improved transparency does not constrain the use of wealth in politics itself, it does allow us to see how that wealth influences political decisions. Transparency measures would also mean disclosure of meetings between ministers and lobbyists, and details of lobbying expenditure. This, suggests Rowbottom, may improve accountability by enabling the public to ‘decide for itself whether a particular financial arrangement breaks ethical standards or whether a politician is too closely aligned with a particular group’. Moreover, ‘Knowing who is paying for a message or activity is also an important piece of information…as it can help people to assess and evaluate a particular message’.\textsuperscript{226}

Whether transparency is quite the panacea portrayed by Rowbottom, however, is open to argument. Rowbottom’s arguments appear to assume that the public will have an active interest and an understanding sufficient to evaluate the spending and lobbying activities revealed through transparency measures. While this may be the case for those policy areas closest to the public consciousness such as healthcare and education, it is unlikely that the average citizen would monitor a more specialist area such as IP. Information revealed through transparency measures would, on the other hand, also be available to those within particular fields, helping them to keep track of their contemporaries’ political activities; however as will be discussed in more detail later in this thesis, the reality of information provided by the measures currently in force in the UK arguably do not achieve their stated goal and reveal very little useful information. Interestingly, Rowbottom also addresses the suggestion that transparency may give rise to suspicion.\textsuperscript{227} Might it be that any interaction between public and private actors, financial or otherwise, may be seen as tainted? Arguably such concerns would be more justified where spending is involved, for example, during an election campaign. With any form of transparency, however, must surely come explanations to put the

\textsuperscript{225} Rowbottom (n203) 65.
\textsuperscript{226} ibid 67.
\textsuperscript{227} ibid 68.
information provided into context. A properly designed system of transparency should not only seek to disclose activities such as lobbying and funding, but should also seek to educate those who would use the information. As is evident both in academic literature and in the mass media, lobbying is an activity that is often viewed with suspicion and is seen as anti-democratic. As my own model seeks to argue, it should in fact be seen as vital to democracy. Without sufficient transparency and balance, however, suspicion and anti-democratic activities will surely remain.

Among those more useful strategies could be reviews and consultations. Rowbottom discusses forums for communication, defined in his context as spaces ‘where people can associate with one another, speak to a wider audience and hear different viewpoints’. Such forums are, argues Rowbottom, ‘of central importance to political equality’. Forums can take many forms, ranging from the courts to social media and some will have more formal barriers than others. Crucially, however, those barriers are not generally determined by resources (although it may be argued that those with fewer resources may find it harder to use the courts as a forum given the potentially high costs involved). In the lobbying context, publicly available forums remain relevant. Social media in particular has become a powerful tool for private actors for raising awareness and encouraging debate around policy and legislative issues. It is also arguable that reviews and consultations could fall within the forum category. While such forums are more confined by the terms of reference of the review or consultation in question, they nevertheless represent a more level playing field to which all interested parties are able to contribute with ease.

**2.8 Wealth, Equality and Lobbying**

When considering lobbying, Rowbottom acknowledges that the practice, broadly speaking, has a valuable role to play in democracy but is also quick to acknowledge the image problem introduced at the very start of this thesis: an impression of suspicion, backroom deals, and corruption, buttressed by high-

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228 ibid 73-76.
229 ibid.
230 ibid.
profile lobbying scandals reported in the media. \(^231\) Whilst it is clear that wealth and lobbying are linked at many levels, the greatest concern is when that link as its most direct: when money buys influence. In addition to the democratic implications of such conduct, however, Rowbottom observes that the historical pattern of lobbying controversies has also meant that regulations governing lobbying activities have evolved piecemeal, leaving something of a patchwork. \(^232\) Furthermore, in a nod toward the need to improve transparency, Rowbottom also points out that analysing lobbying is made difficult due to the lack of readily available information concerning interactions between private actors and policymakers. \(^233\) We may know that it happens, but not what is said or how what is said ultimately determines the resulting law and policy. This represents a significant obstacle in justifying lobbying on a democratic basis. Whilst I will argue that it is a democratically legitimate activity, in order for this position to move from the normative into the actual, greater transparency is necessary to ensure that influence is equal, fair, and not distorted by unethical means.

Topics such as cash for questions fall outside the scope of this thesis, however the role played by money where lobbying equality is concerned is important. To some extent, it must be said that inequality is inevitable and as has already been discussed, while some form of affirmative action strategy is perhaps necessary to level the playing field, redistribution of wealth is neither practical nor desirable. An important question, however, is where to draw the line between corruption and acceptable behaviour. As Rowbottom notes, for an organisation to spend large sums on lobbying a particular official only becomes corrupt if the official’s own behaviour is so, i.e. by acting in a certain way in response to some benefit conferred upon them by that organisation. \(^234\) Corruption is usually what attracts attention to inequality, but that inequality persists whether there is corruption or not. Anti-bribery laws and similar measures can help to put a stop to corruption, and can impose limits on borderline activities such as gifts and hospitality, but how to redress the non-

\(^{231}\) ibid 88.  
\(^{232}\) ibid 79.  
\(^{233}\) ibid.  
\(^{234}\) ibid 83.
corrupt balance resulting from inequality among stakeholders remains an open question.

Lobbying for Rowbottom is clearly a legitimate activity, but for him the important issue is ‘whether that activity is consistent with political equality’.235 As is already quite clear from the present discussion, in its present form, it is not. The model presented at the conclusion of this chapter, however, seeks to offer normative proposals aimed at making it consistent.

Resources come in many forms, and as noted above may include the skill set and political know-how within one’s own organisation necessary to facilitate effective access and influence. For others, however, professional lobbyists may be the preferred option, bringing with them considerable expertise, knowledge, and contacts. The use of such professionals, as Rowbottom observes, is not always a guarantee of success,236 however as discussed above, equality arguably lies just as much in the opportunity to influence as it does in the end result. What is more, the imbalance resulting from the use of professional lobbyists may be even greater than that resulting from mere inequality of resources as the most successful lobbyists may have access to, and influence over, policymakers even greater than that of those with in-house resources, not to mention access to information that may be inaccessible to others. The use of professionals, therefore, may be seen as raising entry barriers as in order to lobby successfully, all participants must now operate at the same levels as the professionals.237

With so much expertise available for hire, whether in the form of in-house lobbyists employed directly, or those working on a contract basis, Rowbottom is drawn to question whether too much expertise, access, and influence can be as harmful as the more obvious forms of impropriety such as bribery.238 Simply put, when it comes to lobbying ability, how much is too much? Access to political expertise is therefore another key element of my model, presented below.

235 ibid 88.
236 ibid 89-90.
237 See Rowbottom’s discussion of this at Rowbottom (n203) 89-93.
238 ibid 90-91.
Transparency, or rather a lack of it, is a prominent concern with lobbying. Despite recent measures taken in the UK designed to improve matters in this regard, much work remains to bring about meaningful, useful transparency. Rowbottom also acknowledges this concern, focusing in particular on what is said during meetings with MPs and ministers.\footnote{ibid 92.} Indeed, this problem remains unaddressed by current transparency measures and will be considered in greater detail later. Because detail on what is said behind closed doors is scant, Rowbottom suggests that certain unethical kinds of pressure can be applied by private actors out of view of the public eye. As Rowbottom acknowledges, such tactics would be unlikely to engender a long-term, productive relationship between private actor and policymaker;\footnote{ibid.} and may thus not be employed frequently, a lack of knowledge about what does take place inevitably gives rise to suspicion. From the perspective of democratic legitimacy, both aspects of this are problematic. Trust is important in underpinning such legitimacy, and trust is impossible without the knowledge and understanding of the process that transparency could bring. As to questionable tactics, particularly in a field such as IP, it may be suggested that these will be the exception rather than the rule. Nevertheless, in the absence of consistent, readily-available information, it is difficult to hold private actors to account for their lobbying activities and difficult to ensure that such activities are being undertaken fairly and ethically.

There is also an argument to be made in favour of transparency where equality is concerned. Improved transparency does not directly address inequality of access and influence, however with clearer information showing who is saying what to whom, one is also able to see who is not saying anything. By extension, suggests Rowbottom, certain officials may pay attention to a greater range of private actors in order to appear fair, although this is by no means certain.\footnote{ibid 105.}

A number of measures to improve transparency are addressed in Rowbottom’s work including disclosure requirements imposed upon policymakers and disclosure and registration requirements for lobbyists. The work in question predates the statutory Register of Consultant Lobbyists introduced in 2015, but
nevertheless offers some useful commentary worthy of consideration in any discussion on transparency. Ultimately, Rowbottom concludes that a register alone is insufficient to promote transparency and ethical behaviour and that other means should accompany a register to ‘make the process more open and accessible to other groups’.

In light of events that have followed, this conclusion appears quite correct.

2.9 MPs: Delegates or Trustees?

An interesting question referenced by Rowbottom asks how one should conceive of an MPs role. If an MP is defined as a delegate, ‘meeting with outside interests performs a way for constituents to transmit their preferences to their MP’, whereas a trustee is furnished with information by such activities and must then ‘form his independent judgement on a particular issue’. Either option carries with it important implications for democracy, and either could be considered democratically justifiable and Rowbottom appears to suggest that in practice MPs will be free to decide which route to take. In the IP context, particularly given the prevailing lack of IP knowledge among policymakers, it may be arguable that the former applies more than the latter; however, given the combination of information that policymakers will receive, ideally from all sides of the debate, there should also at least be an element of independent decision-making involved. The former option appears to suggest that an MP will simply hear the arguments of one side, and those arguments will then become that MP’s line in the debate. It also appears to suggest that the MP will not be receptive to the counterarguments of other stakeholders or of his colleagues. It is submitted that such a scenario is not entirely plausible, for even if that MP’s position remains the same as that of the private actor that first communicated it, during the process of hearing alternative views and debating the matter, the MP will have made a decision at some point that that position is still the one that he prefers, having considered alternative viewpoints. As will be noted throughout this thesis, one should be wary of viewing the policymaker’s mind as a blank page upon which a lobbyist may write their own legislation. Moreover, even in instances where a particular MP has an active personal interest in the area in question – for example an MP with a

\[242\] ibid 109.

\[243\] Ibid 94.
background in IT or the creative sector – it is unlikely that the position of that MP would render all others subordinate, however swayed it may be by that MP’s own background.

### 2.10 All Party Groups

All Party Groups (“APGs”) are identified by Rowbottom as another method for private actors to connect with policymakers. Due to the involvement of private actors, these informal committees of MPs and peers can be a topic of democratic concern, not least with respect to the often-considerable influence of the private organisations involved. As Rowbottom points out, APGs are subject to transparency requirements, however these requirements are not without gaps, for example if a lobbying firm sponsors an APG, it is not obligated to disclose the identities of its clients, thus providing a channel of influence for interested organisations who will not then be subject to transparency requirements. APGs undeniably play an important role in opening up access and channels of influence, enabling interested parties to become involved in debating law and policy that will affect their interests; however, once again the issue if imbalance appears to be present and must be considered in more detail. Those with the resources to employ the services of professional lobbying firms would appear to enjoy advantages that those without such resources do not.

### 2.11 Who to Lobby?

The term adopted for this thesis is ‘policymakers’ and it has been deliberately chosen for its broadness. Rowbottom suggests that ministers and civil servants will often be the preferred lobbying target when compared to run-of-the-mill MPs, not least due to the closer levels of involvement such individuals will have in the formulation of law and policy. Ministers are also, however, subject to stricter rules governing their conduct, particularly those aimed at eliminating conflicts of interest. Similarly, civil servants also work under strict rules governing their relationships with private actors, not to mention obligations of impartiality.

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244 ibid 97-98.  
245 ibid 100.
A point not addressed in this work, however, is whether all private actors are able to reach ministers and civil servants. It will arguably be easier for a professional lobbyist or a large organisation to gain access to the upper echelons of policymakers than it will be for an individual or SME. It may be the case that shadow cabinet members make for more accessible targets or, failing that, an MP with an interest or background in the subject at hand.

The more obvious forms of coercion such as financial incentives are tightly controlled, however lobbyists may exploit less detectable forms. One such example raised by Rowbottom is known as the revolving door; an issue of some concern in recent consultations and reports into lobbying regulation. By offering employment to a particular official to commence after they have vacated their current office, an incentive is provided of which there is little or no tangible evidence, and no immediate gain is made. Both parties stand to benefit, with the private actor not only potentially securing a favourable action from the official at the time, but also subsequently gaining their political knowledge, experience, and useful contacts. The official, on the other hand, has a new job to move on to when he or she leaves public office.

Despite concerns, there are currently only limited restrictions on this practice, such as the requirements in the Ministerial Code\textsuperscript{246} and the Business Appointment Rules for Civil Servants\textsuperscript{247} for ministers and senior civil servants to consult the Advisory Committee on Business Appointments on employment to be taken within two years after leaving office. Similar restrictions also apply to lobbying government after leaving office.\textsuperscript{248} MPs who have not held ministerial posts, however, are not subject to such rules. While this may be somewhat less concerning as MPs make less attractive lobbying targets than ministers and senior civil servants, as noted above, it does not mean that MPs are not lobbied at all and therefore leaves a gap which is somewhat troubling.

\textsuperscript{248} ibid.
2.12 Opening Up Access

As discussed above, the importance of equalising access and influence is paramount. Rowbottom addresses some *affirmative-action* style strategies in the context of lobbying, arguing that one way to offset advantages gained through professional lobbyists (to which must also be added those organisations with their own strong political skill set) is to make the entire policymaking process more accessible to all, irrespective of wealth. Indeed, this notion forms one of the central points of my own model as presented below. Lobbying must be equal and open to all if it is to be seen as democratically justifiable.

Among the suggestions offered by Rowbottom are greater openness both in terms of information concerning current policy debates and in terms of the availability of research data and evidence, accompanied by more information and guidance on lobbying for those without the internal resources to lobby effectively on their own behalf or the financial resources to hire professional lobbyists. Rowbottom acknowledges the rise in exercises such as consultations as examples of government attempts to redress the balance, however he also notes that ‘The best time for outside interests to influence policy is at the earlier stages...before the publication of the consultation document’, meaning that a policy position will have already been at least partially established and influenced before many are even aware that it was under consideration. Moreover, as will be seen in the context of the Hargreaves Review, the presence of a consultation or review does not put a stop to *normal* lobbying on the issue, meaning that those with sufficient resources will still be in a position to secure an advantage. While there are clearly important issues to be addressed, however, I will argue later in this thesis that such methods, if suitably supported by further rules limiting such *additional influence*, present a particularly plausible means of levelling out the lobbying landscape, promoting greater equality, and thereby improving the case for justifying lobbying as a valuable part of democratic policymaking.

249 Rowbottom (n203) 102-103.
250 ibid 103.
251 ibid.
2.13 The Media

The media is often portrayed as being a key part of democratic society, underpinning the legal right to freedom of expression. Courtesy of the rise over the past decade of social media, this has never been more accurate. As with many elements of democracy, however, the media can be used as a powerful tool to gain an advantage and in the UK, there is very little in the way of regulation to prevent such use. Rowbottom argues that the ability to use wealth to secure access to ‘the main forums for communication’ is a particular concern where wealth and politics meet.\textsuperscript{252} As with the opportunity to speak to policymakers, however, Rowbottom emphasises that it is equality of opportunity to use the media that is most important.\textsuperscript{253}

The freedom of the mass media, argues Rowbottom, is important because it serves its audience. From a democratic perspective, this is a persuasive argument; however, it is difficult to agree without qualification, particularly in light of recent mass media coverage of the 2016 EU membership referendum in the UK and the 2016 presidential campaign in the USA. Indeed, media bias surrounding both events has been strong and it would be difficult to argue that such bias is in any democratically objective way serving the interests of the audience. Nevertheless, the media does facilitate debate at all levels of society. Rowbottom refers to the politically biased landscape as the \textit{polarised model} of the media\textsuperscript{254} and acknowledges the particular problem that readers will often not look at a broad cross-section of views, instead preferring one particular source and at that, arguably often a source that confirms rather than challenges their own views.

An alternative media model discussed by Rowbottom is the \textit{public service} model, whereby the media ‘aims to provide a common forum for citizens to hear different views and speakers, and to engage in debate’.\textsuperscript{255} In reality, a combination of the public service and polarised models is more to be expected and while the polarised media gives voice to specific political positions, the public service media offers a forum for debating those positions.

\begin{itemize}
\item \textsuperscript{252} ibid 173.
\item \textsuperscript{253} ibid 174.
\item \textsuperscript{254} ibid 175.
\item \textsuperscript{255} ibid 176.
\end{itemize}
The media also provides a channel for publicity that goes beyond words. Some, for example, may have the resources to pay for a publicity stunt that will attract headlines.\textsuperscript{256} This may not always be advantageous, however, and the CII Directive, discussed in detail later provides an interesting example of an expensive publicity stunt that was successfully turned against its creators by the less well-resourced \textit{underdogs} of the debate on software patentability. Such successful derailing aside, however, money can often buy attention. As to any legal means of preventing such a strategy, however, Rowbottom concedes that finding a workable solution would be difficult.\textsuperscript{257} Indeed, not only would enforcement be difficult since in some cases any publicity is good publicity regardless of the consequences, but arguments in favour of preserving freedom of expression and suggestions of incompatibility with the Human Rights Act 1998 would surely follow.

Few forms of mainstream media exist purely as a public service. Most seek to generate some form of return, whether in the form of direct sales or through advertising, licensing of content, or other means. This will therefore influence the choice of content. The old media adage, ‘if it bleeds it leads’ may take a somewhat extreme view, but if an issue is not likely to attract the attention of readers or viewers, it is not likely to be covered in much detail, if at all. As is observed throughout this thesis, and by authors such as Farrand,\textsuperscript{258} topics such as IP are generally of low salience. Once in a while, a particularly controversial IP-related issue will receive detailed coverage in the mainstream media, but such instances are comparatively rare and much the same can be said of other niches that are of less interest to the individual citizen. For any interested party to utilise media coverage, therefore, may be seen as difficult. Rowbottom asks whether market pressures can help to balance out inequalities.\textsuperscript{259} Market pressures do not, suggests Rowbottom, mean greater equality of coverage of issues in commercial media. Content attractive to certain advertisers may be given priority, for example, and owner interference remains problematic, admittedly more so in some examples than others (it would be difficult to

\textsuperscript{256} ibid 177. \\
\textsuperscript{257} ibid 178. \\
\textsuperscript{258} Farrand (n44). \\
\textsuperscript{259} Rowbottom (n203) 181-183.
envisage, for example, a News Corporation publication or network offering a
great deal of pro-copyright-exceptions material, but on the other hand, an
individual favouring looser copyright restrictions would arguably be less likely
to favour any News Corporation offerings in any case).

Rowbottom suggests that controls on media ownership may go some way to
limiting the imbalance of views on offer by limiting the number of publications
or outlets that any one individual or organisation can own. Under such a
system, it is to be hoped that the media as a whole would be more
representative of the different groups in society, and would result in more
diverse content. Regulation would be required to implement such a system,
and would seemingly work in addition to current competition legislation.
Further suggestions offered by Rowbottom include measures to safeguard
editorial and journalistic autonomy, subsidies, legally-enshrined rights of
access to the media, controls on advertising, and regulations designed to
ensure impartiality. A combination of one or more such measures may indeed
promote greater equality when it comes to media coverage of political matters,
however the overriding issue of salience remains. The mainstream media will
rarely offer much coverage to an issue that is unlikely to sell. This is not, of
course, to discount specialist publications, although it must be argued that any
individual sufficiently interested in a particular topic will generally be more
llikely to seek out a broader range of viewpoints, rather than confining
themselves to one particular publication. Moreover, with the rise in digital
media, both for mass-market audiences and for specialists, one must ask
whether the problem remains so acute in any case.

2.14 Digital Media and Participation

Perhaps more so than any technological development that has come before it,
the internet has democratised communications. Even in those states where
state censorship is strict, internet technologies such as virtual private networks
(“VPNs”) and the Tor anonymity network allow unrestricted and practically

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260 ibid 186-187.
261 ibid 194-196.
262 ibid 196-201 and 205-208.
263 ibid 201-202.
264 ibid 202-204.
265 ibid 208-214.
anonymous access to the world wide web. Social media has increased such participation yet further, shifting the internet from a medium largely of consumption to one of creation in which opinions can flow freely from every individual with an internet connected device. Both accessibility of information and the ability to participate in debate have arguably never been higher. With that in mind, then, one must ask what the consequences may be for democracy. Certainly, on the face of it, the internet allows for much greater participation at all levels, from the individual to the organisation.

Some have questioned the degree to which this is true. Sunstein, for example, suggested that many would simply continue consuming and discussing only those views that confirmed their own (through a process he calls *enclave deliberation*), thus meaning that prejudices would be further confirmed rather than challenged. Might this statement be open to question, particularly given the rise in popularity of more open forums in the form of social media? Indeed, most news sources today, whether accessed directly from publishers’ own websites or through third party platforms such as Facebook and Twitter, allow readers to discuss articles in comment threads. While these can often deteriorate into petty squabbles, the very fact that they do that demonstrates that not all readers think alike and any given article on any given topic has a diverse audience. That being said, however, many more closed online discussion forums continue to exist (including those hosted by Facebook) and it may indeed be the case that those with more focused or limited views will continue to limit their consumption and discussion of information to them. Moving beyond news articles, digital technologies enable those with shared interests to meet in virtual spaces to discuss shared political interests and to coordinate campaigns that prior to the rise of the internet would have required close geographical proximity. Indeed, the success of the anti-software patent campaign in the case of the failed CII Directive can be attributed in no small part to the internet as will be seen later.

Despite such a warm introduction, however, the lobbying landscape in particular remains imbalanced. Rowbottom suggests that the internet can, however, open up channels of influence to greater numbers of people. Greater

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availability of information allows anyone to be kept more informed on legislative proceedings and indeed such information is readily available both through official channels such as government websites and through less formal means including social media with many ministers, departments, MPs, and peers now maintaining an active presence. In a related theme, participation is now easier for many, with the online publication of contact details for policymakers, along with the ability to communicate directly with them through social media and similar channels. Furthermore, direct citizen participation has improved with measures such as online petitions which will receive a governmental response after receiving at least 10,000 signatures and will be debated in Parliament after passing 100,000. Such abilities notwithstanding, however, Rowbottom suggests that traditional methods of lobbying are still likely to be more successful. Caution is unquestionably important. The increase in information, debate, and accessibility should not be ignored, but the central theme of Rowbottom’s work here remains: ‘The major lobbying campaigns are likely to hire professionals to advance their cause, continuing the capital-intensive channels of influence’. That being the case, online access and influence must also be treated somewhat normatively. It is a valuable ingredient in a democratically-justifiable lobbying landscape, but one that, in its current form, is not perfect.

Search engines are a topic of some concern for Rowbottom, particularly the way in which search results are ranked, leaving the potential for bias and control by the search engine’s owner. As Rowbottom suggests, however, that ‘the leading search engines have shown little inclination to exercise this power to advance their own political agenda’. While one may expect specialist niche topics to be perhaps more untouched, recent high-profile examples have resulted in a number of questions and accusations concerning search engine bias. Google, for example, faced accusations throughout the 2016 US Presidential election campaign, allegedly favouring positive coverage of the Democratic Party nominee, Hillary Clinton with particular controversy surrounding the search engine’s auto-complete feature which allegedly produced positive search

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267 Rowbottom (n203) 218.
268 ibid.
269 ibid 219.
suggestions for Mrs Clinton, while offering negative search suggestions for her rivals, Bernie Sanders and Donald Trump. Google denied manipulating search results and more research is clearly called for, however with search engines serving as pivotal gatekeepers to the internet, whether realised or not, the concerns expressed by Rowbottom at the very least merit further research and, if proven valid, have significant consequences for democracy, particularly where large-scale public matters such as elections are concerned. Rowbottom suggests various strategies for regulating search engines beginning with greater transparency on the functioning of search algorithms – something which could be done, he argues, without compromising trade secrecy; secondly, citing Bracha and Pasquale’s suggestion of regulatory oversight to provide accountability; and thirdly a state-operated search engine ‘that serves democratic values’. From a democratic perspective, however, all three options carry consequences for freedom of expression and could arguably not be implemented without considerable legal resistance, if at all.

Ultimately, Rowbottom seems sceptical of arguments suggesting that the internet provides truly equal chances to communicate and participate and suggests that the notion that those without substantial wealth can speak on a level with the traditional mass media is a ‘radical claim’. In the broader democratic context, it is indeed difficult to argue that the individual citizen, or even groups thereof, can hope to wield the same political power as wealthier individuals or organisations.

2.15 Concluding Remarks

‘The demos’ has classically been used to collectively refer to the individuals that make up society. It is arguable, however, that while the demos in its traditional sense remains a keystone, the increased complexity of law and policymaking and of the world in which the same takes place, means that

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272 Rowbottom (n203) 225-226.

273 ibid 228.
contemporary models of democracy must now cast a wider net. It is helpful to view society as being made up of multiple groups, each with equally important ends to pursue. Many classical accounts of democracy limit their focus to the individual citizen, thereby excluding larger groups and commercial interests as legitimate components of democratic society. This, it must be argued, is not a realistic way in which to view modern democracy. The affairs of many different actors occupy highly specialised niches, each subject to its own law and policy, and to build a model of democracy on a one-size-fits all approach is simply not a realistic prospect.

Many classical models considered throughout this section, therefore, provide little contemporary value. Why, then, has Held’s coverage of them featured so prominently in this account? It is important not only to show a modern model of democracy, but also the foundations and evolution of the concept in order to better understand it and ultimately arrive at the model presented below with a view to democratically justifying lobbying.

Pluralism has emerged as a particularly important model of democracy. By positioning government as the central arbitrator balancing the competing wants and needs of different groups in society, pluralism offers what is arguably a more realistic model and one that is particularly relevant to this thesis. Dominance by elites, however, remains a problem and it cannot be said that the pluralist model can be adopted here without qualification.

Inequality is one of the most dominant themes in this discussion of democracy, and with good reason. Equality, after all, is arguably a central element of democracy itself and yet, even in its earliest forms, that element seems not to have been manifested in reality. Some have suggested that resource-redistribution is necessary to create a more equal society and while it is difficult to agree with the more extreme forms of social engineering this might entail (such as the redistribution of financial wealth), the redistribution of political resources such as know-how and information is rather more palatable and practical, ideally enabling those stakeholders with smaller, quieter voices more effective opportunities to participate in the policymaking process.
Having considered the broad views of both governance and democracy the
discussion will now turn briefly to the European Union, given its unique status
as a democratic framework and its particular relevance to this thesis in light of
the coverage of the ill-fated CII Directive in Chapter 5.

3. Democracy in the EU Framework

The EU, as a policy environment, differs substantially from the typical nation-
state. In the present context, this will carry with it implications for both
lobbying and democracy. An important question which arises is whether the
EU can and indeed should be judged by the same democratic yardstick as a
nation-state and what this means for the democratic justification of lobbying.

In broad terms, under the principles of subsidiarity and proportionality
established by Article 5 of the Treaty on European Union, EU legislation should
deal only with trans-national matters that are of relevance to all member states
and that can be best handled by the EU institutions rather than individual
member states. A measure designed to harmonise a particular area of law such
as the CII Directive presents a particularly good example.

In light of the abovementioned principles, one might expect that EU policy
ought to strike a comfortable middle ground and be relatively centrist in
nature. Indeed, this very suggestion is noted by Majone: that all EU market
regulation or regulatory policies are, or should be Pareto efficient. In other
words, there should be no winners or losers or at least the gap between them
should be as small as possible. The present reality, however, as Follesdal and
Hix acknowledge, is that a great deal of EU policy does have clearly identifiable
winners and losers. Indeed, the CII Directive demonstrates the potential of this
all too well.

The nation-state model of a democratic government is generally not applicable
to the EU. Indeed, the only directly elected body, the European Parliament (the
“EP”) is arguably the weakest of the three institutions that make up the

274 Chapter 5, 210.
275 Andreas Follesdal and Simon Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’
legislature. Consequently, many EU policymakers are seen as being more distant from the individual citizen, leading to suggestions that the EU suffers from a *democratic deficit*, a topic that will be discussed in greater detail below.

When examining legislators and policymakers at the EU level, popular are terms such as *enlightened technocrats* and *enlightened bureaucracy*. Follesdal and Hix suggest that policies designed and chosen by technocrats may differ from those that would be chosen by citizens.\(^{276}\) Furthermore, they note that advocates of such an approach, such as Majone and Moravcsik, extol the ‘virtues of “enlightened” bureaucracy against the dangers of untrammelled “popular” democracy’.\(^{277}\) While this arguably holds a certain appeal, particularly in the case of a specialist area of law and policy like IP, it is not a view that finds itself compatible with democracy per se. Indeed, it presents an alternative to democracy more than it corresponds to a model of it. For that reason, therefore, it must be considered outside the scope of this thesis and of the model presented at the end of this chapter.

Building on one of the central themes both in this chapter and in the case studies themselves, it is perhaps not the distance between EU policymakers and citizens that should be the greatest concern, although that certainly carries with it negative implications for the EU’s democratic credentials when evaluated against classical models. The problem of inequality of access to, and influence over, policymakers is arguably of greater concern when considering specialist niches in law and policy such as IP.

As acknowledged above, the notion of a *participative technocracy* could be an interesting one, and certainly merits further study free of this work’s self-imposed constraint of a democratic focus; however, without equal and full participation of all relevant interests, the policy derived from such a system would still be poorly founded in any case. The fact that policy and legislation may be formulated by policymakers who are not directly elected is not in itself unduly problematic, but without sufficient checks and balances to ensure accountability and transparency, the system is undeniably flawed. Indeed, as

\(^{276}\) Ibid 545.
\(^{277}\) Ibid 546.
Follesdal and Hix observe, ‘We must also know whether there are mechanisms that will reliably continue to ensure acceptable outcomes in ways that provide crucial trustworthiness.’

A further point of interest raised by Follesdal and Hix is that, in the current EU structure of legislative institutions, there is nothing akin to an Opposition or government in waiting. As a result, they suggest, the EU policy process inherently suffers from less accountability and less deliberation. In part, this is arguably due to the party-political structure of the EU, a structure that is markedly different to that present in a system akin to the UK parliament. As will be discussed below, there are a number of political parties present, and a number of political party groupings, gathering along lines of political ideology; however, party politics does not play quite the same adversarial role at the EU level.

Following on from the previous point, Follesdal and Hix also note that whilst policies may well be crafted with the best of intentions at the outset, without electoral competition there is little incentive for them to be changed in the future in response to citizens’ preferences, thereby giving rise to further concerns about a lack of democratic accountability. A question which thus arises is whether private interests face a similar issue to that faced by citizens. If individual citizens are not in a position to vote out a particular EU administration, arguably private interests will similarly not be in a position to impose any form of electoral pressure. With this said, however, one must question the degree to which many private interests would seek such involvement in electoral politics in Europe in any event. What is more likely, it is submitted, is that private actors who desire a change in policy or legislation will actively seek it out by lobbying EU policymakers. Whilst Follesdal and Hix’s argument may be sound with respect to citizens, then, extending that same reasoning to the ability of private interests to shape policy is perhaps less certain. Private actors will likely voice their preferences more directly than individual voters in any event. Moreover, one would also submit that the necessity to ensure the popular vote for the continuation of one’s career might

278 ibid 548.
279 ibid 548.
280 ibid 549.
not be the only motivator to act. The suggestion that legislators will cease to legislate effectively without the threat of losing their seat is, one would submit, somewhat weak.

3.1 Political Parties, National Governments, and Their Role in the EU

In light of concerns surrounding the distance between citizens and the EU policymaking framework, the House of Lords European Union Committee, in its 2014 report on the role of national parliaments in the EU\textsuperscript{281} called for a greater involvement of national parliaments in the EU legislative process, in particular at the proposal stage:

\begin{quote}
...drawing on their diverse experience and expertise, national parliaments can make a distinctive contribution to the development of policy at an early stage...
\end{quote}

From a lobbying perspective, might it be argued that a more active role in the EU-level process on the part of national parliaments may present a more attractive opportunity for private actors to become involved at an earlier stage? Whilst it is not in dispute that the diffuse national legislatures across the EU would nevertheless make it harder to gather support (certainly as compared to gathering support in the state-level legislative context), it is nevertheless arguable that the ability of a particular individual, organisation, interest group, or range of interests, to target national legislatures with which they may be more familiar and have nurtured stronger ties may present a useful opportunity to put forward information and opinions at a crucial stage in the process.

The House of Lords report further notes the potential for the formation of informal \textit{clusters of interest} conferences, noting that, ‘As national parliaments increasingly engage with key EU policies, it is likely that there will be informal


\textsuperscript{282} ibid 17.
conferences to discuss major policy issues.’\(^{283}\) Whilst no further elaboration is provided with respect to the possibility for the involvement of private actors in such conferences, such potential is at least worth acknowledging. Subject, as always, to the requirement of sufficient transparency and equality of access, such conferences – if open to private actors as well as parliamentarians – could present valuable ‘melting pots’ for political and legislative ideas that would ultimately feed into the EU legislative process.

What of political parties in the EU framework? In particular, what is the relationship between state-level parties and EU-level parties? As political divisions (whether ideological or otherwise) arguably have the capacity to play a decisive role for lobbyists at the national level, as will be seen in the context of the CII Directive, it is important to examine the value (or not, as the case may be) of such groupings in the EU context.

At the national level, parties lie at the heart of the political system, not least with respect to policymaking and the respective positions of each party may be influential for lobbyists in determining which policymakers to approach. Ideally, then, this presents both individual citizens and private actors with relatively clear lines along which to cast their decisions: who to vote for, who to support, and who to lobby. Moreover, as Lindberg, Rasmussen and Warntjen note, political parties ‘help to aggregate and communicate policy preferences, link decision-making between different legislative bodies and hold politicians accountable’.\(^{284}\)

At the EU level, whilst political parties and groupings thereof certainly exist, their function is somewhat different and, some suggest, weaker. This, suggest Lindberg et al, citing a 2005 commentary by Hörl et al, is largely due to the fact that the EU, as originally formed, focussed more on international relations than on smaller-scale legislation.\(^{285}\) This is not to say that political parties are irrelevant, be they national parties or transnational groups, however. National-level parties in particular play a key role in elections for the European

\(^{283}\) ibid 39.


\(^{285}\) ibid 1108.
Parliament. It is with some regret, however, that one must observe that this may not translate into a sound connection between individual citizens and the EU as a governmental body. On a related point, Lord notes that those parties that are more involved in the pro-integration groups at the EU level will be more likely to deal with EU-related matters at the national level.\textsuperscript{286} It may thus be the case that such parties represent more attractive lobbying targets for private actors at the national level where EU policy is at stake, while also presenting a more relatable connection between the EU and its citizens.

Irrespective of a particular party’s stance on the EU, one must also consider the impact of resources on the value of EU-related lobbying at the national level. Lord suggests that national parties have a tendency to compartmentalise EU matters, delegating EU duties to a small number of specialists.\textsuperscript{287} This may carry both advantages and disadvantages for those seeking to influence EU policy at the national level. On the one hand, such compartmentalisation arguably offers a useful focal point for private actors. On the other hand, however, particularly where specialist niches such as IP are concerned, compartmentalisation may result either in undue influence as a result of an expert painting a biased picture for a layperson and labelling it \textit{objective information} or in a lack of useful dialogue between experts and suitably knowledgeable policymakers. By further narrowing down the potential audience, the likelihood of finding a lobbying target with the relevant expert knowledge will arguably decrease yet further. The risk that the policymaker may simply not be so receptive to arguments about an area of law of which they have little or no knowledge may be a concern.

As to the notion that political parties are somehow weaker at the EU level, Lord argues that this is at least in part due to the way in which the EU functions,\textsuperscript{288} further noting that divisions are based more on issues than on traditional party-political grounds, namely political ideology in the broader sense.\textsuperscript{289} Moreover, the national interest appears to override political differences that may be more apparent on the national stage. In particular, this is noted by Lord in the

\begin{footnotesize}
\begin{itemize}
\item[287] ibid.
\item[288] ibid 11.
\item[289] ibid 9.
\end{itemize}
\end{footnotesize}
context of the Council. Indeed, we may observe such behaviour in the context of the CII Directive. As will be seen, Ireland in particular had good reasons to support the directive given its position as a European base for a number of large multinational software producers. Given the great importance of the software sector to Ireland’s economy, it is likely that Irish politicians would have set aside partisan divisions that may otherwise separate them at the national level in their support for a directive that would have been so favourable to such organisations.

If national parties, normally rivals, can be united over issues of national importance in the EU arena, then, one must ask how parties behave at the EU level – whether as extensions of their home parties or within groups of like-minded parties from across member states. Certainly, given the electoral structure of the EU, transnational party groups are of little importance from the perspective of individual citizens. There also appears to be less division along what we would traditionally recognise as party lines. For these reasons, Lindberg et al. conclude that such groups are weaker when compared to traditional national political parties. One may also suggest that from a democratic perspective, they are less representative of individual citizens since in many cases, citizens will cast votes for their elected representatives along party lines.

Lindberg et al. identify three types of party groupings at the EU level: transnational parties, European party federations, and national party delegations in the European Parliament. The first refers to a group of representatives within a given institution that typically come from the same party family. Examples include the European Democratic Party, the European Green Party, and the European Peoples’ Party. The second category refers to those party organisations at the EU level which are active outside the confines of the EU institutions. The third exist within the transnational European Parliament parties and consist of MEPs from the same national party.
Of particular interest is the notion that transnational parties reduce the transaction costs of legislative decision making at the EU level by allowing like-minded legislators to group together without the overheads imposed by the establishment of formal party frameworks and leadership. The power imbalance between national parties and transnational parties, however, reduces the potential effectiveness of such groups and, one can therefore suggest, their attractiveness as lobbying targets. Lindberg et al. note Hix’s observation that national parties in essence compete with transnational parties and that the balance of power in the context of election and appointment continues to tip in the national parties’ favour. The value of a national-level party or politician as a focal point for a private actor may, therefore, still be significant.

Moreover, Lindberg et al. note that within the EP, MEPs’ attitudes are ‘significantly more in line with the opinion of their national parties than with that of their EP party groups.’ This view is also upheld in Lord’s analysis, noting that in the event of a conflict between the position held by a national party and one held by a party group, MEPs demonstrate a tendency to align with their home party. Of further interest is Lord’s suggestion that MEPs from a party that is also in government will be more likely to follow the national party line than those from an opposition party. In so doing it is more likely that such MEPs will be in agreement with their member state’s Council members. Might this mean, then, that the national party in power makes for a more attractive target for a private actor than one in opposition? One would argue that this is not necessarily the case. Depending upon the position of respective parties taken on a particular policy issue the more attractive option may nevertheless be to work with the opposition, gaining their support at the EU level and enabling them to score a partisan victory over the government of the day. Whether or not this suggestion carries sufficient validity in real world politics, the argument can still be made that private actors may be able to exert influence over EU policymaking by lobbying at the national level. When one considers the makeup of the Council of Ministers, consisting as it does of

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293 ibid 1114.
294 ibid 1115.
295 Lord (n286) 15.
Ministers from national governments, the case for national-level lobbying is strengthened further.

What, then, of Commissioners? Whilst MEPs often hail from parties with which many will be familiar with on the national stage and Council members originate from the elected governments of member states, Commissioners possess – at least notionally – a degree of independence. Nevertheless, it is unlikely that a commissioner will come from a non-political background. As Lindberg et al. note, Commissioners can be, and often are, chosen based upon their national party affiliations by governments sharing those affiliations.296 One must therefore ask to what degree such ties translate into partisan influence, and to what degree can Commissioners be considered democratic representatives.

Egeberg, as cited by Lindberg et al. theorises that the primary influence on a Commissioner will be the nature of that Commissioner’s portfolio but that the normal influences (i.e. national and partisan) will also remain.297 As something of a counterpoint, however, Lindberg et al. note Wonka’s position, suggesting that while there is little evidence of national or transnational party effects on a Commissioner’s decision making, sectoral and national patterns of decision making are evident. In short, decisions may be based around national issues or matters that are of particular importance to the Commissioner’s member state. The influence of national parties and national political affiliations, then, remains an important one as, it would seem, is the bearing of issues of national importance to a particular member state. For any private actor aiming to influence EU policy, therefore, there certainly appears to be an arguable case for continuing to nurture and utilise national-level contacts.

Despite the arguments considered here – that national political influence is a key factor at the EU level – the House of Lords European Union Committee clearly did not believe that there is sufficient national involvement for national parliaments. It is important to observe here that the two need not go hand in hand. Politics and process may, it is submitted, be seen as distinct – the former

296 Lindberg et al. (n284) 1115
297 Ibid 1119.
being influential, the latter too separate. Party politics, it seems, is alive and well on the EU stage – even if it is the traditional national parties that would appear to wield the greater influence. The involvement of elected national legislatures, however, may not be as strong as some desire and shows a disconnect between the demos and the governance structures that exist to govern and to serve it.

Might the European Union Committee, however, have been putting the cart before the horse? A fundamental barrier in the way of more national involvement at the EU level is that of resources, a theme discussed at length in the context of democracy, above. The Committee’s report examined the issue of prioritisation at the national level, noting that, ‘it is often helpful if there is effective prioritisation, so that each national chamber and its committees concentrate on the policies which matter the most to it’.298 From a lobbying perspective, such prioritisation would arguably provide a useful focal point, making it easier for private actors to identify those responsible for dealing with a particular issue. It is, of course, a professional lobbyist’s business to have such knowledge in any case; however, in light of the issue of equality of access, it is arguable that clearer organisation of issues may improve matters for those with fewer lobbying resources and less experience, particularly if clear, easily accessible information about those issues is made available early enough to allow for consideration, planning, and action on the part of those who would seek to participate.

For the Committee, however, such prioritisation is not without limits and it is at this juncture that the scarcity of resources becomes an issue for, as the report states, ‘…effective scrutiny is resource-intensive, in terms of Member time and staff time.’299 Perhaps inevitably, it seems, for a national parliament, the priority will be national matters – at least when compared to EU policy. Whilst the national-level politician may have an interest and indeed a measure of influence in and over EU matters, then, the value of national-level lobbying to a private actor may now have been called into question, a question that will be discussed in more detail when examining the CII Directive in Chapter 5.300

298 House of Lords European Union Committee (n281) 14.
299 ibid.
300 Chapter 5, 210.
The issue of national parliament / EU engagement is clearly also one of importance at the EU level. As the Committee’s report observes, ‘The European Commission has acknowledged for some time that it needs to engage with national parliaments’. Encouraging in this regard was an initiative established under former Commission President, José Manuel Barroso, in 2006 under which all new consultations and proposals were to be sent directly to national parliaments for their response. The Committee noted that from the start of 2010 to the end of 2013, some 2000 written contributions were submitted by national parliaments under the so-called ‘Barroso initiative’. A detailed examination of said contributions falls outside the scope of this study, however it is submitted that there would be significant value in such an examination with particular regard to the involvement, if any, of private actors. It is after all unlikely that there would be no such involvement.

It is unfortunate, then, that the Committee highlighted a lack of firm evidence as to the impact of national parliaments on EU policy and legislation. Not only does this call the value of the Barroso initiative into question but, more importantly for present purposes, it highlights the fact that there is still considerable dissatisfaction at the lower level of involvement national parliaments have in EU legislative decision-making.

The Committee’s report further suggested that, despite measures such as the Barroso initiative, the Commission pays little real attention to national parliaments. By way of an example, the report notes the view of the chairman of the European Affairs Committee in the Polish Senate, ‘The European Commission does not take into account national parliaments’ opinions or even neglects them. The Commission’s answers are often delayed and sent when negotiations are already advanced, are very general and do not address any specific issues. In principle, the Commission upholds its position, repeating arguments from its original proposal’. Indeed, similar behaviour will be observed when considering the account given by software lobbyist Florian Mueller of the CII Directive.

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301 House of Lords European Union Committee (n281) 15.
302 Ibid.
303 Ibid 28.
In light of the apparent weak position of national parliaments in the realm of EU policymaking, one may thus ask whether greater cooperation between national parliaments – a sort of union within a union – may enhance their position. For the European Union Committee, the idea was an important one, albeit subject to the familiar caveat that EU-centric resources within national parliaments are limited. Beyond this greater official cooperation, the report suggests that parliamentarians should be encouraged to forge contacts with their counterparts from other member states, thereby creating a more effective network of national parliaments within the EU framework without the overheads associated with a more formal organisation.

From the perspective of private actors, in this context, it may be helpful to consider groups of private actors (including groups of organisations) in addition to individuals in light of the fact that on a pan-EU basis, it is likely to be practically difficult for all but the largest individual organisations to lobby multiple parliaments. Provided, however, that sufficient access is bestowed upon private actors, their views, opinions, and ideas may nevertheless enter into the process via national parliaments and, if those private actors are working alongside foreign counterparts to convey the same message, that message may have a stronger impact if it is reaching multiple parliamentarians who may ultimately come together to discuss the same issue. Moreover, it is submitted that lobbying that where lobbying is excessively biased (I use the term excessive as all lobbying will naturally be biased to some degree) that input into the policymaking process may in essence be filtered. If those representing national parliaments at the EU level are indeed so limited in number, one might suggest that the chances of influencing them may be higher. With an opportunity to discuss the policy at hand with their counterparts from other member states, one may argue that the more extreme ideas will inevitably be watered down as part of the debate.

304 ibid 35.
305 ibid 40.
3.2 Transparency, Accountability, and Democracy

When considering the level of involvement and commitment and therefore, by connection, the level of interest in the arguments of a private actor, of a national politician to EU-level policy and legislation, it is important to consider the arena in which that politician operates. On the face of it, as has been discussed previously, a national-level contact may remain attractive to a private actor even where EU-level policy is at hand. As has also been noted, however, the amount of time and resources dedicated by national-level politicians to EU-level matters, particularly those such as IP appears to be relatively low.

An important motivator at the national level for an elected official will naturally be that official’s re-election prospects. Furthermore, as re-election (or not, as the case may be) becomes more imminent, an MP’s track record in parliament will be scrutinised – arguably to a much greater degree than that of an MEP. Of particular concern, it is submitted, is the fact that EU politicians will be more likely to spend their energies campaigning on a limited range of national issues. To the average citizen, an MEP’s stance on EU-wide IP regulation will matter very little when compared to his or her stance on topics that impact everyday life at the individual level. The day-to-day levels of transparency and knowledge, then, of an EU politician’s work are relatively low, if for no other reason than the simple fact that the average citizen has little interest in that work. Similarly, Lindberg et al. observe that, ‘the legislative performance of transnational parties represented in the Council is not evaluated in national elections’. The aforementioned transnational parties may be important where policy is concerned, but are of little importance when it comes to the involvement of citizens in democratically appointing policymakers to the various EU bodies.

Continuing on the theme of distance between EU-level actors and their home parliaments, Follesdal and Hix note that ministers working in the Council and officials working in the Commission are ‘more isolated from national parliamentary scrutiny and control than are national cabinet ministers or bureaucrats in the domestic policymaking process’. As a result, they suggest,

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306 Lindberg et al. (n284) 1113.
307 Follesdal & Hix (n275) 535.
it is easier for governments to side-step or even ignore their national parliament when taking action at the EU level. It may be arguable, then, that such policymakers may be more easily (or indeed effectively) influenced by private actors – not perhaps because they are more open to influence per se than those working on the national stage, but because there is inherently less parliamentary (and thus democratic) accountability.

A further problem for Follesdal and Hix arises when considering democracy and accountability. As has already been made quite clear, many EU policymakers are not directly elected and thus not accountable to the individual citizen. Moreover, even the body that is directly elected – the European Parliament – seemingly attracts little electoral interest when compared to a national legislature and is thus less accountable. If the electorate is not participating in elections or has adopted a largely blinkered view of EU affairs, there is less likely to be an adverse reaction among citizens to a policy change or piece of legislation that they may otherwise find unpalatable. An important component of democracy is accountability – ensuring that policymakers do not enact policy that would be harmful to the state by giving the citizenry the power to remove them. To say that EU officials are unaccountable, however, is arguably to condemn the EU’s democratic credentials a little too far. Whilst fewer EU officials are directly elected, most still emanate from national governments or at least from national parties. Moreover, it is important to remember that large numbers of policymakers in the UK are similarly unelected: civil servants. Nevertheless, citizens, stakeholders, and in particular the media still ultimately have an important role to play in holding those policymakers to account.

Supporting the notion that policymaking at the EU level may be inherently less restricted, Follesdal and Hix observe that ‘Governments are able to undertake policies at the European level that they cannot pursue at the domestic level, where they are constrained by parliaments, courts and corporatist interest group structures’. Whilst this point is generally well taken, the suggestion that interest groups are less involved is at the very least open to question. To take the example of the CII Directive, this thesis examines a legislative proposal

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308 ibid 537.
that was in no small way born out of private influence, manipulated throughout its tumultuous life by private influence, and ultimately killed by private influence. Certainly, where such specialist niche law and policy is concerned one would not expect to find stakeholders very far away. It is with apparent contradiction, then, that Follesdal and Hix note that, owing to the European Parliament’s comparative weakness alongside its fellow institutions, ‘private interest groups do not have to compete with democratic party politics’. However contradictory this may appear, however, it is submitted that the point is an important one and indeed supports the arguments made here.

Taking the contrast between EU and national politics yet further, Follesdal and Hix note Majone’s argument that an EU in which the Parliament or a directly-elected Commission were the leading power would ultimately lead to the politicisation of regulatory policymaking. Certainly Majone’s argument is an interesting one. Whilst it is not in dispute, however, that politics-neutral regulatory activity is both important and necessary, it is questionable whether that same activity could be considered interest-neutral. It may be reasonable to suggest that certain areas of EU policy are more likely to be neutral than others, but it would certainly be difficult to argue that most areas are free of private actors with an agenda to advance. Indeed, of thirteen European Directives transposed into UK law by the Department for Business, Innovation and Skills throughout 2013, for example, it is submitted that few, if any, could be considered sufficiently neutral to be free from private influence.

A further point of interest arising from Majone’s work is the suggestion that there should be more involvement by private actors, particularly in terms of legislative scrutiny. Given that the suggestion appears to be in the context of ‘ex-post’ review, Majone may not be advocating greater levels of lobbying per se. Nevertheless, such arguments clearly recognise the value of private actors’ expert knowledge and their opinions. Moreover, from a democratic

309 ibid.
310 ibid 538.
311 Examples of such Directives include those relating to the marketing of pyrotechnic articles, late payment in commercial transactions, packaging and packaging waste, the use of hazardous substances in electrical equipment, and the term of copyright protection.
312 Follesdal & Hix (n275) 538.
perspective, particularly in light of the stated aims of my own model, this argument suggests an interesting additional role for private actors in the crafting of law and policy.

From the discussion presented thus far, suggestions that the EU is distant and opaque appear to be supported, at least in terms of the distance between citizens and the EU’s governmental machinery. As for the opacity (suggested by an IT industry lobbyist interviewed for the CII Directive case study in Chapter 5), however, the case is less clear. Indeed, as Moravcsik\(^\text{313}\) has pointed out, there is a great deal more information available about the EU policymaking process than there is about many national governments. There is indeed credibility to this view; however just as Majone suggests that the EU suffers from a crisis of credibility more than one of democracy, so too can one argue that the fact that the information is available is somewhat meaningless if nobody knows of its existence or where to find it. A practical model of governance and democracy must therefore be supported with meaningful transparency, rather than mere technical transparency.

Of particular use in supporting my own model is Moravcsik’s apparent endorsement of greater access for, among others, interest groups and his suggestion that such increased access equates to more democracy.\(^\text{314}\) Indeed, it is this very argument that lies at the heart of this thesis. What is less certain, however, is the assertion that ‘no single set of interests can dominate the EU policy process, as the Commission consciously promotes the access of diffuse interests, and diffuse interests have access via those parties of party groups (on the left) in the Council and European Parliament’.\(^\text{315}\) The accuracy of this statement, it is submitted, is questionable. Much of the discussion in this chapter is dominated by one central theme: inequality. In many cases, that has referred to inequality between citizens and private actors, but important inequalities between private actors themselves are also highlighted and will continue to be highlighted throughout the case studies considered later. In the EU context, certainly those lobbying against the CII Directive would be inclined to disagree, with most of their opponents representing large, resource-rich

\(^{313}\) As cited by Follesdal & Hix (n275) 540.
\(^{314}\) ibid.
\(^{315}\) ibid 540.
multinational corporations. One must, nevertheless concede, that the CII Directive – whilst a valuable illustration of the potential strength of activist-style lobbying – may not be representative of everyday lobbying on less contentious issues.

A further issue highlighting the valuable role of expertise emerges from Follesdal and Hix’s consideration of democracy in the EU. The authors submit that elections are ‘crucial to make policies and elected officials responsive to the preferences of citizens’. Where policy is of a grass-roots nature, this statement is not in dispute; however, it is submitted that there may be a range of policy areas over which the EU has competence which would be incompatible with such a statement. As discussed above, particularly with reference to areas of policy which are highly technical in nature or relevant only to certain industries, the average citizen will have little knowledge or understanding of, nor interest in, such policy. The importance of private actors’ voices, however, will be considerably greater. Moreover, even where policy that is of greater relevance and interest to citizens is under consideration, the preferences of a citizen in one member state may not match those of a citizen in another.

3.3 Concluding Remarks: A Democratic Deficit?

The central theme to the work discussed here is the suggestion that the EU, in its present form, suffers from a democratic deficit. The focus of Follesdal and Hix’s argument is the lack of citizen involvement – the fact that the European Parliament is the only directly elected body, the fact that a lack of ‘contestation for political leadership and over policy...an essential element of even the ‘thinnest’ theories of democracy...is conspicuously absent in the EU’. At the nation-state level, it would be hard to disagree; however at the EU level, as has been observed throughout this section, this may be more open to question. The very nature of EU policy instigated under the principles of subsidiarity and proportionality arguably makes it less suitable for citizen involvement. Follesdal and Hix argue that, ‘the low current salience about policy issues is

318 ibid 549.
317 ibid 533.
not a justification for no democracy'\(\text{'}\) but there appears to be a flaw in such reasoning. The argument appears to be founded upon the notion that the average citizen has an active interest in the policies being formulated. In many instances, particularly those concerning education, healthcare, income tax, policing and similar issues, this is indeed the case. When one steps into an area like IP, however, policy and legislation are, it is suggested, by their very nature at such a distance from the average citizen that most of those citizens will neither know nor care of their existence.

For present purposes, however, a different kind of democratic deficit is of interest. It is not the distance between citizens and legislators, but between private actors and legislators that is perhaps more relevant – particularly in the case of those private actors that are resource-poor. Indeed, as has been observed in the national context, the inequality of access when comparing large organisations and interest groups to smaller interest groups, SMEs and individual stakeholders represents a problem. It is vital that all stakeholders are given the opportunity to speak their minds about policy that affects them, but if the smaller and/or quieter voices are not being heard, the resulting policy may ultimately be biased in favour of those voices that have the means to be heard.

4. Conclusions on Governance and Democracy: Towards A Model of Democracy

This chapter began with Kooiman’s observation that governance has made a transition from a top-down, one-way model to a more horizontal, two-way model. Some view this as a negative, as the ‘hollowing out of the state’, but it should, it is submitted, rather be viewed as a positive. This is not to justify undue influence, backroom deals, or corruption, but the important involvement and input of individuals and organisations in areas of law and policy that will directly affect their activities.

Does government ‘steer’ or does it act more as an arbitrator, weighing up competing inputs and arguments? Power is a dominating factor, both in

\[\text{\textsuperscript{318} ibid 551.}\]
theoretical discussion and, as will be seen, in practice. This is arguably a key reason why governance and the participation of private actors in the policymaking process is often viewed as anti-democratic. Wealth (whether financial or in the form of other resources such as political expertise and contacts) frequently distorts influence and renders it unequal.

If government is to serve as a co-ordinator, as emphasised in the pluralist school of thought; as a body that draws together competing arguments and forms a consensus, it is important that the end result strikes a balance of all competing interests and therefore does not allow one side of the debate to gain an unfair advantage over the other. This requires measures to ensure that all sides are heard from and listened to.

Hirst proposes one definition of governance that essentially requires government to set out a framework within which private economic action can work effectively, something of a laissez-faire approach. On the other hand, governance may also revolve around networks wherein private economic actors do not so much work within a framework as become a part of it and determine its shape. By extension, those actors are active in creating a system which enables them to pursue their activities more effectively. Networks are key, both in theory and in practice and it is here that the horizontal element becomes most relevant. Policy networks may help to highlight the influences behind law and policy and, although they have been criticised for not examining policy outcomes themselves, the insights remain important as they help to show which voices have been included and which have not.

A weakness of networks, however, is that, despite some suggestions to the contrary (Rhodes, for example) a number of actors may find themselves excluded from those networks due to a lack of resources (including know-how) to participate. The policy which results, therefore, risks being skewed in favour of the more powerful interests involved.

As observed in the introduction to this thesis, when considering the meaning of lobbying, it is clear that the role played by private actors should not necessarily be viewed as external to the policymaking process. The greater the
role of policy networks, and the more integrated private interests are in policymaking, the more internal they become. It is clear that the greatest problem is not that lobbying per se is anti-democratic, but that it is so in its current form. The exclusion of smaller interests is the most significant issue to be addressed. In areas such as IP, the individual citizen often neither seeks nor needs participation – particularly given the presence of organisations such as the Open Rights Group and the Electronic Frontier Foundation, who seek to protect the freedoms of users while also understanding the technical aspects of IP. The greater concern is the fact that large economic interests continue to dominate, and if lobbying is to be fully justified on democratic grounds, the balance must be redressed. Measures such as consultations and reviews may help in this regard, although as will be seen, these take place alongside traditional lobbying, not instead of it, meaning that the results may continue to be skewed.

Balance is important, but observed above, certain arguments will be more important than others and in some cases, the greater good will be important. For IP policymakers, an important consideration must be the economy, and supporting the greatest contributors to that economy will therefore take priority where there is a conflict between the interests of those contributors and, say, the creative freedom of SMEs and individuals. This is not to say that balance must not always be strived for, but it does concede that sometimes there will necessarily be winners and losers and that to expect otherwise is unrealistic.

As observed above, the concept democracy must now accommodate and accept the complex and diverse reality of the modern policymaking landscape. Indeed, this is a central argument underpinning this thesis and of the democratic justification of lobbying that this thesis seeks to support. Democracy in the classical sense cannot support lobbying, but it also cannot support modern society. Participation by every citizen cannot practically extend beyond current levels because there are simply too many people. If a citizen has a right to determine how his or her life will be ruled by the state, in the modern world so too should a sole trader, SME, or multinational corporation. This is not, it must be emphasised, to say that the
primacy of the individual citizen – the natural person – as a component of a democracy should be displaced; however, it is to say that if the state is to regulate the activities of a particular sector of commerce (in this case IP), those who will be subject to that regulation should be given a say in the shape of that regulation.

Democracy may be viewed as meaning that each individual has a right to participate, however even in classical models (Athenian democracy, for example), participation was in fact limited. Moreover, as the above examination of models of democracy has illustrated, as long as democracy has existed, networks and the influential impact of wealth and status have been an influential component.

Inequality is without question the single greatest threat to democratically legitimising lobbying. Some have sought to eliminate inequalities, but one need only turn to examples such as the former USSR and North Korea to see not only the lack of success inherent in such endeavours, but also the totalitarian control necessary to bring about such conditions. Far more important and, it is submitted, realistic, is to accept inequalities and manage them through mechanisms designed to ensure that wealth and power do not result in privileged access and influence and to bring about the participation of those smaller organisations and individuals that will also be affected in a given area of law and policy.

It is also important to consider those models of democracy that favour freedom of trade and commerce – free, that is, from state interference. To allow complete free rein would arguably be impractical, particularly with such a globalised marketplace. Rules and standards are necessary, particularly to support the framework of IP rights and enforcement. The next best thing, therefore, to allowing freedom of interference from the state, is to allow those subject to the rules to have an input into the process in which those rules are developed. Similarly, justification can be located in Locke’s view that government is a means to an end; a body that enables private individuals in society to pursue their own ends. The end for many individuals is to group together, produce, and profit or, in other words, to engage in commerce.
When considering power, it is also important to consider the power of policymakers. Accountability and limits of power are also key elements of democracy. First and foremost, such power is kept in check through elections, but as Dahl suggested in the context of pluralism, there are other mechanisms including competition between political parties, groups, and individuals. While checks and balances are needed to ensure equality of access and influence, the fact that private actors themselves also help to keep a check on power should not be overlooked.

Other elements from the pluralist school of may be drawn upon to support the model presented below: power, resources, and bargaining. Power should be competitively distributed and used in bargaining between different interests. This is not to say that it currently is, but that if it can be, lobbying again becomes more democratically palatable. Pluralism also supports the notion of government as a central arbitrator, balancing competing arguments and demands in order to produce law and policy that serves the interests of the greatest number.

It is also important to allow for and encourage constructive forms of influence, since to deny them would arguably be to encourage more destructive forms: bribery, threats of political or economic damage such as relocating to more permissive economies, and so forth. To outlaw lobbying as undemocratic would not stop it, it would instead drive it underground meaning that it would become less transparent, less ethical, and arguably even harder for those with fewer resources to make an impact.

Ultimately, Egalitarian Pluralism perhaps explains the model below most effectively: ‘An outcome is legitimate only if it emerges from a process of representation and bargaining in which all interests have substantively equal chances of being heard and influencing the outcome’.

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319 Cohen & Rogers (n216) 16.
5. A Model of Democracy

When compared to classical models of democracy, the model presented here may be criticised as being less democratic but, as is argued above, those models can no longer be considered realistically achievable in modern society. Indeed, one may question whether some of them ever have been. The model upon which this thesis will be founded, then, is built upon a two-way approach, accepting and emphasising the importance of participation in the policymaking process by those subject to the law and policy being made.

Expert information, both objective and subjective, is important; particularly in specialist niche areas like intellectual property and it is important that those charged with governing not only understand the objective facts, but also the subjective wants and needs of those they govern. In espousing such value, however, it must also be understood that reliance upon private actors by policymakers will necessarily vary from one niche to another, and must not cross the boundary between democracy and technocracy; but it is submitted that private actors will, and indeed should, have greater involvement in areas which may, in the public eye, be of low-salience due to their more specialist nature. Given that the public will often still be affected by such law and policy, however (IP being a case in point), their interests must still be represented alongside those of other stakeholders. Policy networks and subsystems incorporating policymakers and private actors, as described above, help to illustrate both the role and importance of the horizontal approach and, it is submitted, must remain a key feature of democratic governance and policymaking.

Another key aspect of this model is the positioning of government as an arbitrator of sorts: gathering the competing arguments and inputs of stakeholders with a view to producing law and policy that seeks to best serve the interests of all sides. That being said, however, the emphasis of equality is on opportunity more than the eventual result. As is discussed above, certain arguments will be more important than others at the end of the balancing exercise.
A number of conditions must be imposed on the foregoing points. Most importantly, that policymakers need to receive the input of all affected parties, from individual citizens to multinational corporations (or at least categories or groups thereof), if they are to successfully formulate balanced, democratically legitimate law and policy that will be accepted by all. Proactive approaches may therefore be necessary to ensure that powerful actors do not dominate the policymaking landscape. Such approaches may take the form of resource allocation (in the form of lobbying know-how and easily accessible information on law and policy as opposed to financial resources), thereby enabling those with fewer resources to better understand how to lobby, and providing the necessary information to enable them to formulate their arguments and counter-arguments effectively.

A further important equalising measure may come in the form of greater use of more formalised means of input. Reviews, such as the Hargreaves Review considered in the next chapter, arguably have a key role to play in limiting the capacity of elites to dominate policy networks. A more radical approach may also support such formalised procedures by placing greater restrictions on informal means of access and influence, requiring improved transparency, and the imposition of formalised codes of conduct, placed on a statutory footing aimed at ensuring ethical conduct and at providing a universal structure to lobbying that can be understood and followed by private actors at all levels.

Underpinning all conditions is the importance of improved transparency, helping to level the lobbying playing field by highlighting not only inequalities, but also the key points of competing arguments, again assisting those with fewer political intelligence resources in coordinating effective lobbying efforts.
Chapter 3
Case Study I: The Hargreaves Review

1. Introduction
The Hargreaves Review or, to give it its full name, Digital Opportunity - A Review of Intellectual Property and Growth was commissioned in November 2010 by then Prime Minister, David Cameron. Professor Ian Hargreaves, Professor of Digital Economy at Cardiff University, chaired the review and was tasked, along with the panel, with addressing what was described as David Cameron’s ‘exam question’:

The review was needed, the PM said, because of the risk that the current intellectual property framework might not be sufficiently well designed to promote innovation and growth in the UK economy.¹

Faced with the task of addressing this difficult issue, a panel of IP experts was assembled:

- Tom Loosemore, internet innovator, formerly of the BBC, Channel 4, and Ofcom;
- Roger Burt, then IP Law Counsel for IBM Europe;
- Professor David Gann, head of Innovation and Entrepreneurship at Imperial College;
- Professor James Boyle of Duke Law School, expert in IP, open source production, and digital business models; and
- Professor Mark Schankerman, Professor of Economics at the London School of Economics with research interests in IP, R&D, and innovation.

The review concluded that the Prime Minister was right: the current IP framework was not fit for the modern age and laws designed to work for the

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creative and innovative sectors as they were two centuries ago could not adequately handle the challenges of technology in the modern world.

The other two case studies in this thesis focus on IP legislation that has been affected by lobbying. The choice to include the Hargreaves Review may therefore seem an odd one, however it is precisely because it is different that it merits inclusion. Not only is it an IP-centric example of structured and transparent input from private actors, but it also, perhaps unfortunately, suffers from similar difficulties in eliminating inequalities between private actors seeking to influence IP law and policy. As will be seen, the review achieved a great deal in terms of proactively seeking input from SMEs, yet inequalities remained and accommodating all points of view ultimately proved to be difficult.

1.1 The Appointment of Professor Ian Hargreaves

The review’s IP focus notwithstanding, Hargreaves’ background lies in journalism – a field in which he had until recently spent much of his career – with more recent evident interest in the broader creative economy. After spending eleven years with the Financial Times, Hargreaves moved to the BBC in 1991 serving as Managing Editor, then Controller and finally Director of News and Current Affairs. Further periods were also spent as Director of Corporate Affairs for BAA, Director of Strategic Communications for the Foreign and Commonwealth Office, and as a Senior Partner and Board Member for Ofcom. Throughout his career, much of his written work has focussed on journalism and related matters with some additional coverage of political and economic matters. Expansion into the creative industries more broadly is evident in the more recent years of Hargreaves’ career and by October 2010 had grown to encompass his current position with Cardiff University.

With this background in mind, then, it is important to question why Hargreaves was appointed to oversee a review of IP law and policy. Might his own views and knowledge not become too easily coloured by the opinions and interests of those submitting evidence to the review? In answer to this, one

must ask if this is not rather the point; a dyed in the wool IP specialist would
doubtlessly bring to the table their own ideas and prejudices. Hargreaves, on
the other hand, viewing matters from the perspective of the creative economy,
would be sufficiently detached from IP to view it objectively with a view to
benefitting that economy whilst also being able to absorb the subjective views
on IP held by those working with it. Moreover, this would not be Hargreaves’
first foray into this arena: in 2009 Hargreaves headed a creative industries
review for the Welsh Assembly entitled The Heart of Digital Wales.

If one is to define Hargreaves’ role as making recommendations for adapting
analogue creative and inventive industries for a digital age, viewed through
the lens of the UK economy, the relevance of Hargreaves’ background to the
Review of Intellectual Property and Growth becomes considerably clearer.
Indeed, far from being distracted by what could perhaps be an IP expert’s own
opinions and prejudices on specific IP rights, Hargreaves would arguably be in
a far more objective position to coordinate and deliver practical
recommendations under the review’s terms of reference.

1.2 The Forerunner: Gowers

The 2005 Gowers Review had identified many areas for improvement in the IP
system, including the strengthening of IP enforcement, spanning piracy and
counterfeiting; the reduction of IP litigation costs; and bringing greater balance
and flexibility for businesses, institutions and individuals to use IP in the
digital age. The review was initially well received, however by the time the
Prime Minister commissioned the Hargreaves Review, less than half of
Gowers’ recommendations had been implemented. Considering the general
tone in the Hargreaves report toward the Gowers Review, it may be suggested
that this lack of action stems more from governmental demurral than it does
from any lack of quality in Gowers’ recommendations. Indeed, a number of
the unimplemented proposals from the Gowers Review were made again by
Hargreaves. Of particular note are the proposals to broaden copyright

4 See, for example, Professor Bill Cornish who commented that “the Review...deserves to be read and welcomed – and also
International Review of Intellectual Property and Competition Law 1. 5.)
2 Hargreaves (n1) 6.
exceptions with the inclusion, for example, of a new parody defence and a new private copying exception, the latter of which is considered in more detail below. The subsequent fate of the private copying exception, however, also suggests that such demurral may have resulted at least in part from lobbying. An important question when considering the Hargreaves Review, therefore, will be how reviews co-exist with lobbying and whether lobbying in fact undermines the democratic function and transparency of reviews.

1.3 Hargreaves’ Recommendations

Hargreaves’ first recommendation is particularly relevant to this thesis: emphasising the importance of basing IP policy on evidence. By this, Hargreaves did not mean that lobbying *per se* should be encouraged; indeed, the importance of objectivity is emphasised. Nevertheless, the role of lobbying in formulating law and policy upon a sound evidence base is noted throughout this thesis. As established in Chapter 2, my position is that it is not the act of lobbying that undermines democracy but the way in which it sometimes takes place. As the Hargreaves Review itself demonstrates, in order for law and policy to be successfully founded on evidence, that evidence needs to be broad and must encompass the wants and needs of all who will be affected by it, not only those with the resources to undertake effective lobbying campaigns or with strong positions within policy networks.

The second recommendation emphasises the importance of working with the EU on the establishment of a unified patent court and with emerging economies such as India and China on more effective protection, both in terms of establishing better IP frameworks within those countries and in terms of better protecting the IP rights of UK interests working within them.

The third, fourth and fifth recommendations focus on copyright. The establishment of a digital copyright exchange is proposed whereby those wishing to use copyright material would be able to easily identify the owners of that work and obtain a licence. Emphasis is also placed on cross-border

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6 Hargreaves (n1) 24-25.
7 ibid 28-34.
licensing. Attention is given to orphan works in recommendation number four, in essence meaning that such works would be freed from the harmful effects copyright protection if their owners could not be located, enabling them to be used. Finally, recommendation five advises caution with regard to limiting what can and cannot be done with copyright works, returning to Gowers’ recommendations pertaining to format shifting, parody, non-commercial research and library archiving.  

Patents and barriers to innovation form the focus of Hargreaves’ sixth recommendation, emphasising the importance of combatting so-called patent thickets; the reduction of backlogs for clearing patent applications through greater international cooperation; and the avoidance of patents becoming available for too many fields of innovation, citing software and business method patents as specific examples.  

The seventh recommendation addresses the design industry and strengthening IP rights available to those in what the report describes as an ‘important branch of the creative economy’ which, in the view of the report, ‘has been neglected’.  

Recommendation eight calls for better enforcement of IP rights, not only in terms of protective legislation, but also in terms of education and the supporting of IP-intensive markets.  

SMEs form the basis for the ninth recommendation, specifically their access to lower-cost IP business and legal advice.  

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1 ibid 35-38.
2 ibid 38-40.
3 ibid 41-52.
4 In short, complex webs of overlapping patents all relevant to a particular invention, requiring considerable resources not only to research and identify them but also to negotiate for licences to use them, thus creating a barrier to entry into a number of high-technology markets for smaller innovators.
5 Hargreaves (n1) 53-63.
6 ibid 9.
7 ibid 64-66.
8 ibid 67-85.
9 ibid 86-90.
The final recommendation calls for ‘An IP system responsive to change’, with emphasis on a more active quasi-legislative role for the Intellectual Property Office, issuing statutory opinions on IP policy for clarification purposes.\textsuperscript{17}

1.4 The Respondents

The importance of basing law and policy on evidence from affected stakeholders is a central theme in this thesis, and indeed is also highlighted in the final report of the review itself.\textsuperscript{18} The review’s call for evidence, issued in December 2010, received some 256 responses from a diverse spectrum of individuals and organisations. Some responses were simple one-page submissions from individuals – some not even as formal as a letter – relating opinions and experiences in dealing with IP, for example, as freelancers or consumers. Others, such as Microsoft’s 32-page submission took the form of fully-fledged reports rich in statistics and economic data. Many submissions were also received from academics, often in a form very similar or identical to that of a typical academic paper. The breadth of respondents begins to highlight the importance of equality to Hargreaves and his team. Indeed, as will be seen, equality was a key factor in the conduct of the review and would require a proactive approach in order to avoid the biases often inherent in day-to-day lobbying.

Such a broad range of respondents inevitably (and usefully) provided an equally broad range of views. Some, such as the Creative Coalition Campaign (a group representing many UK rights holders), favoured the strengthening of the existing IP framework, with a significant emphasis on combatting piracy.\textsuperscript{19} Others favoured a more liberal approach. The Open Rights Group, for example, emphasised the importance of limiting the degree to which consumers’ rights could be restricted contractually (through end user licence agreements and digital rights management, for example), along with the importance of creating new exceptions to copyright protection such as parody.

\textsuperscript{17} ibid 9.
\textsuperscript{18} ibid 91-96.
\textsuperscript{19} ibid 3.
\textsuperscript{20} It should be noted, however, that the statistics used by the report seem to be largely based on estimates and details on how such estimates were arrived at are not provided. To read the Creative Coalition Campaign’s submission in full, see TERA Consultants, ‘Building a Digital Economy: The Importance of Saving Jobs in the EU’s Creative Industries’ (2010) <http://www.ipo.gov.uk/ipreview-c4e-subccc.pdf>.
and the ill-fated private copying exception. In contrast to the wide-ranging submissions of such large organisations, many responses were more focused in their points, concentrating only on those aspects of the review that were directly relevant to the activities of those respondents.

The responses to the Call for Evidence were not the only interaction the review had with the world of stakeholders. There were also meetings with 69 IP stakeholders covering a range of different interests. As one might expect, multinational corporations from IP-rich sectors appear on the list, including the likes of Apple, the BBC, Google, Microsoft, and News Corporation. Also included are organisations representing smaller companies or individuals collectively such as the Association of Independent Music, Consumer Focus (now known as Consumer Futures), the Featured Artists Coalition and Stop43. Meetings also took place in the United States that included not only stakeholders such as Facebook, Electronic Arts, the Motion Picture Association of America, and Disney, but also with official bodies including the US Copyright Office, the US Patent and Trademark Office and the US Department of Commerce. Finally, many meetings, seminars and other events were hosted providing a range of interests from individuals to corporations with an opportunity to discuss and debate IP policy in the broader context of the review. Such additional events are perhaps more familiar as lobbying. Indeed, as will be noted below with some concern, the traditional lobbying of MPs appears to have continued during the course of the review. Nevertheless, as with other activities conducted within the scope of the review, the impression is one of a proactive approach to equality and of wanting to ensure a comprehensive evidence base upon which to found the review’s recommendations, thereby helping to limit the democratic, resource-driven flaws inherent in lobbying.

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22 A full list of all responses to the Review, complete with links to a PDF copy of each and every response is available from ‘Intellectual Property Office - IP Review Call for Evidence’ (2011) <http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm>.
23 Complete lists of all submissions, meetings and events can be found in Annexes B and C of the Official Report, see Hargreaves (n1) 102-108.
1.5 Implementation

The government’s response to the review was largely positive, proclaiming itself to be in ‘broad acceptance’ of Hargreaves’ recommendations. The official response was signed off by George Osborne MP, Vince Cable MP and Jeremy Hunt MP in their respective capacities as Chancellor of the Exchequer, Secretary of State for Business, Innovation and Skills, and Secretary of State for Culture, Olympics, Media and Sport. In its 24 pages, each proposal put forward by Hargreaves was given a considered response accompanied by indications (some more comprehensive than others) of the next steps to be taken. Full coverage of the implementation of the review’s recommendations would go beyond the scope of this thesis, however in order to examine the process and to consider the influences at work, one example will be considered in detail; an example which not only represents a particularly contentious issue and one on which responses to the review were sharply divided, but one that has also since been both implemented and subsequently repealed: the private copying exception to copyright. From a democratic perspective, this example is of particular interest because the opposing interests hail from significantly different backgrounds, creating a power imbalance in terms of access and influence. Consumers, on the one hand, seeking the legal freedom to create copies of legitimately purchased copyright material for personal use and rights holders on the other, attempting to prevent lost revenue through the legitimisation of such freedom.

In December 2011, the government launched a consultation on copyright, making it clear that the government, in agreement with Hargreaves, sought to expand the range of exceptions to copyright in areas where doing so would have the potential to benefit both society and the economy without harming the interests of rights holders. Such expansion, it was claimed, would promote economic growth by removing restrictions that were considered to yield little benefit for those they purported to protect but that did serve to stifle
innovation. Secondly, the envisaged expansions would promote a better balance between protecting works and allowing freedom of use in contexts such as education, public administration and assisting the disabled. The third justification underlines the importance that copyright be understandable by ordinary individuals and that exceptions to copyright should live up to such individuals’ reasonable expectations of what they should be permitted to do with copyright works, noting digital technology and social media as prominent examples of situations in which technology allows more than copyright law permits.

With this rationale in mind, the consultation then sets out to establish what form the expanded exceptions should take, how wide (or indeed narrow) they should be and what respective costs and benefits would be derived from them. Taking each proposed exception in turn, the consultation generally outlines the proposal itself, provides background, context, and justifications for that exception, and concludes with one or more questions for would-be respondents to address. Key expansion areas proposed included:

- Private copying, focusing on the ability of private individuals to make copies of copyright material to place on devices such as portable music players;
- Preservation by libraries and archives, proposing the extension of existing exceptions to include more types of copyright work such as audio and visual works;
- Research and private study, proposing expansion of the existing exceptions to incorporate works including sound recordings, films, and broadcasts;
- Text and data mining for research, addressing the use of electronic analytical techniques allowing entire works to be copied and digitized for non-commercial research and proposing an exception to allow such use.

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28 ibid 58.
29 ibid, 61.
30 ibid, 70.
31 ibid, 74.
32 ibid, 79.
- Parody, caricature, and pastiche, focusing on proposals for an exception allowing the use of existing copyright works in such contexts without infringing copyright;\(^{33}\)
- Educational use of works, examining the proposed extension of exceptions allowing educational establishments to use works in certain ways that would otherwise infringe copyright;\(^{34}\)
- Copyright exceptions for the disabled, proposing the expansion of existing exceptions facilitating easier access to works for those with visual impairments, total or partial deafness and other disabilities;\(^{35}\)
- Quotation and reporting current events, proposing the extension of existing exceptions permitting the use of works (or portions thereof) for criticism, review, and news reporting;\(^{36}\) and
- Public administration and reporting, considering the use of copyright works by bodies such as Parliament and the Courts in relation to public records, official records, and other public matters and the expansion of related exceptions.\(^{37}\)

The private copying exception, as originally set out in the consultation, envisages individuals being allowed to, ‘copy creative content for private, non-commercial use…permitting private copying of any type of copyright work to any type of device or medium,’ and, ‘[ensuring] that such an exception is sufficiently narrow so that any harm caused to copyright owners through private copying is minimised.’\(^{38}\)

In making its case for change, the consultation document argued that both consumers and ‘innovative businesses’ would stand to benefit from the allowing of limited private copying and the factoring in of any associated costs in the price of original content.\(^{39}\) The consultation focuses on the impact made by new technology, citing not only the iPod as an example but also the home video recorder – a source of great concern in the 1980s – similarly responsible for a change in copyright law to allow for the time-shifting of television

\(^{33}\) ibid 83.
\(^{34}\) ibid 89.
\(^{35}\) ibid 96.
\(^{36}\) ibid 102.
\(^{37}\) ibid 107.
\(^{38}\) HM Government (n26) 65.
\(^{39}\) ibid 64.
broadcasts. By allowing for a new format-shifting-based private copying exception, suggested the consultation, risks faced by innovative businesses (SMEs in particular) when developing new technologies and services would be reduced.  

The consultation ran for a period of fourteen weeks, and in June 2012, the government published a summary of responses. The consultation received some 471 responses from a broad range of interests ranging from representative bodies to individuals. Several general themes are identified in the report, including the importance of providing consistent protection for rights holders whilst taking care to balance that protection with accessibility and freedom of use; and the need for greater clarity. The weight of rights holder opinions is clear to see with an emphasis placed on the preservation of copyright and what appears to be a demand for a cautious approach to any exceptions that might serve to weaken it. Many also questioned the economic justifications advanced in the consultation, some suggesting that the government’s estimates were too generous and others questioning whether the proposed reforms would have any significant economic impact at all.

The division between supporters of the proposed exception and its opponents is both clear and unsurprising. Consumers and technology companies were to be found primarily in support of an exception allowing private copying, albeit one that would apply only to content already legitimately acquired by the copier. Rights holders were largely opposed to the exception and suggested that if it was to be, it should be tightly limited by conditions: the most notable among them being a levy of some form imposed on blank media and copying devices. Opponents also disliked the idea of including online cloud storage of copies within the exception. It was further suggested that there was in fact

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40 ibid.
41 It is interesting to note that the full range of responses could not be published at the time due to the fact that some respondents were unduly critical of others in their industries, giving rise to concerns surrounding potential defamation actions. The full range of responses would ultimately be published the following month.
43 ibid 5.
44 ibid.
45 ibid 13.
46 ibid.
little need to allow private copying given the availability of more flexible licences and products offering multiple formats in one package."

By December 2012, the proverbial ball would bounce back in the other direction with the government’s publication of its response to the consultation. Having taken account of the myriad responses received to the consultation, the government was ready to set out its proposals in a more concrete form. Adjustments to the proposed exceptions can be observed, clearly responding to the feedback received from the consultation. The private copying exception had become:

...a narrow private copying exception, allowing copying of content lawfully owned by an individual (such as a CD) to another medium or device owned by that individual (such as a mobile phone, MP3 player or private online storage), strictly for their own personal use."

The absence of a levy on recording devices, copying devices, or cloud storage could be justified, argued the government, on the basis that ‘to some extent, the value that consumers gain from being able to make personal copies will be factored into the market via positive effects on prices and demand’.

It is quite evident, however, that rights holders did not favour the exception. Indeed, music industry representatives had been critical even of the review itself, let alone its recommendations, for its apparent bias against rights holders. Songwriter, producer, and former BPI deputy chairman, Mike Batt is quoted in a 2011 news article as describing the review’s terms of reference as being ‘completely biased towards Google, the ISPs and anyone who wants to set up an internet company’. It is interesting at this point to suggest, then, that some policy networks (or at least different factions within the same) were

47 ibid.
49 ibid 16.
50 ibid 23.
perhaps being more effective than others in achieving their goals, or at least found themselves to be more favoured. In December 2012, the Culture, Media and Sport Committee heard evidence from key representatives of the recording industry including the BPI, UK Music, and The Association of Independent Music.⁵²

Whilst it appears that those organisations were willing to accept the long-standing (albeit unlawful) practice of private copying to physical devices such as iPods without the imposition of a levy, they were not prepared to accept copying to cloud storage without one.

Speaking for UK Music, its chairman, Andy Heath, explained to the committee that a significant portion of the value of an electronic device such as a smartphone or computer was derived from its ability to play and store music but that the music industry received no share of that.⁵³ BPI Chief Executive, Geoff Taylor, pointed out that cloud storage providers such as Google and Apple were making money from providing such a service and that because consumers benefited from greater convenience when copying and accessing their music using the cloud, the music industry should again be entitled to a share of the revenue.⁵⁴ As will be seen, such concerns were not reflected in the resulting legislation, despite being provided for in Article 5(2)(b) of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (commonly known as the InfoSoc Directive), under which the Secretary of State had the discretion to introduce the exception.⁵⁵ Of particular interest is Mr Heath’s suggestion that effective lobbying by the technology industries had resulted in the prevailing direction of copyright law in that respect.⁵⁶ Considering the effectiveness of the music industry’s own lobbying efforts in the form of the Digital Economy Act, such a suggestion is surprising. Similarly surprising is the absence of any credit given to organisations such as the Open Rights Group, a noted opponent of stricter copyright enforcement lobbying on behalf of consumers.

⁵² House of Commons Culture Media and Sport Committee, ‘Supporting the Creative Economy (Third Report) (2014-15 HC 674-I)’.
⁵³ Ibid Q233.
⁵⁴ Ibid Q236.
⁵⁵ The Directive requires that rights holders receive ‘fair compensation’ where such copying is permitted.
⁵⁶ House of Commons Culture Media and Sport Committee (n52) Q241.
A range of answers to the questions posed and issues raised in the consultation enabled the government to set out its proposals more clearly. The response begins its coverage of private copying by observing that, with the general exception of rights holders, most respondents (with whom a Business, Innovation and Skills Select Committee agreed) were in favour of a private copying exception to copyright. The arguments of the rights holders were again emphasised with, ‘the great majority of them’ being of the view, ‘that a private copying exception of any type or scope would cause them unreasonable harm’.

A general consensus is presented with a view to keeping the exception limited and, most importantly, keeping the ownership of a legal copy of the work to be copied as a prerequisite.

The general tone of the response makes it quite clear that the government, though not deaf to the concerns of rights holders (indeed certain limitations, not least the lack of an expansion of the exception to include copying within family or domestic circles, were factored in), remained committed to the exception, none more so than with respect to levies, described as being:

unfair to consumers in that they are payable regardless of the use to which a levied device...is put and regardless of whether a user has already paid for the copies they already store on a device. Furthermore, particularly in the current economic climate, it is not right to extract more money from the pockets of hard-pressed consumers.

An Impact Assessment also published in December 2012 addressed the exception further, again concluding that rights holders should bear the responsibility for factoring private copying into the pricing of their content, and again positing that – on the basis of IPO research rather than responses to
the original consultation – the costs to rights holders resulting from the exception would be minimal or zero.

In June 2013, draft legislation was published for technical review, the exception showing a certain colouring which can be connected to the responses to the consultation, and also clearly to the IPO’s independent research as detailed in the December 2012 Impact Assessment. Most importantly, and perhaps surprisingly given the apparent strength of the entertainment industry in the case of the Digital Economy Act (as discussed in Chapter 4), significant concerns with the private copying exception remained unaddressed. The commentary explained the conditions to which the exception was to be subject, asking whether those conditions represented an effective implementation of the stated policy. To take another example, the subsection intended to limit the exception to the making of copies only for one person (as opposed to the originally suggested family or domestic circles) is explained, followed by the simple question of whether or not the provision as presented meets the stated objective. Interested parties were given a two-month period within which to submit their feedback; a period which would also incorporate a week of open meetings hosted by the IPO, providing further opportunities for discussion during which, it is apparent from the end result, that policymakers continued to resist the express wishes of the entertainment industry to impose levies, instead arguing that consumers’ ability to copy for private purposes should be reflected in the price of content at the point of sale.

If, as UK Music chairman, Andy Heath suggested, the absence of such a requirement can indeed be attributed to lobbying by the technology industry, including key organisations such as Google, one must again address the issue of equality and the balance of power. The resulting exception arguably benefitted consumers as it legalised an activity that had persisted for as long as home recording had been possible. Moreover, in contrast to some of their European counterparts, those consumers would not be faced with an increase in the price of devices or cloud storage services. Whether that benefit was the

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61 Which were said to be lacking in any useful data to enable a useful assessment (ibid 18).
62 ibid.
64 ibid 2.
65 House of Commons Culture Media and Sport Committee (n52) Q241.
intended goal, however, is a different matter given the equally clear benefit to technology companies of not risking profits either through lost custom or through the need to absorb such price differences, whether in part or in full.

An updated impact assessment followed in March 2014, explaining the decision-making process that lead to the final version of the private copying exception. A wide range of evidence lay behind this definitive version, including but not limited to consumer focus surveys, surveys produced by the Universities of Hertfordshire and Leeds, academic papers, submissions from consultation respondents, statements from a range of music industry organisations, the BPI, PRS, Warner Music, and research commissioned by UK Music.

Several months later, in March 2014, it was announced that the final drafts – amended following the summer 2013 technical review – would finally be laid before Parliament. The changes present therein, explained the IPO, ‘make small but important reforms to UK copyright law and aim to end the current situation where minor and reasonable acts of copying which benefit consumers, society and the economy are unlawful’. The private copying exception came into effect in October 2014 in the form of Section 28B of the Copyright Designs and Patents Act 1988. Faced with the failure of their attempts to persuade policymakers, the entertainment industry turned to the courts. The British Academy of Songwriters, Composers and Authors; the Musicians’ Union; and UK Music began judicial review proceedings, aiming to have Section 28B declared unlawful. Not only did the claimants submit that the government had been wrong to justify the exception on the grounds that it would result in minimal (or zero) harm to rights holders, but they also felt that the consultation process had been conducted unfairly, claiming that the Secretary of State had predetermined the outcome; an issue of particular relevance in the present context.

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66 R (on the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills [2015] EWHC 1723 (Admin), [2015] 3 CMLR 28 [92].
67 Intellectual Property Office (n63).
69 ibid [16].
The most significant factor counting against Section 28B was the research upon which it ultimately rested. Reliance on the pricing-in theory would prove to be the government’s undoing. The research issued by the IPO was insufficiently precise and, to take the example of music, did not provide sufficiently sound evidence to support the conclusion that harm to rights holders resulting from private copying was minimal or zero. Furthermore, there was evidence that should have cast doubt upon conclusions drawn in relation to films but such evidence had been ignored. Ultimately, Green J concluded that ‘the decision adopted by the Secretary of State was nowhere near to being justified by the evidence that the Minister specifically accepted and endorsed’.

It was indeed the evidence issue that would result in the repeal of Section 28B; however in the present context, the issue of predetermination on the part of the Secretary of State is of more interest, not least given that such a predetermination would surely colour the interpretation of the evidence, and made all the more intriguing in light of the aforementioned suggestions by music industry leaders that technology industry lobbying had been highly influential in shaping the private copying exception. On this issue, however, Green J held that ‘the Secretary of State was entitled to have a strong predisposition’ and that such a predisposition was not ‘inimical to a fair consultation assuming…that the decision maker is prepared to keep an open mind…’. The Court found no evidence ‘which showed that the Secretary of State had, in actual fact, predetermined the outcome’ and that whilst the defendant had erred in interpreting the evidence, that did not ‘prove predetermination or the appearance thereof’. During the course of proceedings, internal documents had revealed no evidence that the Minister ‘did anything other than accept the conclusions in the Updated Impact Assessment’.

As a result of the decision, Section 28B was repealed on 17th July 2015. Whilst the outcome was doubtlessly pleasing to the rights holder community, those in

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70 ibid [95]-[125].
71 ibid [233].
72 ibid [277].
73 ibid [279].
74 ibid [280].
75 ibid.
the technology sector are unlikely to have been so happy. Indeed, as Steyn observed in her commentary on the case, technology providers had no doubt been ‘looking forward to receiving a share of the £258 million benefit that it had been estimated that the exception would generate over 10 years’. The extent to which lobbying by the technology sector influenced the government’s decision to base the private copying exception on the *de minimis* principle may not be clear, however it is certain that such lobbying took place, as did lobbying from other affected groups, not least the recorded music industry.

Given that any alleged predisposition must emanate from some form of persuasion – at least one which is so immovable, even by evidence to the contrary – it is curious that no mention is made of any lobbying by the technology industry in Green J’s judgment. What is clear, however, is that the music industry sought not so much to prevent the legalisation of a long-standing consumer habit (that is, the copying of music from one medium to another for personal use) but that they sought to benefit financially from the evolution of that habit to include personal cloud storage. One must therefore question whether any predisposition on the part of the Secretary of State had indeed been unjustly influenced by the technology industry or whether it had in fact been founded, not unreasonably, on the reasoning that storing a copy of a legitimately purchased song on an individual’s cloud storage arguably did no more harm to the rights holder than storing that same copy on a personal MP3 player. It is submitted that perhaps the rights holder community felt that they had missed the opportunity to monetise format shifting from physical media to physical digital devices and could not rationally argue, after its persisting for so long, that it was causing untenable harm. They were not, however, prepared to make that same mistake with the growth of cloud storage however artificial the differences may ultimately be when the end result is considered.

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77 That is, one individual making a copy of a purchase for added convenience, simply storing it on a cloud drive rather than physical memory. Indeed one may argue that the music industry’s arguments are further hampered by the fact that it is increasingly becoming the case that on-board storage is giving way to cloud storage as the latter becomes more deeply integrated into platforms such as Windows, MacOS, iOS, and Android.
Whether the resultant Section 28B was attributable to technology industry lobbying or not, however, two issues remain important for the remainder of this chapter. Firstly, it is clear that the resulting legislative changes emerging out of the Hargreaves Review owe their genesis to more than just the review itself. Secondly, as noted above, from the perspective of equality of access and influence, the technology industry arguably falls into the same economic and politically-strong category as the entertainment industry insofar as it has access to considerable wealth and resources which it may dedicate to political efforts. Mention of the end-user – the consumer (i.e. the individual citizen) – is conspicuous by its absence. The BPI may have sought to accuse the government of bending to Google’s will in shaping the private copying exception, but note that it does not appear to have made similar accusations concerning the Open Rights Group, for example, or the Electronic Frontier Foundation – two organisations seeking to influence the shape of IP law and policy in favour of individual consumers. These two issues will be revisited as this chapter continues.

2. Perspectives on the Hargreaves Review

Four individuals were interviewed for this case study, each with a different perspective on, and a different role in, the review. Of the four, two were members of the panel and have requested anonymity; they will therefore be referred to as Panel Member A and Panel Member B throughout. In light of these requests, therefore, little further introduction or background will be provided with respect to the individuals in question. Of both, however, it can be said that they were approached due to their backgrounds in areas of related expertise, each contributing something distinct to the overall makeup of the panel. When considering reasons for agreeing to join the review, Panel Member B recalls his longstanding interest in the economics of IP and the remit of the review to look at the subject through practical eyes. Much of the existing literature on the subject he found to be weak, favouring a theoretical approach over practical evidence.78 The benefit to Panel Member B at the outset, therefore, appears to have been the review’s capacity to gather empirical evidence directly from IP stakeholders.

78 Panel Member B, Interviewed by: Adamson B (30 July 2012) [Hereinafter ‘Interview 1’] at 05:36 and 05:54.
Panel Member B’s IP-centric background suggests that he would have approached the review with a strong set of preconceived ideas about IP policy, indeed his role within associated policy networks is likely to have been (and indeed remain) a significant one; however, it is interesting to note that his role in the review prompted him not only to think about his own views, but also on his approach to the evidence:

...basically, you have evidence, you have information and...what Ian [Hargreaves] made us do was to look at the material in the context of the UK economy and all its facets...That really made you think carefully...because the lobbyists are trying to get you to look at it in their context.”

Moreover, is should be noted that Panel Member B was one of six, including Professor Hargreaves himself, thus limiting the effect of any particular predispositions he may have harboured that favoured his own industry.

Also offering insights from outside the operation of the review are former MP for Hove, Mike Weatherley and current MP for Bury South, Ivan Lewis, both of whom are listed in the final report under ‘Meetings with MPs’.” Such perspectives not only offer a more objective take on the review itself, but also help to highlight the important fact that the usual lobbying of MPs did not simply stop merely because the review was taking place.

Mike Weatherley had a background in the creative sector, having in the past spent several years working for the record producer, Pete Waterman, and a further several years as the Vice President in Europe of the Motion Picture Licensing Company* (as of Spring 2015, Weatherley remained a director of the Motion Picture Licensing Company*), Weatherley understandably had well-

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79 ibid at 02:34, 03:09 and 03:24.
80 Hargreaves (n1) 103.
established views on the subject-matter of the review at the outset. Moreover, of particular importance when considering a topic of such low-salience, he had a knowledge and understanding of IP that many of his colleagues in Parliament lacked. After joining Parliament in 2010, Weatherley noted a distinct lack of knowledge among his new colleagues about IP:

...there were about a dozen MPs that understood what “IP” stood for and the rest of them were hoping that someone else knew what it stood for.

This prompted him to start raising awareness of IP within Parliament. It was this strong belief in the importance of IP rights and their value to the economy that prompted Weatherley to keep, ‘a close eye on what [the Hargreaves Review] had to say about it’.

Weatherley’s involvement in the review was not an ongoing one. Indeed, he recalls only one meeting with Hargreaves himself but Weatherley recalls it to have been of some considerable depth. In addition, he raised a number of parliamentary questions on the review and further addressed it during a recent investigation into IP undertaken by the Alliance for Intellectual Property. In the review’s early stages, questions were raised as to the makeup of the panel – pertaining to matters such as the method of selection. Rather than being interviewed, members of the panel were instead, as Weatherley recalls, ‘selected in order to equip the review with a range of relevant expertise, including in business, innovation, economics, and aspects of intellectual property’. It is important to highlight the panel’s makeup, particularly when comparing it to the composition of, a select committee, for example. As Weatherley points out, and is as clear from the makeup of Parliament (both then and now), expertise in a specialist niche such as IP is often lacking. The value, therefore, of having evidence examined by a team of experts in the field

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83 Weatherley M, Interviewed by: Adamson B (12 September 2012) [Hereinafter ‘Interview 2’] at 00:58.
84 ibid at 01:07.
85 ibid.
86 ibid at 02:16.
87 Hansard HC Deb 15 December 2010, vol 520, col WA798W.
is strong, provided that such expertise does not give rise to strong predispositions.

Weatherley personally raised seven parliamentary questions during the period between the announcement of the review and the publication of the final report. Of these, three focussed on the appointment of panel members. Of his colleagues in the House of Commons, only former MP Louise Mensch, née Bagshawe, and Ivan Lewis MP raised questions during the same period: the former with regard to the areas on which the review was expected to advise, and the latter an equally simple question as to when the review was expected to be published. In terms of parliamentary scrutiny with regard to the selection of the review’s panel and the conduct of the review itself, then, there appears to have been little. As to scrutiny in the House of Lords, it would appear that awareness of the review was somewhat lacking as it was not until 4 March 2011, approximately four months after the review was announced by the Prime Minister, that anyone thought to ask about reviewing intellectual property with Lord Kennedy of Southwark asking simply: ‘To ask Her Majesty’s government whether they plan to review intellectual property protection’. In light of this, one must question the degree to which the assembly of the panel could be considered democratically accountable. It is arguable that the low-salience of IP as a political topic contributed to the prevailing lack of awareness not only among MPs and peers, but also among individual citizens. To expect such individuals to be sufficiently aware of an impending review of IP law and policy, however, is arguably unrealistic, thereby further underlining the importance of impartiality and objectivity on the part of the panel. Without constituents holding them to account, the responsibility would seemingly fall to them alone.

In contrast to Mike Weatherley, and in common with many of his parliamentary colleagues, Ivan Lewis, ‘assumed the role [of Shadow Secretary of State for Culture, Media and Sport] knowing very, very little about intellectual property at all’. It was clear to him, however, that IP had a central

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88 Hansard HC Deb 11 January 2011, vol 521, col WA260W.
89 Hansard HC Deb 4 May 2011, vol 527, col WA774W.
90 Hansard HL Deb 4 March 2011, vol 725, col WA634.
91 Lewis I, Interviewed by: Adamson B (2 November 2012) [Hereinafter ‘Interview 3’] at 02:52.
role to play in the digital economy." The central issue, in Lewis’s mind, was that of IP theft – largely taking place online. Interestingly, when discussing this issue, Lewis focuses on the lack of awareness among consumers as a root cause noting that,

...there is a great lack of public awareness of the fact that it is theft and...in defence of young people who download music and all the rest of it – they don’t always see it...or understand it in those terms."

Once again, then, IP is highlighted as a low-salience issue. Among policymakers and citizens alike, knowledge and understanding of IP is low, therefore making it more difficult to effectively hold policymakers to account and to ensure that influence by private actors does not lead to imbalanced law and policy. Perhaps even more so than those with pre-established views on the review’s subject matter, one might reasonably suggest that Lewis was in a position to be influenced more strongly by the views of stakeholders. It is perhaps not surprising that by Lewis’s own estimation, it is difficult to assess whether his own views were influenced; but they were at least informed by a great deal of evidence submitted by stakeholders:

I read lots of evidence and attended lots of meetings where I heard people’s views...I think it did make a difference because I think...you’ve got to understand people who are part of the debate. It’s not necessarily, at first sight, an easy issue to get your head [around] so I think...the evidence was quite important..."

Being a member of the opposition, Lewis’s interactions with interested parties differed somewhat from the experiences of those in government. Meetings, rather than being with ministers or civil servants, were primarily with those in

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92 ibid at 02:52.
93 ibid.
94 ibid at 06:14.
industry, particularly the creative industries. The content of such meetings, recalls Lewis, generally reflected that of the respective parties’ submissions to the review: ‘Of course the language may have been slightly different – maybe more detailed – but…pretty consistent as you would expect.’

Consistent or not, however, what this statement illustrates is that despite the existence of the review, the lobbying of policymakers by private actors continued as normal, at least on the part of those sufficiently well-resourced to gain access and influence. Even if such lobbying was, as Lewis suggests, generally only repeating the substance of submissions to the review, it is arguable that it may still have served to influence by emphasising and strengthening those submissions. As is detailed below, Hargreaves and his team took a proactive approach to gathering input from individuals and SMEs, but it may be arguable that the lobbying acknowledged here continued to tip the balance against such smaller players who would be unable to engage in sophisticated lobbying themselves and who would likely also have fallen outside of affected policy networks.

It may also be worth questioning what kinds of conduct may be acceptable off the record that would not be in a written submission to a review. This is not to suggest that a representative of the creative industries would angrily threaten a policymaker with withdrawal from the UK economy lest their policy demands be met, but it is arguable that stronger attempts at persuasion may be more attractive when those attempts are not recorded in writing and published in a publicly-accessible report.

The focus on the creative industries in Lewis’s work in this area is clear. The creative sector is one which Lewis believed to be vital to the UK economy:

[It is] a massive driver of jobs and growth and I don’t think, even to this day, the government and others fully understand the potential and the power of the UK’s creative industries and, at a time when we’re in economic difficulty…what we

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95 ibid at 07:05.
96 ibid at 07:34.
need...is an assertive jobs and growth strategy...a joined-up approach.

Such strong sentiments thus needed to be paired with positive actions in order to foster such growth and, in Lewis’s view, the first priority was clear: modernising IP policy, thus creating certainty among creators, owners, and consumers alike and improving protection. Lewis recalls that the industry had not received the government’s creation of the Creative Industries Council with much enthusiasm, noting that they, ‘...were quite sceptical that it was really going to do very much – if it was really going to motor and drive things’.

Further action on IP was, ‘viewed by virtually everybody [as] one of the top issues’.

3. The Role of Private Actors in the Review

The range of organisations whose voices were heard throughout the Hargreaves Review is, unlike their counterparts in the legislative process, relatively transparent. Indeed, such transparency must be said to improve the democratic legitimacy of private actor involvement in the policymaking process in light of the theoretical model presented in Chapter 2. Nevertheless, such qualities may be open to question. It is clear that input did not only take the form of formal written answers to the review’s call for evidence at the time, and a great deal more evidence-gathering and lobbying would subsequently take place as the review’s recommendations were implemented, as discussed in the example of the private copying exception, above. In addition to the formal questions of the review, a number of events were held in the form of round table meetings, seminars, and workshops – each offering ample opportunities for interested parties to have their say. Moreover, as has been noted above, it is also evident that what may be termed traditional lobbying continued unabated.

A related issue in this case, is that of representation. One must also question the degree to which individual respondents, or indeed respondents in the

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97 ibid at 08:00.
98 ibid.
99 ibid.
shape of organisations, purporting to represent the interests and opinions of others actually did so. Additional lobbying aside, whilst the evidence submitted to the review was indeed clear for all to see, it is not necessarily so clear whether that evidence, submitted on behalf of others, was truly representative of the views of such parties. Consider, for example, Pitkin’s framework for representation within a democracy: ‘acting in the interest of the represented, in a manner responsive to them’.\footnote{Hanna Fenichel Pitkin, \textit{The Concept of Representation} (University of California Press 1967). 209-210.} Much, it is submitted, may turn on the nature of those represented by a particular group. Some groups pursue their aims by way of solidarity. These groups do not necessarily pursue the interests of their affiliates, instead focusing on beneficiaries. Others, adopt a more representative \textit{modus operandi}.\footnote{Darren R Halpin, ‘The Participatory and Democratic Potential and Practice of Interest Groups: Between Solidarity and Representation’ (2006) 84 Public Administration 919, 925.} Some groups, then, will directly draw together the wants and needs of their members, while others will work on the basis of what is thought to be in the best interests of those they represent.

From the Whitehall side of the equation came a team of civil servants representing the IPO, assigned as the secretariat of the review.\footnote{Panel Member A, Interviewed by: Adamson B (23 July 2012) [Hereinafter ‘Interview 4’] at 03:50.} These individuals were subject to the leadership of Ian Hargreaves; however, when outlining their role, Panel Member A, while noting that the IPO team stressed that they were working for Hargreaves and not the IPO, goes on to observe that, ‘…clearly their knowledge-base and their experience had been formed largely as a result of them working in the IPO’.\footnote{ibid at 03:50.} It is, then, perhaps not unreasonable to suggest that their view and understanding of IP would have been shaped and influenced by the IPO’s own policy ideas. This is not, of course, to suggest that the IPO is directly involved in the business of policymaking; however, in its position as the government’s official body for administering IP it will clearly have a vested interest in policy and legislative decisions that affect it and the system of rights for which it is responsible. The IPO’s status as an active component of a policy network is quite clear. Indeed, one would perhaps even go so far as to suggest that the IPO could be viewed, in a sense, as quite similar (albeit not a \textit{private} actor) to those parties submitting evidence to the review. Certainly, there is clear evidence that the IPO’s remit
stood to change as a result of Hargreaves’ recommendations – not least the recommendation that the IPO be granted a new statutory power to publish formal opinions in response to demands for particular areas of copyright law to be clarified. Such opinions would not have legally binding status, but the courts would have nonetheless had a duty to consider them when hearing relevant cases. On the other hand, from a governance perspective, it is difficult to argue that the IPO is in any meaningful way separate from the state and certainly does not fit in with theories on the hollowing out of the state. As an executive agency, the IPO is semi-autonomous but only insofar as it has some managerial authority independent of its parent department, the department for Business, Innovation and Skills. Legally, the IPO remains a part of that department and those working within it are considered civil servants (unlike their counterparts in non-departmental public bodies, for example).

Of the voices representing the non-governmental side, some spoke more loudly than others and not always within the scope of the official call for evidence. Panel Member A recalls that, even within the official remit of those involved in the review, he found there were certain groups (or at least representatives thereof) that, ‘showed greater determination than others…to meet with me’. Indeed, it appears that certain representatives would seek out the opportunity to discuss issues on a one-on-one basis with panel members, generally frequenting any relevant events to ensure that their presence be known. Given that such activity fell outside the formal responses to the call for evidence, details of those who engaged in it are unrecorded. This, then, provides a further example of everyday lobbying continuing in the context of an otherwise open review, thus having the potential to erode the transparent qualities and equalising effects that such a review might otherwise (and arguably should) possess.

As noted above, it is apparent that a number of panel members were approached outside the context of the review’s official questions. One might argue in any such case that where an individual or group is seeking to get their point across, it is perhaps inevitable that they will at least want to periodically

104 Hargreaves (n1) 95-96.
105 Interview 4 (n102) at 05:40.
remind their audience of that point; to drive it home, as it were. It is not the desire to act outside of the scope of the review, then, that raises concern; but rather the fact that it is possible. As observed above, the ability of better-resourced and experienced private actors to continue lobbying in addition to their submissions to the review arguably undermines to an extent the proactive approach taken by the review panel to gather the input of smaller players, as described below. The natural question to ask of such lobbying is whether it made any difference to panel members’ treatment of the evidence:

To be honest, actually, they were more entertaining than anything else…I don’t think they changed my opinion on anything…I looked a bit harder at their submissions to see how partial they were, but that’s about all."

It is to be hoped that Panel Member B speaks for his colleagues as well, however it is submitted that even taking a closer look at the evidence of some but not others may have potentially had a distorting effect. Moreover, it was not only panel members that had additional contact with those submitting evidence. With a view from outside the review itself, Mike Weatherley’s account similarly notes such additional access and influence, suggesting that an organisation’s response to the call for evidence may only have been the beginning of their involvement and that less formal conversations could then follow. This he sees as being a valid part of the exercise, noting that, ‘It’s nice to have a flow of information and ideas not restricted…to the review itself…because there’s a lot of background information in there’.

To what degree, then, was transparency threatened? On the face of it, lobbying taking place during the review, on the same topics, would seem to raise the same concerns as traditional lobbying taking place within traditional policymaking; however, one must argue that there is still a far greater degree of transparency. It is not necessarily clear whether such additional information and ideas will influence the conclusions of a review and even less clear to what

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106 Interview 1 (n78) at 09:03 and 09:24.
107 Interview 2 (n83) at 03:08 and 03:24.
degree. The conclusions and recommendations stemming from a review, however, are clear for all to see, along with the official submissions made thereto. It may therefore be possible to argue that discrepancies between the published evidence and the review’s recommendations would be clearer. As the example of the private copying exception demonstrates, however, the review’s recommendations were but a starting point for much longer exercises involving consultations, lobbying, and the legislative process itself. It is therefore clear that even with the review as the starting point, many opportunities for access and influence remain. With that in mind, one may argue that the lobbying itself makes no difference either way; however as has been argued previously in this chapter, those with fewer resources will likely find themselves at a disadvantage in such a scenario, thereby putting their own submissions at risk of being somewhat overridden by the additional efforts of larger players.

While it is difficult to argue that such additional contact does not at least have the potential to create inequalities, one must nevertheless ask whether it can perform a useful function as well. Arguably the additional background information can lend greater strength to a review. As well designed as any set of predetermined questions may be, it is very difficult to pre-emptively address every potential issue of importance. The value of the ability to add a hitherto unforeseen perspective to a debate ought not to be underestimated. Moreover, any review of this kind will necessarily be limited both in terms of time and financing. The review must therefore establish strict confines within which to operate. Allowing the formal interactions within the review to serve as an undue constraint to the exclusion of such additional contributions may be counterproductive. Certainly, a review should remain broadly within its terms of reference; however, the broader and more substantial the base of evidence on which the review can found its conclusions and recommendations, the more useful it is likely to be. It is not, therefore, the value of additional contact and information that should be called into question but the fact that it such activity appears to be limited to those with greater wealth (whether of finance, resources, political know-how, or otherwise).
4. Using the Evidence

When considering the influence and persuasiveness of the presentations of those submitting evidence to the review, Panel Member B’s recollections highlight the importance of putting information into context and, in effect, stripping away the subjective elements:

…You might come out of a meeting influenced by someone’s [view]…in their context, but as soon as you got home and considered it in the overall context of the UK economy then you had to look at it differently."

It is also important to note that submissions to the review (and therefore, one can reasonably assume, submissions of information to similar reviews, inquiries or simply information provided in the course of normal policymaking and legislating) often carried more subjective than objective substance. After stripping away the subjective, as described above, Panel Member B found that ‘many of the submissions were not good enough in their own right…lacking in sufficient detail [and] sensible context…’. This is, of course, not to say that all submissions to the review were lacking. Indeed, as Panel Member B observes, ‘There were some that were very good…they were the powerful ones’.

For him, it seems, what made the key difference was the ability of a submission to put information into a context and to fully support it with suitable data and research. When considering evidence-based policymaking, the importance and value of this would seem to be self-evident; however, it would seem to be the case that in some instances agenda is more prominent than evidence-based fact.

The question that naturally arises, therefore, is: what influences policymakers? Is it the subjective arguments, the objective evidence, or a combination of the two? If we are to take the words of those interviewed for this thesis at face value, we are to understand that policymakers will in essence strip away any subjectivity

108 Interview 1 (n78) at 07:23.
109 Ibid at 07:47 and 08:03.
110 Ibid at 08:13.
or what might be more usefully termed excess subjectivity. The term excess subjectivity is used here to refer to that which might otherwise be termed anti-competitive – that which serves the interests only of the person or organisation providing the information – not other members of its industry or sector.

It can be argued that the more inclusive nature of the review (not to mention the proactive gathering of input from individuals and SMEs) helped to ensure not only a broader evidence base, but also to address inequalities in the lobbying landscape which might otherwise have seen smaller interests’ views overlooked or not even voiced at all. However, it is evident from the accounts provided by the two panel members in this case study and from the evidence provided for the review itself that not all submissions were created equal. Some were considerably more detailed and helpful to the panel than others. This in itself may have had a further distorting effect since the lack of detail (and indeed the bias) inherent in many submissions led to, in Panel Member B’s experience, ‘filling in the gaps with your own prejudice’. Given the importance of maintaining objectivity, therefore, one can begin to see how panel members (and, by extension, other policymakers) were faced with the difficult task not only of balancing out the subjectivity inherent in submissions to the review, but also their own subjective viewpoints.

Given that such variance in the quality of submissions may contribute to bias in interpretation, thereby potentially undermining the democratic equalising effect of the review, one must therefore consider how it occurred. Might apathy have been to blame? One must also consider the possibility that smaller interests, while eager to provide input, did not have sufficient know-how and resources to produce detailed, evidence-backed submissions. This is not to question the value of their input, indeed quite the contrary, but perhaps inevitably the research resources available to a large organisation such as Microsoft as compared to those of a small three-person app development business will mean that the latter’s submission may be based more on opinion than evidence. Given the high levels of lobbying present in this area of policy one might expect that when those in the industry were expressly invited to have their say, they would seize the opportunity with officious zeal. A concern

\[\text{\textsuperscript{111}}\text{ibid at 14:16.}\]
therefore arises that reviews, as a means of evidence-based policymaking, are perhaps not taken quite as seriously as we might hope:

I think they thought, ‘Oh this is just another review. We’ve had the previous review, the Gowers Review – not another review!’

If this is truly representative of the general response to independent reviews, one must ask why. On the face of it, a review provides a vital basis for evidence-based policymaking; however, if those submitting the evidence are not taking the matter seriously and those responding to the presentation of that evidence (i.e. the government) are not taking them seriously then we are presented with something of a chicken and egg scenario that renders them of questionable use. Indeed, the response to the 2006 Gowers Review was a little lukewarm. It could perhaps be argued, as Panel Member A suggests, that too many reviews may be counterproductive. As is clear from interview responses discussed later in this chapter, there is an undeniable perception that reviews (and perhaps their more investigative cousin, the inquiry) are employed to give the appearance of action being taken on a particular issue without actually taking much action. The reality behind this perception is clearly a matter for further empirical investigation, however the fact that the perception exists at all is a cause for concern. Certainly, the close temporal proximity and similarities between the Gowers Review and the Hargreaves Review supports the less action, more talk accusation. Nevertheless, the acceptance of Hargreaves’ recommendations and subsequent action taken does indicate that there remains a place for those reviews and it must be emphasised that while additional lobbying continues and may serve to undermine those submissions made by smaller actors, the fact that their submissions are made and considered at all remains important in helping to address inequalities in the policymaking process.

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112 ibid at 14:41.
113 Interview 4 (102) at 14:14.
5. Equality of Access and Influence

In Chapter 2, a key theme emerging from the literature on governance and democracy was identified as equality, or rather inequality. Whilst there may not always be a direct correlation between the wealth of a particular actor (whether in terms of financial wealth or in other forms such as resources and political abilities), it is, as has been noted, an important issue. Indeed, the theoretical model presented at the end of Chapter 2, while broadly supportive of lobbying as a component of democracy, imposed a number of conditions, three of which were aimed at limiting the impact of resource-inequality. In the context of the Hargreaves Review, it appears that such inequalities were a prominent concern. Indeed, from Panel Member A’s perspective those organisations that are better established are generally more organised and, consequently, more effective. Conversely, smaller and more recently-formed organisations seem, in the experience of the review, to have less impact and are less well-organised.  

Many organisations in favour of stronger measures to protect IP rights will likely be well established. Record labels, film studios, book publishers, academic institutions and other types of prominent rights holders will inevitably have more and better resources to organise coherent campaigns to advance their respective positions. As one will recall from the theoretical discussion in Chapter 2, such resources need not take the form of money. Such organisations will generally benefit from a better skill-mix within their staff, greater knowledge and experience of how to gain access to policymakers, and better contacts with other like-minded organisations, coupled with the knowledge to utilise those contacts more effectively. In governance terms, then, they will be strong and active participants in influential policy networks. Similarly, as illustrated above in the context of the private copying exception, other heavyweights have a significant interest in the shape of IP law including manufacturers of consumer technology and providers of online services such as cloud storage. As discussed previously, such imbalances in resources and strength have the capacity to render policy outcomes similarly imbalanced.

114 ibid at 11:07.
115 It is not insignificant that two of the most valuable companies in the world at the time of writing, Apple and Alphabet (parent company of Google) now fall into multiple affected categories, offering a wide range of digital content for sale including music and films, providing cloud storage services, and offering consumer electronics.
This can lead to what Panel Member A describes as, ‘a crude distortion’\textsuperscript{116} in the balance of lobbying impact.

A key condition in this respect is included in the model of democracy in Chapter 2: the need for measures to redistribute lobbying resources. As is acknowledged, it is neither possible nor practical to force the redistribution of wealth in the literal sense, and therefore other approaches are needed. The Hargreaves Review is a useful example of such an approach. As Panel Member A recalls:

\begin{quote}
We set out to find the small high-tech SMEs. We felt that otherwise we probably wouldn’t hear too much from [them]. That meant going to meet them on their own territory, in a setting that works for them, rather than…calling a public meeting at the IPO or something which would be much less likely to attract those kinds of people.\textsuperscript{117}
\end{quote}

This approach resulted in a broader range of evidence being gathered and went some way toward ensuring that a balance of voices was heard on the relevant issues. More importantly, particularly in the context of access and influence in policymaking, the proactive approach demonstrated by the review shows a clear awareness of the imbalance. Moreover, the need for greater awareness amongst interested parties is arguably highlighted. That Hargreaves and his team actively sought the involvement and views of smaller organisations is indeed laudable. The fact that this was required, however, is a cause for concern. The question that naturally arises, then, is whether it should be left to reviews to actively seek out the smaller voices or whether can something else be done to encourage them to speak for themselves? On the one hand, more self-driven involvement in the process is indeed desirable, but on the other, one must question whether this is a practical proposition.

\textsuperscript{116} Interview 4 (n102) at 11:07.
\textsuperscript{117} ibid at 13:10.
Larger organisations have the time, money, skill set and political awareness to engage with policymakers and reviews. Many will have in-house legal experts, the necessary commercial, political, and legal acumen to keep abreast of developments in the legislative and policy landscapes, and will, as noted above, generally be actively involved in relevant policy networks. Smaller organisations, however, will by their very nature have less of every resource and will be focused more tightly on their primary purpose. Reality, one might at least hope, perhaps lies somewhere a little closer to the middle of the extremes as any competent organisation must surely spare at least a little time to keep one eye on law and policy that is directly related to their trade. The key to fostering greater involvement by smaller voices in reviews, and indeed in the wider policymaking context, perhaps lies in promoting them and raising awareness in the correct circles.

To what degree, then, were Hargreaves and his team successful in levelling the proverbial playing field? Oddly, in the light of Panel Member A’s comments, Weatherley feels that, in the context of the review, size had no impact at all. Similarly, Lewis is somewhat unclear as to whether, in his opinion, all sides of the debate were equally represented. One can perhaps explain this given that his involvement, like Weatherley’s, was not an ongoing one. He instead focuses on the eventual outcome of the review. In general terms, he feels that the recommendations put forward in Hargreaves’ final report, ‘got the balance right’. This is not without qualification, however. In particular, he notes, ‘…the photographers were certainly unhappy with elements of Hargreaves’ recommendations’, but concedes that, ‘…one of the difficulties was always going to be to come up with proposals that kept everybody on board’.

The concerns to which Lewis refers related principally to the review’s proposals for the Digital Copyright Exchange and orphan works. Indeed, after the publication of the final report, a number of photographers and associated organisations took to the Internet to voice their distaste. The proposal – arguably a good idea in principle – whereby copyright owners would either register their images with the Digital Copyright Exchange and all non-

\begin{itemize}
\item \textsuperscript{118} Interview 2 (n83) at 07:44.
\item \textsuperscript{119} Interview 3 (n91) at 12:49.
\item \textsuperscript{120} ibid at 12:49.
\end{itemize}
registered images would be considered orphan works, requiring the payment of a nominal fee for use, such fees being paid to the copyright owner should they ultimately identify themselves was derided by critics. Some argued that only professional photographers would register, leaving the work of amateurs and semi-professionals open to free exploitation, further suggesting that non-UK-based photographers would also be at a disadvantage as they would not likely be aware of the Exchange’s existence. Technology news website, The Register, somewhat colourfully opined that:

Hargreaves also recommends photographers and visual artists be thrown under a bus: the [Digital Economy Act’s] abandoned Clause 43 reappears, with the relaxation of the use of orphan works if the user claims they’ve done a diligent search for the owner.

The British Photographic Council, an organisation representing a large number of photographers that had itself submitted evidence to the review, also expressed concerns over the proposed system for the collective of orphan works but did note that the Digital Copyright Exchange as a concept had potential provided it was properly executed.

Returning to equality of access, the question of balance is not always an easy matter to address. Indeed, in the case of the review, delivering effective IP protection would not necessarily entail the same measures for every industry – an issue vividly illustrated by the example of the Digital Copyright Exchange. Moreover, one must question whether equality of access and influence should result in equality of outcomes. It is not in dispute that all interested parties should have the equal opportunity to communicate their wants, needs, and

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123 It is interesting to note, however, that the British Photographic Council’s response to the Review’s call for evidence did not itself express any concerns over the issue of orphan works. See John Toner, ‘The British Photographic Council’ (2011) <http://www.ipo.gov.uk/preview-c4e-sub-toner.pdf>.

views, but even with a fully balanced set of evidence to assist in their decision-making, it is arguable that larger interests may still be favoured due to factors such as their importance to the economy.

Panel Member B offers a different perspective. Instead of focusing on the *ability* of different interests to gain access, he considers the value in receiving information from a range of different sources – particularly where, in the context of the Review, that information all relates to the same questions:

So, if you take the example of, say, designs law, you had material coming in from the representative bodies, lobbyist groups about designs, you had individual designers come in, but then you had submissions come in from the judges and from expert lawyers who were looking at the actual law.

So, you could look at [it] from the context of…a designer: this is how I try to protect it as a designer…this is how I look at it from the point of view of a lawyer and then the judge…

The strength highlighted in this example, then, would appear to be a strength of reviews in general: inviting or, in certain instances as noted previously, actively seeking out a range of input from across the spectrum of stakeholders and considering it all within a broader context; in this case, that of the UK economy. As the other case studies in this thesis illustrate, size and wealth can be significantly influential when it comes to a private actor’s ability to influence policymakers, not least due to the greater difficulties in gaining access to them in the first place. Individuals and smaller organisations often lack the necessary know-how and resources to lobby effectively and whilst representative or ‘umbrella’ organisations may be of assistance in some cases, as noted above, such groups may not always successfully represent their members’ individual interests. The fact that the review itself represented only one part of a much larger exercise, however, must also be taken into consideration given that additional consultations, meetings, and other

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125 Interview 1 (n78) at 17:26 and 18:00.
lobbying opportunities were plentiful. Nonetheless, this should not detract from the fact that the evidence base gathered by the review still benefitted from considerable breadth and an inclusive (indeed proactively so) approach.

6. Conclusions

The Hargreaves Review, more so than the other two case studies in this thesis, serves as a good example of a targeted attempt to gather input from interested parties from across the spectrum: large and small, rich and poor, and from multiple sectors concerned with varying forms of IP. From the all-important perspective of equality, then, it is indeed worthy of praise. That praise cannot, however, be unqualified.

A natural issue now arises. Evidence – whether it is obtained through academic research, through inquiries, commissions, or reviews, or through lobbying – forms a valuable ingredient in policymaking. We may subdivide the term evidence into a number of categories and it will naturally vary in both form and function depending upon whether legislators seek to make something new or fix something old. In some cases, evidence may support existing opinion and in other cases, challenge it. Evidence may at times come only in the form of minority opinion, in which case it may be overlooked and possibly discarded; other evidence may be presented by a majority desiring change. At all times, one must also be aware of the chicken and egg scenario – which came first: the idea that the law needed changing or the evidence showing how that change should look?

Whatever the form of evidence, however, and whether it arrives before, during or after policy or legislation is crafted, the importance of its effect on the relevant parties is paramount. The Hargreaves Review is illustrative of an approach to policymaking that seeks to perform a check up on the law – to find out what is working, what is not working, and for whom. Moreover, its conduct portrays a respectable degree of objectivity and a clear desire to ensure that a balance of voices are heard from and factored in to decision-making. Whether that approach was entirely successful, however, is open to question. As has been seen, while the review clearly gathered a broad range of evidence from an equally broad range of stakeholders – SMEs in particular – the fact that
lobbying as usual continued not only throughout the review but also following it suggests that despite Hargreaves’ laudable proactive approach to obtaining input from smaller actors, more powerful players still had the capacity to tip the balance; a balance, moreover, that appears to have been difficult to strike at any level, as is well illustrated by the example of the private copying exception.

Notwithstanding the suggestion, then, that traditional lobbying by better-resourced actors continued to tip the balance, it must be acknowledged that the review nonetheless succeeded in ensuring that the input of smaller players was secured. Moreover, it provides a valuable model for a more formalised approach to the gathering of evidence: one that is inherently more transparent (even if the policymaking process that followed was not), and one that is more structured. Such features are both, it is submitted, vital in addressing inequalities in the lobbying landscape that result from differences in resources.

Is there, then, a place for a greater number of Hargreavesesque reviews? Ivan Lewis feels that whilst reviews, ‘have their place’, they should perhaps be used with caution. It may sometimes be the case, fears Lewis, that reviews are used when government wants to ‘kick things into the long grass’.

Panel Member A also begins with words of caution. Too many reviews may not be a good thing in his view, instead becoming, ‘part of the wheel spinning process itself…” citing examples such as inquiries into interest rate fixing and the procurement of security services for the 2012 Olympic Games. Whilst Panel Member A’s point is well taken – too many reviews and inquiries could indeed slow the machinery of government down and potentially be somewhat wasteful – the point must be also made that reviews and inquiries stand apart from one another. A review which takes a proactive approach to evidence gathering in order to take the temperature on existing policy and to better plan future policy is quite different to an inquiry assembled in reaction to a scandal

126 Interview 3 (a91) at 17:00.
127 ibid.
128 Interview 4 (a102) at 14:14.
129 Of course one must keep in mind that lobbying could, of itself be a trigger for a review. It can be said with considerable certainty that if a sufficient number of interests persuade Government that policy is not fit for purpose, the Government will seek to address the situation in ways which may well include a review.
charged with the task of investigating the improper conduct and taking steps to ensure that it does not happen again.

Nevertheless, despite emphasising that reviews should not be overused, Panel Member A does acknowledge the value of, ‘a well-timed review, with a clear remit’, where either the provision of evidence from either side of the argument may be uncertain or where there is well developed but contending evidence which would benefit from the judgement of ‘a cool external eye’.

Mike Weatherly sees a limited future. He feels that the conclusions of reviews lack the necessary degree of concrete enforceability. Moreover, his views seem to reflect those of the then-coalition government in light of his observation that, ‘…David Cameron said that Hargreaves should be the last one of these reviews’. Whilst this is perhaps not surprising, not least in light of the onus on austerity and cutting public sector expenditure, and now, in 2017 the intensive focus on the UK’s departure from the EU, sure to eclipse (and indeed encompass) many other policy areas for some time, it is certainly to be lamented when considering the success that the Hargreaves Review represents, particularly when one considered the broad range of interests whose views were sought. As noted above, the Hargreaves Review should not be viewed as an unqualified success in this regard, but it can be argued that to have the input of smaller actors at all represents a significant improvement.

Reviews, then, are not by any means set to replace traditional policymaking, nor are they set to replace traditional lobbying. Indeed, they serve as a component part of both or, as we might also see them, as a transparent conduit for lobbying. When the importance of gathering evidence from stakeholders is high, they provide a valuable means of gathering and distilling that evidence, producing practical, evidence-based recommendations. It should not, of course, be assumed that reviews conducted in this fashion would work in all policy areas but in an area such as IP within which a broad spectrum of different interests must coexist in something approaching a fair, practical and

130 Interview 4 (n102) at 14:14.
131 ibid at 14:14.
132 Interview 2 (n83) at 09:00.
133 ibid.
profitable harmony, the aforementioned cool external eye plays a vital role. What is more, when one considers that the implementation of many of Hargreaves’ recommendations has, as noted in the introduction to this case study, been subject to further (and indeed thorough) consultations with stakeholders, the model presented here would seem to be highly effective. One should note with some caution, however, that after the review’s pro-equality approach, subsequent policymaking appears to have followed a more standard approach, presumably to the exclusion of those without the resources, knowledge, or motivation to get involved.

Nevertheless, it is clear that, when properly conducted, reviews can be used to gather submissions from a broad range of affected parties – broader than would be heard from in the traditional course of lobbying. By actively seeking out those voices that might otherwise go unheard, Hargreaves and his team were able to formulate recommendations on the basis of evidence that was arguably more fully representative of those sectors which IP law and policy seeks to serve.

To suggest that a system of policymaking (whether evidence-based or otherwise) exists that is free of any flaws and can please one hundred per cent of the people, one hundred per cent of the time, is quite unrealistic. Reviews are not met with universal success. Indeed, the Gowers Review is but one example that illustrates this unfortunate potential all too well. One must also consider that however much evidence a review collects and however well it presents it, the decision to act remains with the government of the day, whose priorities may shift for any number of reasons, both political and economic.

Such caveats notwithstanding, however, one may submit that as a means of gathering evidence from a range of actors, both large and small, in a transparent manner, the value of a review is significant, and while Hargreaves does not necessarily present an unqualified panacea for the problems identified in Chapter 2 (nor does it satisfy all of the conditions included in my model of democracy), it does indeed represent a useful step in the right direction.
Chapter 4
Case Study II:
The Digital Economy Act 2010

1. Introduction

Famous (or perhaps infamous) for its hasty passage through the wash up procedure in early 2010, the Digital Economy Act (“the DEA”) was the source of much lobbying-related controversy. Significant influence on the part of the entertainment industry over the various copyright protection measures in the DEA makes this piece of much-maligned legislation an ideal candidate for an examination of the work of private actors in shaping IP law and policy.

At the outset, it is important to note that the DEA is not, and was never designed to be, a piece of IP-specific legislation. It is the fact that its IP protection provisions are those that have sparked most controversy and indeed the most interest that warrants such focus upon them. Aside from the copyright protection provisions, the DEA includes provisions relating to internet domain registries, the regulation of television and radio services, the use of the electromagnetic spectrum, changes to the public lending right under the Video Recordings Act 1984, and the functions of Channel Four television.\(^1\) For the purposes of this thesis, however, whilst acknowledging the various important functions of the DEA, this discussion will remain confined to its IP aspects.

The focus of the IP protection provisions in the DEA is largely on internet service providers (“ISPs”). Traditionally seen as \textit{mere conduits}, ISPs are required under the DEA to act as a go-between of sorts. When content owners detect copyright infringement and notify an ISP of an offending IP address, the ISP is required to notify the customer associated with that address.\(^2\) Moreover, if repeated infringements occur with the same IP address within a defined

\(^1\) Digital Economy Act 2010, Preamble.
\(^2\) ibid, s3.
period, the ISP may be required to provide an anonymous infringement list to rights holders who are then able to obtain a Norwich Pharmacal order to obtain the identification details of the offending customer. Sanctions for repeated infringement are also addressed, the central focus of which is the limiting of offenders’ internet access.

As for further detail, including the aforementioned defined period, this is absent from the legislation - instead left to an Initial Obligations Code to be drawn up by Ofcom. It is also important to note that many of the provisions are contingent upon the implementation of the code. At the time of writing, the code remains incomplete. Ofcom’s most recent attempt formed the central component of a consultation, which took place between 26th June and 26th July 2012. Formal implementation of the draft code never took place; after being delayed on multiple occasions, its place was eventually taken in 2014 by a regime developed by rights holders and ISPs under the banner of the Creative Content UK alert programme. In essence, the eventual result was much like that initially desired before the DEA came to be, as will be seen below. Indeed, had such a scheme been agreed before work on the DEA began, it is quite conceivable that the difficulties described in the remainder of this chapter would never have had a reason to exist. While the elements of the DEA discussed below remain in force, Ofcom’s work appears to currently lie dormant, with the industry programme working to the apparent satisfaction of all concerned. While all that ends well may be well, as will be seen, the life of the DEA’s IP protection provisions has not been a peaceful one - not during the passage of the Digital Economy Bill, and not after the Act entered into force.

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1 ibid, s4.
2 A Norwich Pharmacal order is a court order requiring the disclosure of information by a third party that has been involved in wrongdoing through no fault of their own, for example an ISP whose customer has been downloading pirated material. The name is derived from Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 (HL).
3 Digital Economy Act (n1), s10.
4 See, for example, s10 which gives the Secretary of State the power to order ISPs to take technical measures against offending customers. This power is contingent upon Ofcom’s assessment of the need for those technical measures, as required under s9, which in turn is based upon Ofcom’s reports of infringing activity, as required under s8. Those reports, however, must span a 12 month period which can only begin once the Initial Obligations code is in force.
5 The proposals for Ofcom’s code including the June 2012 consultation document are available from <http://stakeholders.ofcom.org.uk/consultations/infringement-notice>.
8 For discussion of the advantages and disadvantages of the industry scheme as compared to the statutory framework, see Alex Watt and Emma Fox, ‘Creative Content UK: Not Very Creative’ [2014] Intellectual Property Magazine 15.

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Within months of the DEA coming into force, two of the UK’s biggest ISPs, BT and Talk Talk, commenced legal proceedings over the IP protection provisions, seeking a judicial review. At first instance, the ISPs’ challenges were founded primarily on the argument that various of the DEA’s provisions were incompatible with EU law. Specifically, the contested provisions should have been notified to the European Commission for scrutiny under the Technical Standards Directive; they were incompatible with the E-Commerce Directive insofar as they imposed liability for transmitted information, monitoring obligations, and blocking obligations on mere conduits (that is, the ISPs); they were incompatible with the Privacy and Electronic Communications Directive, specifically Article 6(1) in that they required the processing of personal data for purposes not specifically permitted thereunder and were also not excused by Article 15 of that Directive; their impact on ISPs, consumers and businesses was disproportionate and did not pursue a legitimate aim, thereby contravening both the Human Rights Act 1998 and the European Convention on Human Rights; and they were incompatible with the Authorisation Directive since the obligations imposed on ISPs should be notified as conditions for general application to be fulfilled by all UK ISPs. The ISPs were unsuccessful on each of their main points and the High Court could not find any incompatibility between the copyright infringement provisions of the DEA and EU law. On appeal to the Court of Appeal, the claimants were once again unsuccessful with the Court upholding the High Court’s judgment in all significant respects. Whilst it was open to the claimants to appeal further to the Supreme Court, the appeal was never made.

From the perspective of lobbying, an important question on the DEA must be why the ISPs needed to resort to judicial review. Why did they not succeed in convincing policymakers of their case as the original Digital Economy Bill took shape? It is interesting to note that just as the technology industry’s aims and objectives – which appear to have been instrumental in shaping the now-repealed private copying exception to copyright as considered in the previous

13 ibid.
chapter – were more closely aligned to those of consumers (for example, having the ability to make free copies for personal use), so too would the ISPs’ aims and objectives for the DEA, yet here they were not successful.

Further questions surround the representation of individual citizens and the interests of consumers. Certainly, groups representing internet users were not silent, but whether they were effective is a different question. What is also interesting to note is that even at the outset, the copyright protection measures in the Digital Economy Bill were called into question from a human rights perspective. As highlighted by the Parliamentary Joint Committee on Human Rights, copyright must be balanced against the wider public interest; technical measures such as the suspension or restriction of internet access had the potential to impact individuals’ rights guaranteed under the European Convention on Human Rights including freedom of expression and the right to privacy; and interference with those rights must be necessary and proportionate in order to meet a legitimate aim (in this case the protection of copyright). As will be seen, the fact that the lobbying surrounding the Digital Economy Bill seems to have been so significantly dominated by the rights holder community, with scarce mention of groups representing individuals, leads one to question to what extent the lobbying that ultimately fed into the Digital Economy Act can be considered democratically legitimate in light of the model of democracy presented in Chapter 2. Moreover, as in the case of the Hargreaves Review, the power of certain policy networks prevailing over others is quite evident.

2. The Origins of the Digital Economy Act

The origins of the Digital Economy Act can be traced back to the Digital Britain report, published in June 2009 by the Department for Culture, Media and Sport and the Department for Business, Innovation and Skills. The report covered a broad range of topics, many of which would later be addressed in the Digital Economy Act. For the purposes of our examination, however, it is important

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15 ‘House of Lords and House of Commons Joint Committee on Human Rights, 2010: 10 Sect 1.16’.
16 ibid 11, sect 1.18.
17 ibid sect 1.19; sect 1.30-1.36.
18 Department for Culture Media and Sport & Department for Business Innovation and Skills | Cm 7650, ‘Digital Britain’ (2009).
to point out that copyright piracy was highlighted as an issue that needed resolving."

There can be little doubt, it is submitted, that much of the information upon which this report was founded was supplied by those within the affected industries – a clear example of policy networks at work. Indeed, there could not possibly be any other source available and, as is repeatedly emphasised throughout this thesis, policy should be designed to serve those to whom it relates. The citing of figures from organisations such as the BPI, therefore, should not come as a surprise. From the outset, however, it appears that the media perception of the DEA’s copyright provisions was one of undue influence by the entertainment industry:

Lord Mandelson, the business secretary, ordered officials to draw up draconian regulations on internet piracy just days after he had a private dinner with a Hollywood mogul [music and movie industry titan, David Geffen] who is a critic of illegal file sharing."

Thus reported The Sunday Times, omitting any mention of the aforementioned Digital Britain white paper, published two months earlier. This was not the only such accusation to be published and despite Lord Mandelson’s personal and public assurance that ‘…the subject of internet piracy was not discussed during our meeting’, rumours persisted; rumours that may or may not have carried elements of truth. Indeed, as will be seen, it is arguable that the rights holder community succeeded in influencing the shape of the Digital Economy Act where other interested parties, not least the ISPs, did not.

After the introduction of the Digital Economy Bill, further news stories abounded. Of particular interest is an amendment to the bill allowing for the blocking of websites introduced by Liberal Democrat Peer, Lord Clement-

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19 ibid 17. For more detail, see 109-115.
Jones: Amendment 120A. Many, both in the media and internet-based industries were displeased by the amendment with some in the press pointing out that it was ‘copied almost word-for-word from a draft written by the BPI...’ That the amendment used was, in some form, proposed by the BPI, is not in itself unduly concerning, however that it was introduced with little alteration perhaps is. Indeed, the same article quotes Jim Killock, then head of the Open Rights Group (an organisation opposed to the IP protection measures in the bill), as making that very argument. If nothing else, this arguably represents bad PR. With the bill already the subject of much concern, the addition of the BPI amendment almost verbatim surely served only to further undermine its reputation. Certainly, news articles with titles along the lines of ‘Is the music industry trying to write the digital economy bill?’ demonstrate that the already tarnished public image of the bill had been further damaged by such a move. As will be shown later, however, Amendment 120A had in fact been introduced to replace a much more severe provision in the original bill, Clause 17; a provision that would have allowed changes to IP legislation to be made in response to emerging technologies, but without much of the standard parliamentary scrutiny.

It is perhaps regrettable, then, that such reports arguably overlook the importance and value of lobbying and the existence and role of policy networks as part of the policymaking process, often omitting important technicalities in the name of sensationalism, not to mention other background details leading up to the introduction of the bill. Nevertheless, they do at least lead one to question whether the involvement of the entertainment industry was excessive, particularly when compared to others, namely ISPs and those representing consumers. If this is indeed the case, it may be difficult to reconcile the lobbying surrounding the DEA with the model of democracy presented in Chapter 2, not least in light of problems stemming from inequality, excessive bias, and a lack of transparency.

2.1 Doing The Washing Up

During the final days of a particular parliament following the announcement of a general election but before parliament is dissolved, the opportunity is taken to deal with any unfinished legislative matters quickly. This is known as the wash-up period and is generally used only for the passage of uncontroversial legislation. The DEA, however, was far from uncontroversial and its passage in this way sparked yet more heated argument from all angles: political, legal, academic, and journalistic:

David Cameron said the Act had been ‘rushed through too quickly’. Nick Clegg went further, describing the “wash-up” passage of the act as a ‘stitch-up’ and pledging to repeal the Act. 24

One might even go so far as to suggest that the Labour government may have feared that the incoming administration (who they likely feared would not be a Labour one) might have been reluctant to continue with anything like the Digital Economy Bill had it not been passed in time and quite likely considered it too difficult to attempt to have the bill carried over into the next session (which may have been considered undesirable for political reasons in any case). Whatever the reasons for the bill’s sudden and rapid passage, however, it would be difficult to disagree with the myriad commentators who question its legitimacy in light of such poor parliamentary scrutiny. Indeed, during the bill’s third and final reading it was subject to a paltry two hours of debate25 with very few MPs present.

Subsequently, concerns have been raised over the use of the wash-up procedure. One former MP, for example, expressed such concerns when interviewed for this case study, at one point going so far as to describe the bill as ‘rancid’. 26 As will be seen, that same former MP had complaints with the IP

26 Mr C [anonymised], Interviewed by: Adamson B (5 July 2012) [Hereinafter ‘Interview 5’] at 05:41.
aspects of the bill already, and therefore his reaction to its quick passage in wash-up is unsurprising. What is concerning, however, is that these were not isolated views. As is clear from the subsequent judicial review proceedings brought by the ISPs, this was not a bill with which many were happy, nor one with respect to which conflicts had been resolved. That the wash-up procedure could be used to hurry through a controversial bill is particularly concerning from a democratic perspective in light of the divisions between many interests on its provisions and one must therefore question whether its IP protection provisions succeeded in fulfilling their goals, let alone served and balanced the interests of all classes of affected parties.

It is perhaps unsurprising, therefore, that following the 2010 wash-up, there were calls for reform. Indeed, of particular interest is an article from the Hansard Society which draws attention to concerns not only over the Digital Economy Bill, but also the Constitutional Reform and Governance Bill.\textsuperscript{27} Whilst the wash-up procedure is considered to be generally acceptable for uncontroversial legislation, it has been argued that for significant constitutional amendments and for controversial matters such as those contained in the Digital Economy Bill, the procedure is rather less palatable. Logically, the more important a bill, the more deserving it is of careful scrutiny. The fast-track nature of the wash-up results in considerably less scrutiny.

Whether or not the Digital Economy Bill and the Act to which it gave birth is indeed \textit{rancid} is, at least in part, a question for another place and another time. What is clear, however, is that external forces played a significant role in the shaping of the DEA – sometimes, one may suggest, a little too significant – and further examination is clearly called for. Whilst it is arguable that law and policy cannot always seek to strike a perfect balance between the wants and needs of competing sectors and industries, it is concerning that the Digital Economy Act appears to have failed so comprehensively to do so. The merits of ISP-aided enforcement of IP rights are not so much open to question as the weight given to the lobbying input of ISPs and it is this aspect of the bill that must be given more consideration in this context.

\textsuperscript{27} R Fox and M Korris, ‘Reform of the Wash-up: Managing the Legislative Tidal Wave at the End of a Parliament’ (2010) 63 Parliamentary Affairs 558.
3. The Digital Economy Act From The Inside

Four individuals were interviewed for this case study, three from Westminster, one from the lobbying side of the table. Unique among all of the interviews conducted for this thesis was the opportunity to discuss the DEA with a member of the House of Lords. It is with some regret that the peer in question has requested that his responses be anonymised, and will therefore be referred to as Lord A throughout. Similarly, a former MP who left Parliament in 2010 is also anonymised, and shall be referred to as Mr C throughout. In order to preserve anonymity, no further background information will be provided with respect to Lord A, however Mr C’s role can be detailed in outline. Others offering insights and personal experiences of the Digital Economy Bill and of the broader role of lobbying itself are Don Foster, former Liberal Democrat MP for Bath, and Richard Mollet, former Director of public affairs for the BPI.

Don Foster, in his role as Shadow Secretary of State for Culture, Media and Sport between 2003 and 2010 had a particularly prominent role in the shaping of the DEA. While Foster’s background lies predominantly in education and science (indeed, he began his working life as a science teacher in 1969),28 his political interests are stated to include culture, media, and sport29 and those interests would certainly have come to the fore during his time as Shadow Secretary of State. Moreover, serving on the opposition front bench, he was in a prominent position to discuss and debate the various provisions of the Bill.30 This he did:

I spoke in every one of the debates; I spoke in lots of the fringe meetings that took place, in conferences and all sorts of events…and in the capacity of Shadow Secretary of State.31

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31 ibid.
Foster also played an active role within the Department for Culture, Media and Sport as Liberal Democrat Party spokesman, in which capacity he had meetings with ministers and those from the private sector – as he recalls, ‘every organisation under the sun’, again, illustrating the workings of policy networks, bringing together private actors and policymakers.

Unlike many of his colleagues, Mr C possessed a degree of knowledge and experience in IP and the creative industries. He also noted that his perspective on the IP protection provisions of the Digital Economy Bill was more closely aligned with many of those in the creative industries seeking more effective protection of their IP. In common with others, Mr C recalls a considerable amount of lobbying from across the rights holder community including publishers, the video industry, and the computer game industry, all of whom sought a levy of some form to offset the financial harm caused by online copyright infringement. Despite his sympathy for the cause, however, Mr C was opposed to such measures – not so much in principle as for practical reasons:

I just thought there were so many illegal downloads, I just didn’t know how the police could have the resources to go after…the million kids who don’t get modern copyright.”

The pressure was nevertheless considerable. Mr C attended a number of meetings, lunches, and dinners with representatives of the abovementioned industries and ultimately, despite his practical reservations, opted to support the industry in their endeavours:

…on the morning before the vote…they pleaded with me and I said, “I’m leaving Parliament. I’m sympathetic intellectually

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32 ibid.
33 Interview 5 (n26) at 00:23.
34 ibid.
to what you’re after. As you know I just don’t believe you can do it, but I’ll vote for it.”

Among those organisations facing significant attention, not to say a measure of scorn for its role in the emergence and crafting of the DEA was BPI (British Recorded Music Industry) Limited, more commonly known as simply the BPI. Head of European Government Relations for the RELX Group and former Publishers Association Chief Executive, Richard Mollet, was at the time of the Digital Economy Bill the Director of Public Affairs for the BPI – a position he retained until October 2010.

The involvement of the BPI in the development of the DEA in fact began long before the bill was introduced. Mollet tracks back to the 2006 Gowers Review of Intellectual Property, in particular Recommendation 39:

Observe the industry agreement of protocols for sharing data between ISPs and rights holders to remove and disbar users engaged in ‘piracy’. If this has not proved operationally successful by the end of 2007, Government should consider whether to legislate. [emphasis added]

Initially, recalls Mollet, the preference of the rights holder community as a whole was to succeed in achieving the first part of Recommendation 39. Nevertheless, this was ‘twin-tracked with maintaining dialogue with Government and Parliament as to the need for statutory action, should [the voluntary arrangements with ISPs] fail to come about’. With the benefit of hindsight, the outcome of such attempts would seem to be inevitable:

Despite attempts by some ISPs and some rights holders…it ended up not being possible and so…we held Government to

35 ibid.
36 Formerly known as the British Phonographic Industry.
the fact that it had accepted the recommendation of Gowers and said, ‘Well there you go, we haven’t got the voluntary arrangement. You need to introduce statute’ and thus the [Digital Economy Bill] was born.«

There was, then, an attempt by rights holders and ISPs to find common ground and reach an agreement to cooperate on IP enforcement; something, which, for the most part, has ironically now occurred, thereby rendering the relevant parts of the DEA somewhat redundant. Indeed, it was even suggested by some in the rights holder community that ISPs were more willing to cooperate in the early stages in the hopes that government intervention and legislation could be avoided.« In July 2008, key representatives in the rights holder community and six of the UK’s largest ISPs had signed a memorandum of understanding (“MoU”) aimed at reducing online copyright infringement.« Out of the MoU would eventually emerge the so-called Principle 5 Working Group. Principle 5 of the MoU stated that signatories to the MoU would be invited by Ofcom to identify measures to deal with repeat copyright infringers, including technical measures such as traffic management, filtering, and content marking (for identification purposes).« As per Mollet’s observations above, however, the Principle 5 working group did not succeed, although as Horten observes, Lord Carter did acknowledge the usefulness of the group’s work concerning the legal and technical feasibility of technical measures to prevent infringement.«

The BPI had been busy on the copyright protection aspects of what would become the Digital Economy Act for quite some time prior to the bill coming into existence and they were not alone:

Throughout the period between ’06 and the presentation of the Bill in 2010…everybody with an axe to grind on this – from ourselves in the rights holder community, through to the ISPs, through to people who created an axe for themselves to grind

« ibid.
42 ibid 175.
43 ibid 178-179.
44 ibid 180.
such as the Open Rights Group – were engaged in various degrees of communication with government and Parliament.\footnote{Interview 7 (n39) at 03:30.}

The debate itself was an ongoing one with many voices speaking to one another and to policymakers. Whether all voices succeeded in making themselves heard (or rather acted upon) by policymakers, however, is questionable. Certainly, the resulting legislation did not reflect the balance of views from affected industries, favouring as it did the rights holder community. It is also interesting to note Mollet’s suggestion that an organisation like the Open Rights Group – an organisation which sought to represent individuals to a far greater degree than ISPs or rights holders – had ‘created an axe for themselves to grind’. Given that, whatever form the Digital Economy Act would ultimately take, its IP provisions stood to impact the rights and freedoms of individual citizens to use the internet, Mollet’s assertion seems to be an unreasonable one and shows perhaps a modicum of contempt on the part of rights holders towards such organisations; a contempt, more worryingly, that perhaps showed in their lobbying efforts. Moreover, from the policy networks perspective, this is indicative of an exclusion of, or at the very least a desire to limit the contributions of, an important representative voice, thereby limiting the effectiveness of such networks.

Of particular importance to the BPI and to rights holders more broadly was the need to demonstrate the harm caused by piracy. Mollet remains uncertain as to the impact of research in this area presented by the BPI to the government; however he feels that it represented an important contribution to the debate, not least as it presented an evidence-based counter-argument to the suggestions by opponents that harm could not be proven.\footnote{Ibid at 05:04.} Mollet’s recollection of the response of opponents to such evidence suggests that it was met with what could charitably be described as cynicism;\footnote{Nevertheless, one should consider Mollet’s observations with a degree of circumspection for inasmuch as those parties opposed to stricter anti-infringement measures were opponents of the BPI, so too was the BPI an opponent of theirs and in neither case can one be expected to be too generous to the other in conversation.} suggesting that many such responses offered little in the way of constructive counter-argument.
As for the evidence itself, although the evidence to which Mollet refers does not appear to be publicly available at this time, it is likely that it took largely the same form as many reports that are available (including some from the BPI), citing statistics on web piracy and using those statistics to calculate the economic losses sustained by the music industry as a result. Two reports from the International Federation of the Phonographic Industry (“IFPI”) demonstrate this approach well.\(^48\)

4. The Role of Lobbying in the Digital Economy Bill

4.1 The View from Westminster

As is already quite clear, the voices that were heard particularly loudly following the introduction of the Digital Economy Bill were those of rights holders. Whilst it should certainly not be forgotten that the DEA is by no means a piece of dedicated IP legislation, it cannot be denied that by far its most talked-about, debated, and controversial aspects are centred around the protection of IP. To many, therefore, the Digital Economy Bill would seem to be the brainchild of Lord Mandelson and various powerful representatives of the media industry. Indeed, as Lord A observes:

\[\text{\ldots some people would say that, under the [Labour] government, the content owners were dominant because they succeeded in persuading Lord Mandelson...and indeed Lord Carter [sic]...to introduce the Digital Economy Bill...}\]

This is not to say that Lord Carter was immediately swayed however. Indeed, as Horten notes, in early meetings with the BPI, Lord Carter was not fully


\(^{49}\) Lord A [anonymised], Interviewed by: Adamson B (9 July 2012) [Hereinafter “Interview 8’] at 01:46.
convincing that rights holders had made their case for treating online file sharing as theft rather than sharing. It is, however, evident that Lord Carter had a number of meetings with different representatives from the rights holder community, including Universal Music chief executive, Lucian Grainge. According to correspondence cited by Horten, Grainge pressed Lord Carter not only on legally-mandated website blocking by ISPs, but also on the use of a public body for enforcement, thereby shifting the cost of prosecution from rights holders to the public purse. It is also interesting to note that Lord Carter continued to favour a solution that struck a better balance between the interests of rights holders and ISPs. His involvement in what would become the DEA, however, came to an abrupt end with his resignation in June 2009. From the perspective of balance, then, one is led to suggest that the resulting legislation may have in fact been more balanced had Lord Carter remained involved. Indeed, as Horten observes:

Lord Carter’s contribution has been underestimated in the political smoke that went up after the Bill was published. The evidence suggests that he did understand the changes in consumer behaviour...and was not totally unsympathetic to them...It is understood that Lord Carter had negotiated with the two industries, and his report struck what he believed to be an appropriate compromise.

The creative industries sought to demonstrate not only the harm suffered as a result of internet piracy, but also the purported ease of their solution. Indeed, Mr C recalls that ‘they brought people from America [who] showed how they could take websites down very quickly’. The problem, however, was not the technological means to remove offending content from the internet; rather the fact that permission was needed to take such action. A particular problem for Mr C was that copyright law in its current form is seemingly unable to keep up with technological developments. In part, he acknowledges, this is due to the

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50 Horten (n41) 184.
51 ibid 186-188.
52 ibid 188.
53 Interview 5 (n26) at 04:00.
54 ibid at 04:26.
rapid pace of technological development; the law will always be reactive rather
than proactive.

This is, of course, not to say that the voices of the rights holders were the only ones speaking to policymakers. Activity within policy networks was not quite as one-sided as that. As previously observed, the ISPs were also particularly vocal, albeit seemingly less so (or at least less effectively) than the rights holders. In both cases, however, it is not these actors’ motivations that should be questioned, nor their desire or action to influence law and policy per se. Intellectual property in the form of music, movies, software, and computer games represents the primary source of income for content owners. Deprived of the revenue stream or even a meaningful portion of it, those owners would not be able to continue in business.55 Similarly, any organisation faced with an increased regulatory burden – as the ISPs were faced with in the form of initial obligations and technical measures – would hope to avoid that burden or to at least ensure that it would be easy to comply with. The real question, then, is how policymakers use the information presented to them and the degree to which they are influenced by one perspective at the expense of another. As the model of democracy in Chapter 2 argues, lobbying can be justified as a valuable component of democratic governance, provided that conditions of equality are satisfied.

At the centre of many accounts of lobbying and the Digital Economy Bill is one figure: Lord Mandelson, the former Secretary of State for Business, Innovation and Skills. As noted above, however, the suggestion that elaborate hospitality laid on by rights holders one day lead to the introduction of the Digital Economy Bill the next is a media-fuelled oversimplification at best. Indeed, as Lord A recalls:

…this was the product of many years of wrangling where [the ISPs] had been told to get their act together…with the content owners…to come to some kind of conclusion. Well, they never

55 This does, of course, oversimplify the situation somewhat, but the point remains that internet piracy does deprive content owners of revenue that they would otherwise receive.
came to a conclusion [and] that’s why Lord Mandelson quite rightly acted…"

From the start of his involvement in the process, stakeholders were lobbying Lord Mandelson: the rights holders in particular. Horten cites a letter written to Lord Mandelson in July 2009 from the British Video Association, on behalf of a group known as Respect for Film. Respect for Film comprised major Hollywood studios, the Motion Picture Association, the Film Distributors’ Association, and the British Video Association themselves. The letter stressed the importance of ISPs’ responsibility for enforcing copyright and urged Lord Mandelson to expedite legislation, ensuring that an Act would be passed before the next general election."

As previously observed, the rights holders and the ISPs were not only voices to speak. Other organisations such as the aforementioned Open Rights Group were also heard, albeit perhaps to a lesser extent. Rarely will policy be so black and white that its opponents and proponents can be neatly divided into two distinct camps. The arguments of an organisation like the Open Rights Group, for example, would align more closely to those of an ISP, but the reasons behind those arguments would be fundamentally different.

From Mr C’s recollections, it would similarly appear that the majority of the lobbying came from either the creative industries or the ISPs. Only the Open Rights Group, as he recalls, represented the interests of users."

Whether such a survey would in fact have provided useful data is questionable. By Mr C’s own admission, ‘It’s a generational thing’."

Indeed, in an age where DRM is often criticised by many digital media consumers, and rights holders are frequently scorned on social

56 Interview 8 (n49) at 02:58 and 03:25.
57 Horten (n41) 190-191.
58 Interview 5 (n26) at 11.15.
59 ibid.
60 ibid.
media and other popular websites for rightly seeking to protect and control the release of their productions, the generational aspect to which Mr C refers would surely skew such research, possibly to the point at which it could not credibly be used to underpin any reasonable IP policy decision. One must question, however, whether that sufficiently justifies its exclusion from the debate as it is arguable that if citizens either don’t like or don’t understand laws that affect them, even if the overall effect of those laws must remain, there could be changes made to improve acceptance.

It is clear then, at least to some degree, which voices were speaking to policymakers about the Digital Economy Bill. Certainly, rights holders’ and ISPs’ voices were among the loudest on both sides of the debate; however Lord A suggests that to say that any one group was more influential than another is perhaps to exaggerate their success:

> I think it’s very difficult to say that at any one time, any one set of individuals [was] dominant…You’re in a permanent tussle for influence and a lot of these are down to the individual views."

The resulting legislation, however, seems to suggest a different story. It is clear that since before the introduction of the bill, ISPs had sought to avoid statutory responsibility for assisting in the enforcement of copyright. Indeed, one may even credit the deadlock within the Principle 5 working group for the DEA, or at least the need for it. Whilst the ISPs were by no means absent from the lobbying landscape surrounding the bill, accounts such as Horten’s,\(^1\) not to mention reports in the media and those interviewed for this thesis, talk of lobbying by ISPs much less than that undertaken by the entertainment industry. Might this be attributable to a resource imbalance? Whilst one could not suggest that ISPs are particularly resource-poor, whether financially or in terms of political and legal expertise (or at least the ability to acquire it through professional lobbyists), next to multinational entertainment corporations, their

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\(^1\) Interview 8 (n49) at 04:58.
\(^2\) Horten (n41).
resources may indeed be comparatively weaker. Of particular interest is Geoff Taylor, chief executive of the BPI at the time of the Digital Economy Bill, a skilled lawyer in his own right. Not only, then, did organisations such as the BPI have skilled legal teams working on their behalf, but in the BPI’s case, a skilled legal mind was actively engaged in lobbying leading policymakers, including Lord Mandelson. What’s more, the ability of the entertainment industry to lay on elaborate hospitality and to undertake more and better lobbying may go some way to explaining the resulting legislation.

As previously noted, Don Foster claims to have met with every organisation under the sun on the topic of the DEA. Of particular relevance to the IP protection elements of the bill, Foster recalls many meetings with ISPs and groups representing those ISPs. It is important to note – particularly when considering the weaknesses of the recently introduced statutory lobbying register which excludes in-house lobbyists– that these organisations were not always represented by third party consultant lobbyists. Quite often, recalls Foster, meetings would take place with, ‘very senior people in the organisations’. In addition to face-to-face meetings (in excess of a hundred, recalls Foster) there were a number of round-table discussions, breakfast meetings, and similar gatherings organised by interested organisations. Often such meetings would have the additional benefit of being cross-party thus meaning that policymakers had not only the opportunity to discuss relevant parts of the bill with stakeholders but also with each other.

Whilst the lobbying weight of the rights holder community is clear, it is interesting to note Fosters recollection that whilst the three most significant creative industries at risk from internet piracy – the music industry, the computer games industry, and the film industry – were present, the film industry was not as concerned as its musical counterpart:


64 Interview 6 (n30) at 06:22.

65 ibid.
The film industry...were slightly behind the curve at the time because, for them, piracy issues were not a big issue because...internet speeds didn’t really allow the vast majority of people to engage in illegal activity in relation to films and the games industry was nowhere near as much on the ball as the music industry."

This is somewhat surprising given that in 2009, some 63% of UK homes had a broadband internet connection.66 Certainly the technology required to pirate larger files was widespread. Moreover, as is noted above, Foster’s statement should not be taken to suggest that the film industry was absent. It can however be said that the music industry was leading the charge.

The music industry (represented in no small part by the BPI) was at the time, according to Foster, the most affected by Internet piracy. The greatest threat at the time came from peer-to-peer file sharing, representing two thirds of piracy activity compared to one third relating to websites. Foster feels that:

...we were behind the curve in Parliament in not addressing web-based stuff, but we went on and that’s why I, and Tim Clement-Jones in the Lords, raised the whole issue of illegal websites."

The problem of piracy in the context of the Digital Economy Act was something of a tripartite situation. Firstly, the creative sector sought to stem the free flow of copyrighted material online. Secondly, the ISPs sought to avoid responsibility and the need to take potentially costly technical measures to prevent piracy. Thirdly, internet users sought to avoid having their internet connections restricted or losing them altogether. The latter group, however,
must be further subdivided. In some cases, parents feared sanctions for their children’s downloading activities; businesses such as pubs, cafes and hotels offering Wi-Fi to their customers balked at the potential cost of customers downloading illegal material, and employers, already feeling the headache of wasted time due to employees’ personal internet use would now be faced with the prospect of sanctions for copyright infringement.

Infringers themselves, it appears, had mixed understanding on the matter. Some, for example, were uncertain of the legality (or rather the illegality) of their actions; some knew of the illegality but perceived online piracy to be a low-risk activity; others felt that online file sharing (of copyrighted material) should be legalised; while some claimed to download infringing content only on a try before you buy basis.69 Despite the fact that internet users were in some ways both the beginning and end of the problem – the innocent stood potentially to suffer from poorly-constructed legislation while the pirates were the reason it was needed in the first place – from Foster’s recollections it would seem that users were by far the least represented of all stakeholders in the IP protection debate:

The mass bulk of users of the internet were not involved, were not represented by any organisation…[The] vast majority of members of the public were turning a blind eye, not concerned, not aware of, not involved in, not interested in the impact that piracy was having on the protection of…IP…and the damage that that could do.70

Foster acknowledges the presence of the Open Rights Group but recalls few other names. Indeed, as observed above, much coverage of the lobbying surrounding the Digital Economy Bill focuses on the efforts of rights holders, particularly those in the music industry. Individual citizens could not perhaps


70 Interview 6 (n30) at 13:12.
be reasonably expected to become involved (or even to be aware of the legislation for the most part, given IP’s generally low-salience nature), however the apparent lack of strong representation on behalf of users is a greater cause for concern. In order for lobbying to be democratically justified under the model presented in Chapter 2, it is important that even those who would not represent themselves are represented, for example, by an interest group. The Open Rights Group is arguably a useful example, but such scarce mentions of it when compared to rights holders and even the relatively unsuccessful ISP community point to a significant imbalance in lobbying impact and the functioning (and inclusiveness) of policy networks.

Such limited lobbying on behalf of individuals notwithstanding, one organisation in particular is of interest: The Pirate Party. According to the Pirate Party’s website, their growth resulted directly from the rise in legal action against online piracy, citing in particular the successful 2009 case against the Pirate Bay in the Stockholm District Court. The Pirate Party are among a relatively small number of political parties operating within the UK with a narrow, specialist remit. This comparatively rare approach to advancing a political and/or legislative agenda warrants further examination. With respect to the Digital Economy Act, it is perhaps unsurprising that the Pirate Party pledged in their 2012 manifesto, under the heading Fix the Digital Economy Act, to repeal sections 3 to 18 of the Act, that is, the complete set of provisions pertaining to online copyright infringement. However unlikely it may be that a Pirate Party candidate would ever be elected, might it be the case that a representative of the Pirate Party wishing to meet with a policymaker would do so on more equal ground? One would submit that this would not be the case. Whilst a party member may possibly be more politically aware than the average citizen, unless that member is elected, he or she will be no different from a constitutional standpoint than a private individual with no registered political affiliations. Nevertheless, as a group, the Pirate Party will be registered with the Electoral Commission and therefore not treated in the same way as a lobbying organisation. A meeting between the Secretary of State for

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Culture, Media and Sport and a representative of the Pirate Party, for example, would constitutionally be no different to a meeting with a representative from the BPI (unless the Pirate Party representative in question was an elected MP), but a letter from the Pirate Party as a whole would be one from a registered political party, not from a lobby group. It is perhaps testimony to the unusual nature of the Pirate Party that such an entity appears not to have been considered by the Government in their introduction of a lobbying register.

Foster also noted pressure from within his own party, recalling a group which moved a motion at a Liberal Democrat party conference addressing certain issues pertaining to the Digital Economy Bill where, Foster notes, ‘they were somewhat critical of the direction that I was taking the Party in’ and it is here that another contentious incident in the DEA’s story provides interesting insights into the shaping of the Act by private actors. In its original form, as introduced into Parliament in November 2009, the Digital Economy Bill contained a clause which was to cause significant problems as the process progressed. Clause 17 was designed to allow for rapid changes to be made to the law in response to technological developments in online piracy. The clause allowed the secretary of state to amend copyright law, or to require Ofcom to draft amendments to copyright law, granting only minimum powers to Parliament to approve such amendments. Moreover, Clause 17 related not to the Communications Act 2003, but to the Copyright Designs and Patents Act 1988 and would have thus paved the way for largely unscrutinised changes to be made to copyright law. Unsurprisingly, Clause 17 was disliked by ISPs and other internet businesses, a number of whom (including Google, Yahoo, and Facebook) communicated their concerns to Lord Mandelson. The rights holder community, on the other hand, liked the provision.

Clause 17 also found few friends amongst the Conservative Party or the Liberal Democrats, who felt that it would grant excessive powers to the secretary of state, despite a subsequent amendment made by the government which would have rendered Clause 17 amendments subject to moderately more parliamentary scrutiny (and open to amendment) under the super-affirmative

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74 Interview 6 (n30) at 13:12.
75 Horten (n41) 239-240.
76 ibid 240-241.
procedure." As noted above, Foster and his colleague, Lord Clement-Jones, had worked together on bringing legislative attention to illegal websites - namely those that distributed, or provided access to, infringing content. In March 2010, Lord Clement-Jones and Lord Howard of the Conservative Party tabled Amendment 120A, an amendment designed to replace Clause 17 with a new Section 97B in the Copyright Designs and Patents Act 1988. In its original form, s97B would have enabled the granting of injunctions against ISPs requiring them to block access to certain websites and services where those sites and services provided access to a substantial amount of infringing content. In principle, s97B offered a good means of dealing with the same future developments as Clause 17, only without the accompanying constitutional flaws. The amendment was not, however, warmly-received either by ISPs or by Lord Clement-Jones’ Liberal Democrat colleagues.

Not least among the concerns surrounding Amendment 120A was the fact that its wording was very similar to that of a proposal for a similar amendment (also s97B of the Copyright Designs and Patents Act) written by the BPI. At the Liberal Democrats’ 2010 spring conference, parliamentary candidate for Islington and South Finsbury, Bridget Fox, moved a motion against the amendment, noting in particular ‘the stand of Liberal Democrat MEPs against website blocking…’ It is of interest to note that the motion highlighted the views of MEPs who were themselves grappling with other IP protection matters including the also-controversial Anti Counterfeiting Trade Agreement (”ACTA”) at the time, no doubt coming under very similar pressure from a very similar range of actors. Despite this motion, however, Lord Clement-Jones remained committed to the amendment, denying allegations of being ‘in the pockets of the music industry’.

Conservative and Liberal Democrat peers succeeded in passing the amendment during the bill’s third reading in the House of Lords.

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77 Ibid 242.
79 Horten (n41) 245.
80 Ibid.
Following considerable disquiet among ISPs and civil liberties groups (who felt that the amendment raised censorship concerns), along with a vocal reaction from citizens, some 20,000 of whom contact their MPs over a single weekend," a further change was afoot. In essence, the government relied on a technicality which saw Amendment 120A rendered inadmissible as it should have been referred to the European Commission under the provisions of the Technical Standards Directive – something that there was no longer time for as the end of the parliamentary session loomed large. Amendment 120A was thus re-drafted to allow the secretary of state to introduce regulations that would allow courts to grant the same injunctions originally provided for in the amendment. The net result would arguably be the same, but said regulations would be subjected to parliamentary scrutiny and review by the European Commission, thus helping to protect users’ rights and freedoms."

In essence, however, the amendment allegedly written by the BPI remained, albeit in a diluted (and more scrutinised) form. It was certainly not as undemocratic as the original Clause 17 and arguably sought (both before and after its late revision in the House of Commons) to strike a much fairer balance between the interests of rights holders, ISPs, and users. Nevertheless, it is clear that interested parties on all sides were working to shape the amendment. Indeed, as Horten observes, ‘The story of Amendment 120A illustrates how wily lobbyists can influence such battles and win for their cause’.

4.2 Means of Access

Setting aside the question of influence for a moment, one must also consider access. The former, after all, counts for little without the latter. Different actors will opt to use different methods to communicate with policymakers. Some will communicate directly: senior figures representing organisations will have face-to-face meetings with ministers; some may choose to communicate their position through a professional political consultant (i.e. a lobbyist for hire); others may opt for a campaign approach – demonstrated vividly by the tactics

81 ibid 244.
82 ibid 246-247.
83 ibid.
adopted by the open source software community in its campaign against the CII Directive.\textsuperscript{84} It must also be observed, however, that methods of access will not always be determined by choice. As discussed in Chapter 2, inequalities of resources, financial and otherwise, may in fact result in fewer choices and less ability to access policymakers.

In the case of the DEA, the BPI, one of the most powerful and influential actors in the process, preferred a more direct and formal approach:

> Any submissions we made to Government were submitted as letters...We would write formally to the minister...recognising all the etiquette that goes with a letter to ministers....We would copy in relevant civil servants...We were always very clear, I think, that whenever we [raised] a certain issue...we weren’t trying to use narrow channels.\textsuperscript{85}

Conversely, recalls Mollet (with perhaps a little cynicism), organisations such as the Open Rights Group preferred to resort to ‘foghorn tactics...mass petitioning of parliamentarians...thousands of text messages to private members’.\textsuperscript{86} While Mollet’s apparent distaste (which, one can reasonably assume, is shared by many others in the rights holder community) for the tactics of the Open Rights Group is perhaps understandable, it is nevertheless a subjective judgement. The tactics adopted by the Open Rights Group in their lobbying efforts against the Digital Economy Bill were similar to those adopted by the anti-software patent campaign concerning the CII Directive – considered in detail in Chapter 5.\textsuperscript{87} Moreover, as noted above, the Open Rights Group’s lack of resources, when compared to an organisation like the BPI, would be a strong determining factor in their choices of lobbying methods. When faced with a lack of means to carry out a sophisticated, nuanced lobbying campaign, shouting louder may be the only recourse. One must also question, however, whether such tactics are as effective. Certainly, they appear to have irritated

\textsuperscript{84} See Chapter 5, 210.
\textsuperscript{85} Interview 7 (n39) at 12:14.
\textsuperscript{86} ibid.
\textsuperscript{87} Chapter 5, 210.
rights holders and perhaps run the risk of not being taken seriously by policymakers. As stated in the model of democracy presented in Chapter 2, addressing such inequalities may require proactive measures on the part of government, thereby ensuring that their contributions are given more equal weight when compared to those of larger (and perhaps, objectively, more professional) organisations such as the BPI.

Furthermore, it can be argued that the type of lobbying depends very much on the type of lobbyist. The BPI and similar organisations are just that: organisations; they are organised and have a number of members who are also organisations. This is to say that their campaigns can be considerably more coordinated and targeted. Dues-paying members of a trade organisation such as the BPI will be smaller in number compared to those represented by a voluntary organisation such as the Open Rights Group, and will be members because they actively seek the benefits bestowed upon them by membership. Organisations such as the Open Rights Group, on the other hand, have no members as such; instead they are founded to represent a broader range of parties – not least the general population – on particular issues. Whether or not they actually do represent the full panoply of views and feelings is a different matter, but it is their goal to do so. Therefore, not only do voluntary organisations lack the funding of more formal organisations, but the number of individuals whom they represent and their relationship (or lack thereof) with those individuals does not permit the same kind of activities. In order, therefore, to represent the nation’s Internet users or music listeners, the Open Rights Group’s choice to campaign by way of, for example, online petitions, was one of a limited number of options.

4.3 Equality of Access and Influence

As this account of the Digital Economy Act has illustrated, the larger, better-resourced, better-financed, and indeed better-organised a private actor is, or the more power and money they have behind them, the greater the chances of access and influence are assumed to be. In the context of the Hargreaves Review, for example, one can suggest that the fact that the Review’s panel actively sought out the views and experiences of SMEs provides evidence
supporting the assumption. In the legislative context considered in the case study at hand, further evidence is provided to suggest an inequality of access where size (whatever its form) comes into play.

Lord A, for example, supports the assumption and indeed made little reference to any smaller interests during our interview: ‘I think, obviously, the big organisations do have an advantage…’ Included among those organisations noted by Lord A, we find the BPI, the Alliance Against Copyright Theft, Google, Facebook, and Yahoo. The ISPs, none of whom could be described as being particularly small, also come up frequently when discussing the lobbying surrounding the DEA, not least in the context of the obligations of ISPs to take an active role in combatting piracy. Interestingly, however, they feature less than actors from the rights holder community and this is arguably reflected in the resulting legislation. What is perhaps a little less clear is whether this is a result of comparatively ineffective lobbying on the part of the ISPs or whether policymakers ultimately concluded that the more valid argument came from rights holders. As is observed throughout this thesis, it is not the result that matters so much as the process. By this it is argued that equal opportunities for access and influence, and more equal participation in relevant policy networks matter more from a democratic perspective than what policymakers eventually decide.

Mr C, on the other hand, suggests that size may be of less relevance, at least in the context of IP. As noted above, the preferred focus of lobbying will be on those with an interest or background in the policy area at hand. In this case, therefore, small on-going campaigns targeted at particular policymakers can perhaps be more effective:

"Very few people know about IP so they keep you warm, as I always say, all year round. So, private dinners, you know, off to Ascot, off to Wimbledon; they look after you."

88 Chapter 3, 136.
89 Interview 8 (n49) at 11:21.
90 ibid.
91 Interview 5 (n26) at 16:42.
This, then, is the type of lobbying that is popularly imagined: special treatment in return for advancing an argument, supporting a new clause, or asking some questions. The central problem, however, is that it is near impossible to state with any degree of accuracy where the maintenance of cordial links crosses the line into undue influence. If a lobbyist adopts an ill-mannered and confrontational tone in a meeting with a Minister, that meeting is likely to be far less fruitful than it would have been had the lobbyist been well mannered and amiable. This does not, however, by any measure of common sense mean that friendly mannerisms and politeness constitute undue influence. Such lavish treatment notwithstanding, Mr C concedes that access and influence to and over policymakers has ‘got to get harder…much harder’, with matters instead taking place on a more formal basis by way of organised breakfast, lunch or dinner meetings. One may even take this a step further and suggest that it should in fact be the responsibility of policymakers to arrange such events proactively. Less elaborate, more formalised meetings would help to avoid undue influence, but arguably those with fewer resources would still be less likely to arrange events of any kind. If relatively informal gatherings were organised and publicised so as to catch the attention of a broad range of individuals and organisations (similar, perhaps, to the proactive approach taken in the Hargreaves review to gathering input from individuals and SMEs), the balance may be further redressed.

As is stated elsewhere in this thesis, perception is very important. As has also been observed, the public perception of lobbying is very poor. The central issue when it comes to the pampering of parliamentarians, then, is perhaps not whether there is any quantifiable difference in the degree of influence, but whether there is a perceived difference. Moreover, even if there were no quantifiable difference for the majority, it would be difficult to argue that there would be no difference in every case. Mr C’s point, therefore, is difficult to disagree with. Combined with stricter and more detailed disclosure requirements, more formal procedures for organising meetings and a reduction of informal meetings would seem to be the optimal choice for ensuring that the potential for undue influence, whether perceived or actual, is reduced. A

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92 ibid.
further related point is that of salience. IP and many other specialist niches of law and policy are generally unknown to individual citizens, even more so the intricate political machinery that lies behind them. A perception, whether well-founded or otherwise, of a corrupt system can arguably only amplify such low salience by reducing levels of trust, thereby further separating the governed from the government. As observed in the context of the CII Directive, considered in the next chapter, the less faith an individual or a business has in government, that is, the less they feel they will be listened to, the less likely they will be to seek involvement in the first place, thereby providing even less weight to counterbalance the powerful interests they perceive as dictating law and policy through lobbying.

If, as Mr C suggests, successful private actors in the IP world do indeed keep you warm, this in itself may confirm that it is only those with the resources to do so that are being heard. A pleasant lunch or perhaps some tickets to Wimbledon may be but a drop in the fiscal ocean for an organisation such as the BPI, or for an international software giant. To an aspiring undergraduate skilfully producing parody videos for her YouTube channel who has been threatened with copyright infringement proceedings, or to an innovative tech start-up staring down the proverbial barrels of the many patents of the established technology giants, however, even getting a response to an email from an MP may be little more than a distant dream.

5. Conclusions

Ultimately, the real story of the DEA is arguably considerably less dramatic than that portrayed in the mass media. While the elements of infamy are present – the Geffen/Mandelson meeting, the pressure from the entertainment industry, the imposition of new levels of responsibility upon ISPs for users’ actions – the suggestion that the resulting legislation is little more than a draconian set of provisions designed by media barons to hamper the freedom of internet users is misguided at best.

Whereas the Hargreaves Review, considered in the previous chapter, was a story of a bona fide attempt at levelling out some of the inequalities inherent in lobbying and a noble effort to expand policy network participation to all, the
Digital Economy Act is one which portrays a considerable tipping of the balance towards one particular group of organisations. The key question to ask, however, is whether this is necessarily a bad thing. The answer to that question, it is submitted, largely turns upon whether one is looking from the perspective of input or output.

As is acknowledged in the model of democracy in Chapter 2, the equality inherent in the outcome of the policymaking process perhaps carries less consequences for its democratic legitimacy than the input. In this instance, it is clear that the discourse and the outcome were lead significantly by the rights holder community. Given the importance of related industries to the economy, not to mention the overall goal of preventing the unlawful infringement of IP rights, the success of those industries is not a cause for concern in itself. What is, however, is the evident imbalance of opportunities to contribute to the debate. Opportunity for involvement is, it is argued, more important than the eventual result which may necessarily favour one side over the other, no matter how much input all parties have had.

It is evident that not only those representing the interests of individuals, such as the Open Rights Group, but also those whose interests stood to be significantly impacted – the ISPs – struggled to influence the debate. Subsequent events illustrate that policymakers were unsuccessful in fulfilling their role as arbitrators, balancing the competing interests of affected stakeholders, as described in Chapter 2. It is also not without irony that following the passage of the Digital Economy Act, and an attempt to have its IP protection provisions overturned by the ISPs on judicial review, the end result is effectively that which should have existed in the first place: rights holders and ISPs working together on a voluntary, industry-lead basis to combat online piracy.

Lobbying methods also play a role in determining the balance in this case. It is evident that those with more resources, particularly from the rights holder community, were able to conduct more elaborate campaigns, not only in terms of hospitality, but also in terms of supporting research for their claims, and in terms of the more senior policymakers to whom they had access. There is also
some evidence that those representing smaller concerns and individuals – the Open Rights Group, for example – may have been viewed with a degree of contempt and one must question the degree to which their so-called ‘fog horn tactics’ may have in fact served to irritate rather than inform policymakers, thereby further undermining the effectiveness of those with fewer resources and/or representation.

It must, however, be argued that in the absence of meaningful transparency, it is difficult to fully determine the true balance of access and influence involved. Had it been more readily apparent, for example, that the voices of internet users were largely absent from the debate, perhaps a more proactive approach to gathering their input might have been taken. Indeed, we might once again return to the conclusions drawn in the previous chapter, suggesting that the approach taken by Ian Hargreaves and his team in this regard might be regarded as something of a model.

With this said, however, the fact remains – particularly when considering the smallest voices in the process – that many of those voices do not themselves understand the issues involved. Indeed, Mr C’s reference to the million kids that don’t get modern copyright speaks volumes. A solution to such a problem must surely come in the shape of some form of public education and indeed any exploration of such a solution falls outside the scope of the research presented here, but it is clear that greater knowledge and understanding of a range of issues – not only the importance of copyright, but also of the key role of actors of all sizes in the policy process – is of considerable importance.

While this account of the Digital Economy Act’s IP protection provisions is unquestionably one of unequal discourse and influence, it must also be viewed as one which illustrates the value of stakeholder input. As noted, the policymaker’s mind is not a blank page, and indeed the inherent subjectivity in the submissions of private actors, far from being undesirable, in fact represents a vital element, as explained in the model of democracy in Chapter 2. Clearly such input must be handled with care and always confronted by an inquiring mind, but without it, the ability of policymakers to devise law and policy that adequately serves, and is thus accepted by, those subject to it, would
arguably be significantly compromised. The chief problem, however, lies in the imbalance of such important information. As is observed throughout this thesis, it is not the fact that lobbying provides subjective information that is the greatest concern, but that such input often lacks sufficient counterbalance from other affected but less well-resourced parties.
Chapter 5
Case Study III: The CII Directive

1. Introduction
More so than the other two case studies addressed in this thesis, the Proposed Directive of the European Parliament and of the Council on the Patentability of Computer Implemented Inventions (the “CII Directive” as it is commonly known) provides a clear example of the power of private actors and the diverse makeup and functioning of policy networks. For better or for worse, it also serves as a demonstration of how destructive that power can be. Although ostensibly born out of a desire to do no more than to harmonise patent law throughout the EU as it pertained to computer implemented inventions and software, the Directive quickly became the subject of a bitter battle between opposing interest groups: specifically, the commercial software industry and the free and open source software community.

1.1 A Brief History of Software Patenting in Europe
The proposal for the Directive was first presented by the European Commission in 2002, representing the culmination of several years of preparatory work which had begun in 1997. The greatest problem, as the Commission and a number of interested organisations saw it, was the lack of clarity and certainty surrounding the patentability of computer programs. On the face of it, such concerns were quite valid. As will be discussed shortly, patenting practice and precedent in the European Patent Organisation (“EPO”) and across member states was lacking in uniformity and thus presented a confusing environment in which to operate – particularly for those organisations used to the more certain (and, towards software in particular, more permissive) patent regimes in the United States and Japan. What is not so clear, however, is the direction in which those organisations wanted things to proceed: towards permitting software patents (that is, more in line with the

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2 Referring to the Computer Implemented Inventions Directive.
EPO’s common practice) or away from patents on pure software, (a stricter adherence to the letter of the European Patent Convention (“EPC”)).

The problem centred around the exclusion of computer programs as such from patentability under Art 52(2) and (3) of the EPC (emphasis added):

Article 52

Patentable inventions

…

(2) The following in particular shall not be regarded as inventions...

(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;

…

(3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

Or, in simple terms, ‘pure software cannot be patented’. The problem was that many patent applications took a more creative approach to the problem, the net result being that pure software would indeed be patented. Moreover, Rules 27 and 29 of the EPC 1973 (as was then in force) imposed requirements of technicality, requiring that the invention claimed must relate to a technical field, be a technical solution to a technical problem and that the application must set out the technical features of the invention. The word technical plagued patenting in this area for some time. Indeed, as Koo has noted, ‘… “computer programs as such” are excluded from patentability due to their having no

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3 European Patent Convention.
4 These rules have now been superseded by Rules 42 and 43 respectively under the EPC 2000.
technical character’. So far so clear, then. That, however, is where the clarity begins to dissipate, for Koo also tells us that ‘The Boards of Appeal of the EPO…have held that a technical invention which uses a computer program is patentable’.

All it would seem that a would-be patentee would need to do, then, would be to demonstrate the technical nature of their invention, but with no concrete definition of technical, this would become an (sometimes creative) exercise in interpretation.

As will be seen later, software lobbyist, Mr D, believes that the birth of the proposed Directive stems from the outcomes of two EPO Board of Appeal cases involving IBM: T 0935/97 and T 1173/97. It is also important to acknowledge that a number of similar cases had preceded the IBM decisions, however. Moreover, as is quite evident from the EPO’s own move to amend the EPC to remove computer programs from the scope of excluded subject matter as detailed below, discontent with the exclusion, with EPO patenting practice and with the lack of legal clarity was widespread. Nevertheless, the essential point (which is both important and broadly illustrative of the bigger problem) to be derived from both IBM decisions is that if a computer program produces a further technical effect when it is run on a computer, i.e. that which goes beyond the normal interactions between software and hardware, it does not fall within the Art 52(2)(c) and (3) exclusion and is not a computer program as such. What exactly constitutes a further technical effect, however, would seem difficult to pin down.

The EPO had, in essence, arguably nullified the exclusion for computer programs as such. Moreover, its decisions also had the effect of removing the restriction against claiming for computer programs claimed either on their own or as stored on a carrier of some form (for example, a disk or USB flash drive),” thus further separating software from any form of physical or technical

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2 ibid.
3 Anonymised, as explained in Chapter 1, 31.
6 Koo (n5) 179.
apparatus. Thus, the EPO was essentially issuing patents for software in violation of its own guidelines, leading to considerable uncertainty." Indeed, such uncertainty coupled with the fact that the exclusion enshrined in the EPC was effectively being sidestepped lead to proposals for the removal of the exclusion by the EPO before the Commission took action.

At the Conference of the Contracting States to Revise the 1973 European Patent Convention, ("the Munich Conference") which took place in November 2000, the EPO sought to remove the Art 52(2)(c) and (3) exclusions relating to computer programs. Unfortunately for the EPO's plans, however, a majority of EPC states voted against the proposals, arguing that it was not the right time to make changes to the EPC and that the European Commission, then engaged in its own consultation on the patentability of software, should be given the time to complete its investigation properly.

1.2 The EPO’s Desire

Drawing from the EPO's Proposals, the revised Article 52 would read thus (emphasis derived from the EPO Proposal):

Article 52

Patentable inventions

(1) European patents shall be granted for any inventions in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.

(2) The following in particular shall not be regarded as inventions...

(c) schemes, rules and methods for performing mental acts, playing games or doing business, [...];

...
(3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.  

Comparing this revised Article 52 to the original version, one can observe that a reference to ‘all fields of technology’ had appeared, and the all-important exclusion of ‘programs for computers’ had disappeared. The addition of the reference to all fields of technology was itself derived from Article 27(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, more frequently referred to as the TRIPS Agreement.  

Some EPC states favoured the proposed amendments. The Netherlands delegation, for example, argued that Article 52(2)(c) had been rendered obsolete by legal practice. Austria similarly argued that the removal of Article 52(2)(c) would be an accurate reflection of EPO practice whilst also clarifying the law. Unfortunately for the revision’s proponents, however, some EPC states had established something of a roadblock before the conference had even begun. States including Italy, France, and Germany had already voted against the removal of computer programs from Article 52(2)(c) in an EPO Administrative Council meeting in September 2000. It should perhaps come as no surprise (particularly in light of the lobbying recounted in this chapter) that some, such as Basinski, have attributed this to lobbying by the free and open source software (“FOSS”) community. What is of greater interest and surprise, however, is the suggestion that lobbying from non-software-related interests may have been influential. One such example is Greenpeace, anxious at the time to prevent the patentability of gene technology and cloning processes.

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12 European Patent Organisation (Administrative Council), ‘Basic Proposal for the Revision of the European Patent Convention, MR/2/00’ (2000). 44. It is also interesting to note that the alteration of Art 52 shown here was in fact only one option presented by the EPO. Another would have seen the removal of Art 52 from the EPC, see European Patent Organisation (Administrative Council), ‘Basic Proposal for the Revision of the European Patent Convention, CA/100/00 E’ (2000). 39 para 6. 13 It should at this point be noted that the TRIPS Agreement came into being in 1994, some 21 years after the original EPC. Whilst the removal of computer programs from the scope of excluded subject matter may be open to question, therefore, one might suggest that the insertion of the reference to all fields of technology was merely designed to bring the EPC into line with TRIPS. Also of interest, and noted in more detail below, is that arguments founded on TRIPS, and this provision in particular, had also formed a part of IBM’s arguments in T 1173/97 and T 0935/97. 14 European Patent Organisation, ‘Conference of the Contracting States to Revise the 1973 European Patent Convention’ (2000) <http://documents.epo.org/projects/babylon/eponet.nsf/0/A3D62EEBEAA84306C12572AE00500ECD/$File/conference_proceedings_en.pdf>. 69-70. 15 Erwin J Basinski, ‘An Open-and-Shut Case: The Diplomatic Conference to Revise the Articles of the European Patent Office Votes to Maintain the Status Quo Regarding Software Patents in Europe Pending Issuance of a New Software Patent Directive by the European Union’ (2000) Winter 200 International Journal of Communication Law and Policy.
Along with the FOSS lobbyists, suggests Basinski, Greenpeace may have sought to ensure that representatives attending the Diplomatic Conference voted to preserve the status quo instead of signalling a willingness to broaden the scope of patentable inventions.

1.3 The European Commission’s Proposal

The Commission opened their proposal by noting that the software patent situation in Europe left much to be desired, with the EPO and many national patent offices granting patents for computer-implemented inventions despite the wording of the EPC. Moreover, there seemed to be no consensus within the software industry as to how matters should proceed. Some wished to retain the ability to patent software, others wanted strict limits or even a complete ban.

Not only was there considerable divergence observed by the Commission in what different parties wanted, but there was also lacking a cohesive understanding of what was already possible. While the decisions handed down by the EPO’s appellate boards certainly held a persuasive sway over similar cases in national courts, they were not binding. Jurisprudence surrounding computer-implemented inventions was thus fragmented. Furthermore, the Commission noted the potentially harmful effects of fragmentation at the national level, with potentially different judicial views on the validity of software patents from one member state to another, neither patentees nor the users of patented products would be entirely sure whether the invention in question was protected. This, felt the Commission, could have harmful knock-on effects pertaining to the free movement of goods within the EU. What is more, it also had the potential to influence the decisions of companies seeking to establish development facilities, making them more likely to set up shop in a software-patent-friendly jurisdiction.
Ultimately, the Commission chose to support the status quo up to a point, without going as far as endorsing pure software patentability. Greater emphasis was placed on the requirement that an innovation make a technical contribution to the state of the art; a measure clearly intended to avoid the granting of patents for non-technical innovations, i.e. pure software. Article 2 of the proposed Directive defined a technical contribution thus: ‘Technical contribution is defined to mean a contribution to the state of the art in a technical field which is not obvious to a person skilled in the art.’

The technical contribution requirement was dyed into the wool of a patent application by Article 4, making it a key component of the inventive step requirement. A fundamental problem, however, lay in what exactly a technical contribution would be. The proposal’s explanatory notes state that, in line with EPO jurisprudence, such a contribution could result from:

- the problem underlying, and solved by, the claimed invention;
- the means, that is the technical features, constituting the solution of the underlying problem;
- the effects achieved in the solution of the underlying problem;
- the need for technical considerations to arrive at the computer implemented invention as claimed.

The problem with this explanation is that it does not really explain what a technical contribution is. Unsurprisingly, the Commission’s proposal attracted considerable criticism and prompted much debate. Batteson, to cite but one example, felt that an opportunity had been missed to ‘resolve the fundamental question of technical character’. Nevertheless, one cannot help but speculate that, had the Directive become law, it would not have been long before such missing answers were provided by the courts and in particular, the Court of Justice of the European Union (‘CJEU’). Had a question regarding technical

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22 European Commission (n1) Art 2.
23 Ibid Art 4.
24 Ibid 15.
character been referred to the CJEU (and it surely would have been), the answer to that question would have subsequently become binding upon the various national courts spread around the EU. Deliberately or not, it may be argued that the Commission were thus exporting the costs of determining the nature of technical character to the courts. An opportunity was, therefore, perhaps missed but it may conceivably have been one that was not sought.

Others suggested that even with a requirement of technicality, much software would remain patentable as it is inherently technical in nature. As European patent attorney AWS Williams explains:

- Without software, a computer doesn’t work…
- Amending…software results in computer operation changing or even crashing.
- Software…is an essential machine element; its technical effect, nature or contribution is that it is essential to make a machine work. The issue of whether or not and how a machine works cannot be other than technical…
- Software controls how the components of a computer system interact with one another…
- Software came to be treated as a literary work because it can be expressed in words, but that is neither here nor there for words which are machine-readable and provide a machine element.
- Software has to be engineered in the same way as hardware. Every stage of development or engineering of hardware has a counterpart in software development, often now referred to as software engineering.26

While the general thrust of Williams’ article is to advocate software patentability, an issue that for current purposes is neither here nor there, the logic of his points is difficult to question. Software is, it is submitted, inherently

technical and some programs more than others do in fact produce what would by all rational definitions be called a technical effect.

While the proposed Directive did expressly rule out the possibility of claiming for a computer program as stored on a carrier (an approach accepted by the EPO, as noted above), little else was changed. Software as such remained unpatentable and, it would seem, that clever drafting of patent applications would still ensure that software as such could in fact be patented. The principle difference, if there would be any to speak of at all, would be that this would become the uniform approach throughout the EU. Or would it?

1.4 War, Decline and Fall

Much of the tumultuous life of the directive is documented in the first-hand accounts addressed later in this chapter: those of former software lobbyist, Mr D, and of open-source activist, Florian Mueller. A brief summary, however, will be provided to assist readers in the navigation of the story of a piece of proposed legislation that would, in a few short and bitter years, be torn apart by the opposing arguments of the different sects of the software industry. What makes this a particularly interesting example, however, is that while many of the inequalities inherent in the lobbying and policy networks observed so far were also present here, this arguably represents something of a victory for the less-resourced side. Resource-wealth certainly played an important role in determining lobbying tactics; however, the end result, as will be seen, cannot be tied to resources so easily.

Upon receiving the draft directive, the European Parliament introduced a number of changes. Not least among these changes was an attempt to address the definition of technicality. If the desire was, as the Commission claimed, to continue denying patentability to pure software applications, then an invention could not qualify as technical merely by virtue of the involvement of a computer. The normal interactions between software and hardware would not, according to the Parliament’s amendments, be sufficient to constitute a

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27 European Commission (n1) Art 5.
28 With apologies to Evelyn Waugh.
The Parliament’s amendments were welcomed by many who feared that the Directive would result in pure software patents but the matter was far from settled.

The Directive next passed into the hands of the Competitiveness Council (that is, a particular configuration of the Council of the European Union) under the co-decision procedure. Here, it would lose many of the Parliament’s amendments and many of those that remained would be substantially watered down. The period that followed may politely be referred to as negotiation or more accurately, a battle between not only the Council and the Parliament, but also between the competing interests on either side of the debate. The so-called common position that would eventually be reached by the Council in March 2005 closely matched the Commission’s original proposals. The technicality requirements that had been so carefully tightened up by the Parliament had once again been made sufficiently flexible that it would arguably only take a little ingenuity in the drafting of patent claims to ensure protection for pure software. Not only that, but the Parliament’s other significant amendment – that containing the interoperability requirements – was conspicuous only by its absence.

As the pressure from both sides of the debate mounted, the Parliament decided that the preferred option, rather than proceeding with a second reading of the Directive, would be to have the entire legislative procedure restarted. The Commission, however, refused to allow this on political grounds. The official reason provided by the Commission was that the Council already had a political agreement in place concerning the common position on the Directive and that to restart the procedure at that time would be to set a dangerous precedent. As will be seen, this reasoning is at the very least open to question and may in fact have been more to do with pressure from private actors. The Directive would have to proceed to the Parliament for a second reading. Commissioner McCreevy, Internal Market Commissioner stated that the Parliament was free to reject the Directive at this point and that no new

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Directive would be introduced. The European Parliament called McCreevy’s bluff. By the time the second reading became inevitable, the Directive was disliked on both sides of the debate. Some of its biggest original proponents, now too hoped to witness its demise, no doubt fearing that it would create no greater certainty than had the EPO Board of Appeal jurisprudence before it and that it might even have added restrictions. On 6th July 2005, the European Parliament rejected the proposed Directive by 648 votes to 14 (with 18 abstentions).

2. The CII Directive From The Inside

As stated above, much of the background to the lobbying surrounding the CII Directive has been drawn from the experiences of two individuals: Lobbyist, Mr D (anonymised) who was, at the time, working for the (also anonymised) international software corporation, Initech; and open source activist Florian Mueller. Mr D’s account is drawn from an interview conducted for this thesis and Mueller’s is derived from his 2006 work, No Lobbyists As Such: The War over Software Patents in the European Union.

While only scant details may be provided by way of introduction to Mr D, it is important to note that, being involved with a major international software company, his work focussed considerably on the Directive for quite some time. It is his familiarity with the field that also provides a number of insights into one of the well-known key players in his sector: IBM, an organisation considerably active in lobbying at the EU level. At the start of the Directive’s tumultuous existence, major commercial software companies were strongly in favour of the patentability of software. In its most basic form, the debate surrounding software patents can perhaps be narrowed down to a battle between two camps: the proprietary software industry and the open source software community. IBM is of particular interest in this regard. With active interests both in proprietary and open source software, it was in the somewhat

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31 ibid 189.
32 For more detail on anonymisation, see Chapter 1, 31. Please note that Initech is a name derived from the 1999 Twentieth Century Fox film, Office Space and that any resemblance to any real organisation of the same name is entirely coincidental.
34 Mr D [anonymised], Interviewed by: Adamson B (21 December 2012) [Hereinafter ‘Interview 9’] at 00:58.
unique position of being in both camps. This issue will be explored in more
detail below.

Not at all surprisingly, the FOSS community were opposed to the Directive
from the outset. Indeed, their opposition to software patentability had begun
much earlier. Resistance to the concept was most notable at the Munich
conference. The Foundation for a Free Information Infrastructure (“FFII”) and
the pro-open source EuroLinux Alliance in particular were active in working
against the proposed changes to the EPC. From Mueller’s own recollections
nobody with a significant interest (whether from an advocacy standpoint or
simply as a software developer) in free and open source software could see any
value in permitting the patentability of software.\textsuperscript{35} Indeed, Muller recalls that
when asked by journalists what he considered the greatest danger to the future
of open source software to be, leading open-source figure, Linux creator Linus
Torvalds, replied simply, ‘software patents’.\textsuperscript{36}

Although Mueller would eventually become a champion of the FOSS
movement and its lobbying efforts to defeat the directive, his background was
not entirely based in open source software. Moreover, what Mueller was not,
and had never been before, was a lobbyist in any sense of the word; yet shortly
after the Directive met its bitter demise, however, Mueller would find himself
in Managing Intellectual Property’s list of the top 50 most influential people in
IP.\textsuperscript{37} From the perspective of examining the role of lobbying, this makes
Mueller’s story particularly interesting. Much consideration in this thesis is
given over to the issue of lobbying know-how and how a lack of it can, and
indeed does, put many at a disadvantage when attempting to gain access and
influence and become more active participants in policy networks. Many of
those who opposed the Directive would have found themselves in such a
position, having insufficient \textit{clout} to lobby against the likes of IBM and
Microsoft.

Mueller’s journey into anti-software patent lobbying began in April 2004 when
he decided to attend a conference on software patents that was to take place in

\textsuperscript{35} Mueller (n33) 7.
\textsuperscript{36} ibid 102.
\textsuperscript{37} Mueller (n33) 374.
Indicative of the tone that would continue throughout the campaign against the Directive, Mueller learned that the conference was to include a protest. This is well the stark difference between tactics employed by the opposing sides of the debate in the hopes of influencing the policymakers of Europe.

Despite the success in cases such as the aforementioned T 1173/97 and T 0935/97, commercial software producers like Initech sought a means of patenting software without the need to resort to creative wording and patent claim interpretation. The EPO had arguably opened the doors to software patentability but had done so in a way that rested on unnecessary (one might even say artificial) technicalities. What was desired, then, was a simpler, clearer approach to software patentability that would also (albeit perhaps incidentally) be more closely aligned with the provisions of the TRIPS Agreement – an approach that endorses patentability in all fields of technology. This is not to say that TRIPS compatibility was necessarily the goal of software patentability proponents, however. Indeed, whilst a useful and interesting argument underpinning their desire for software patentability, it might arguably be considered unlikely that reshaping European patent law to make it sit more neatly alongside an international treaty was a significant concern for private interests.

It is important to note that Initech’s position did not mean that they sought the effective abolition of Article 52(2)(c). Indeed, in a similar vein to the changes sought by the EPO at the Munich Conference, what was sought was a clearer line between technical and non-technical software. This position would remain constant throughout the life of the directive.

At this juncture, one might reasonably ask that if Initech and its companions had been obtaining software patents simply by wording their patent applications in a certain way (that is, to emphasise a certain technical effect), why

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38 Ibid, 6.
40 Interview 9 (n34) at 09:04.
dedicate so many resources to an effort to legitimise software patents? One could argue that by retaining the status quo, those with similarly creative legal minds would be ideally positioned to further cement their market dominance. Mr D suggests that the patentability of software would have had the potential to level the playing field somewhat:

I was very unhappy…that a company like [ours], who knew how to play the game, was getting an advantage over small companies, SMEs in Europe who didn’t know how to play the game…[That] just didn’t seem right."

Such sentiment is arguably admirable, particularly considering it comes from the viewpoint of a big player. It is the organisation’s size and strength, however, which prompts one to evaluate this statement in a more critical light. We might reasonably wonder why a software giant, or anyone representing them for that matter, would want to see a level playing field. One must not forget, however, that not all commercial software companies work exclusively with commercial software. Some indeed also have active open source interests. A further point of interest to note, particularly considering the current trend that sees young, innovative start-ups being acquired by technology giants, is that the larger, well-established players have an active interest in promoting the wellbeing of new entrants into the marketplace and in removing, or at least reducing, the barriers to entry into that marketplace. In adopting such a strategy, the benefits to the acquiring organisation are manifold.

2.1 A Foot in Both Camps: IBM and Open Source

Of the better-known organisations with prominent interests in both commercial software and open source, is IBM. IBM plays a major role in some key open source projects and, beyond that, has in fact taken the lead in initiatives designed to benefit the open source community as a whole. Amongst a number of well-known and less well-known open source projects in which IBM is actively involved is Linux, perhaps one of the most famous

41 ibid at 12:12.
open source projects of all and indeed one which was invoked by Mueller and
the anti-software patent camp as part of their campaign against the Directive
in the form of the LiMux Project, as detailed below. Not least among IBM’s
contributions to Linux was a substantial investment of $1bn in the movement
in 2001. Another prominent open source project with significant IBM
involvement is the Apache Web Server, notable for being the most popular web
server software in the world. Moreover, according to IBM’s literature, the
company collaborates with a number of prominent members of the open source
community including the Linux Foundation, the Linux Standard Base, the Free
Software Foundation, and the Open Source Initiative.

IBM’s role in the open source community, then, is not insignificant and indeed
it is not the only commercial organisation with such interests. One may
speculate, however, as to the reasons behind such involvement. Many
businesses in the software sector opt to get involved in open source and/or
open standards to some degree and such involvement may, to a greater or
lesser degree, have benefits that extend beyond their ostensible benefit to
humanity. An open standard, for example, created and shared for free by one
or more proprietary software companies, may still offer the advantage of
marginalising competitors who for whatever reason choose not to embrace the
standard. Who, then, might IBM have sought to marginalise by pouring
resources into open source? One possibility is its old partner-turned rival,
Microsoft. From the late 1980s until 1991, the two had been working together
on the OS/2 operating system, however Microsoft’s Windows would rise to
become the dominant operating system in the world, leaving OS/2 to fade
quietly into history.

IBM’s decision to support Linux may be partially explained, then, by its desire
to beat back Microsoft’s share of the operating system market; a desire arguably

43 According, that is, to Apache’s own website (see The Apache Software Foundation, ‘Apache HTTP Server Project’ (2014)
bin/ssialias?infotype=PM&subtype=BR&appname=STGE_LX_LX_USEN&htmlfid=LXB03001USEN&&attachment=LXB0
3001USEN.PDF>.
45 For a more detailed account, see Andrew Orlowski, ‘OS/2 a Quarter Century on: Why IBM Lost out and How Microsoft Won’
supported by the community-like nature of Linux, with multiple software developers – some commercial, some not – collaborating on the operating system. Moreover, as the LiMux project, described below, demonstrates, Linux finds favour in governmental contexts and others where privacy and a lack of so-called back doors is important. Linux forms the basis for a large number of web servers, thus providing in no small sense the software backbone of the internet. Furthermore, Linux, owing to its inherent customisability is often used in embedded systems, such as in-flight entertainment. Also of interest is the recent speculation that, following Microsoft’s termination of support for Windows XP in April 2014, financial institutions may choose to migrate their ATMs to Linux.

2.2 The Royalty-Free Open Source Patent Initiative
A further point of interest which demonstrates apparent shades of grey in what may at first appear to be a rather black and white battle between commercial software and open source is the Royalty-Free Open Source Patent Initiative. In January of 2005, as the directive began its painful final year, IBM announced a programme under which some 500 of its US patents would be made available for royalty-free use by open source developers. The move was met with mixed reactions, not least those suggesting that it was largely political, designed to influence the software patent debate in Europe.

Mueller, perhaps not surprisingly, was a particularly vocal opponent of the initiative, calling it hypocritical, alleging that it was designed, ‘to appease the open source community and make [IBM] popular’. Of particular interest in the context of this case study, Mueller was joined in his criticism by the German Social Democratic Party who had voiced opposition to the Directive in October 2004. In the same ZDNet article from which Mueller’s quote above and IBM’s quote below are drawn, the Social Democratic Party were keen to remind readers that IBM was one of the Directive’s key proponents.

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47 ibid.
Views from around the technology and IP worlds were considerably mixed. Some felt that the initiative would serve only to confuse the patent debate in Europe\(^48\) and others preferred to view it as a shrewd political move.\(^49\) Certainly the news was better received in the US than it was in the EU, though it may have reignited the software patent debate on US soil or at least added fuel to the fire with FOSS advocate, Bruce Perens, observing that, ‘One of the biggest questions is, despite this overture, is software patenting really good for the industry in general, and is it going to still be a very big problem for open source?’\(^50\) Cynics of IBMs initiative, however, ought well to have considered the more measured and positive words of the likes of *The Economist*\(^51\) and Professor Lawrence Lessig,\(^52\) both notable for their liberal economic stance and thus, one might expect, likely candidates to view software patents in a negative light.

IBM were naturally anxious to avoid any appearance of pretence:

> We will actively file patents but we recognise that for certain areas of software development there is a need for software companies to collaborate more. We’re not saying that we’re abandoning patents – there needs to be a balance between the two.\(^53\)

One must therefore consider that there may be room for the argument that the reasons behind the initiative were in fact three-fold. Firstly, it is submitted, the move reflected a genuine desire on the part of IBM to benefit the FOSS community. Certainly, given its active involvement and investment in open source it would be difficult to argue otherwise. Secondly, IBM would benefit by strengthening operational ties with the FOSS community, allowing the development of open standards which would make life easier for all in the

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\(^53\) Marson (n46).
technology world and possibly allowing for projects that would bring IBM more money and prestige in the long term. Thirdly, the initiative would indeed curry favour with some in the FOSS community. It would be wrong, however, to pass off the initiative as a mere lobbying tactic designed to influence the debate over software patents in Europe. The overarching argument, then, seems arguably to have been that open source and commercial software could (and indeed should) co-exist peacefully and IBM’s move may provide supporting evidence of such a sentiment. One might indeed argue that the timing of the move at the very least lent credence to the suggestions that it was an attempt at political manipulation. Later in 2005, however, after the Directive had met its demise, IBM took further steps in opening up patents to open source by founding, along with Novell, Philips, Red Hat (a major Linux developer) and Sony, the Open Innovation Network (“OIN”): a large pool of patents which are, under its terms, not to be asserted against Linux or any Linux-related applications. What is particularly interesting is to note some of the prominent technology names that appear in the large list of licensees, all of whom draw from the patent pool, including Cisco Systems, Fujitsu, Hewlett Packard, HTC, LG, Symantec, and Twitter. These multi-billion dollar corporations sit harmoniously alongside countless SMEs from both the commercial and FOSS worlds.

Whilst the evidence certainly seems to lean in IBM’s favour as to their true motives behind opening up part of their patent portfolio to the open source community, the reception from some activists in the anti-patent camp, as noted above, was less than warm. Moreover, some even questioned whether the plan might not have backfired. Some argued that by opening up software patents to the open source community IBM was in fact acknowledging that software patents could indeed be harmful to open source developers.

At this juncture, however, one may offer a counter-argument that nevertheless acknowledges such concerns. In an environment in which software patenting had become the norm, IBM, and others like them may have nonetheless preferred to avoid patenting or at least saw it as a necessarily evil. Whether or

55 Marson (n46).
not this was the case is open to question and we may only speculate, however all things are at least a matter of degree. From the point of view of anti-patent advocates, software companies should perhaps nevertheless cease to use patents. From the point of view of the software companies, however, the need to remain competitive alongside others not so willing to reduce their reliance on patents would arguably override the possibility of taking such measures. IBM (and indeed other OIN members) were faced with a software patenting culture but nevertheless chose to act in such a way that a degree of fair cooperation and royalty-free exploitation could take place without fundamentally changing the overall culture in the sector; at least not directly and certainly not in the immediate term. Moreover, in the context of the CII Directive, one might suggest that by making it easier to patent software innovations, IBM and those aligned with them would be giving birth to an ever-growing library of prior art: an invaluable resource for sequential innovation of the type most commonly seen in the software industry.

2.3 Interactions With Policymakers

2.3.1 Initech & Mr D

With such a significant interest in the push for patentability of software, as one might expect, Initech had frequent interactions with EU policymakers. Within the European Parliament, Mr D recalls that some of the most productive association was to be had with the Green Party. As he observes, this was in no small part due to the closeness of the Greens’ relationship with the FFII. Indeed, he notes that, ‘[We] probably had some of our best discussions with them’.

Aiding in Initech’s discussions with the Commission was the UK Intellectual Property Office (“IPO”). Mr D notes that there were a number of meetings conducted by the IPO, recalling one in particular the purpose of which was to attempt to define the term technical as it pertained to a technical effect. Described as something of an, ‘impossible task’, the definition of technical was viewed as

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56 Interview 9 (n34).
57 Ibid at 16:39.
essential. Unfortunately, without a suitable definition, it was, according to Mr D, ‘such a nebulous word’ on which to focus the central point of a Directive. Indeed, without a suitable definition of technical it is arguable that the law on software patentability would be no further forward and no more helpful than the EPO decisions discussed above. It is unfortunate, then, that in Mr D’s recollection, ‘We failed miserably at [finding a definition].’

It was not only the UK IPO that was working with interested parties to inform the crafting of the Directive. Indeed, as Mr D recalls, most if not all member states’ patent offices, ‘were doing bits and pieces’. The EPO, too, ‘[were] working a lot in the background’. This, then, raises the question of how one is to view patent offices (or, more broadly, intellectual property offices) as actors in the policy process. Certainly, in the present context of the EPO, it appears to fit closely into the mould of a private actor in that it is not an EU body and exists as distinct from any particular member state.

The European Patent Organisation, with its foundations in the European Patent Convention 1973, is a public international organisation. Rather than granting one unitary patent, it grants a bundle of national patents in exchange for one patent application. Of particular relevance in this case is the fact that it is, in essence, self-financed, most importantly by income from application fees. One may therefore argue that the EPO is a self-perpetuating organisation and thus more likely to support any policy that may result in a greater number of patent applications. Certainly, the EPO had good reason to support the Directive, not least in light of it’s clear support of the notion of software patentability demonstrated in T1173/97 and T0935/97, and in its move to alter the EPC itself at the Munich conference.

In addition to the simple motivation of income, however, one must also consider the EPO’s perspective in the context of resources. As has been observed, creative drafting of patent claims enabled a number of software

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58 ibid.  
59 ibid at 15:19.  
60 ibid at 18:24.  
61 ibid.  
62 See Arts 37-40 EPC 1973 (as amended by the EPC 2000) in particular. Sources of finance include the EPO’s own resources, payments made by contracting states, special contributions made by contracting states and, in certain cases, third party borrowings and/or funding.
producers to patent software, skirting around the Article 52(2)(c) and (3) exclusion. Logically, however, it follows that creative drafting also requires creative interpretation. Not only, therefore, can one reasonably assume that the EPO sought a means of getting more applications through the door, but one may also argue that it desired applications that were clearer, simpler, quicker, and thus, most importantly, cheaper to process. Combined with the statutory legitimisation of software patents, then, the resulting increase in clarity in the applications themselves would provide something of a win/win scenario for the EPO: more patent applications that were also easier and cheaper to process.

Further evidence can be seen in various reports of EPO support for industry policy initiatives and of direct lobbying by the EPO. In 2013, for example, an organisation known as No Patents on Seeds alleged that the EPO was actively allowing patents on plants and animals, in conflict with the position of the European Parliament and, more particularly, a 2012 resolution of the European Parliament which had called upon the EPO to exclude from patentability products resulting from conventional breeding methods. Reports also note lobbying by the EPO at the time of the directive, one noting that, in 2005, it had three registered lobbyists working in the European Parliament.

Of particular interest is the fact that the CII Directive was not the only topic of importance at the time in this area. As referenced above, similar work was taking place with respect to the EPC: lobbying to the effect that all exclusions should be removed leaving simply patentability in all fields of technology. As Mr D recalls, ‘the TRIPS wording…came pretty close [and] that nearly got through…[Then] they said, “no, we’re going to wait and see what happens after the [software patent] Directive”’. Such a change to the EPC would have undoubtedly provided significant support in the efforts of the pro-patentability lobby. As Mr D notes, however, for the EPO to allow such a change whilst also supporting the Directive would

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65 Interview 9 (n34) at 18:24.
perhaps not have been, ‘…the brightest thing in the world.’* The directive, after all, did not go as far (at least not on paper) as the changes proposed for the EPC at the Munich conference. Had both come into being, the lack of clarity would surely have continued owing to new inconsistencies.

2.3.2 The FOSS Movement & Florian Mueller

Mr D’s insights into the lobbying framework of the EU suggest that lobbying at the EU level is not only quite different from lobbying at the national level, but that it is also considerably more difficult, due to the structure of the EU legislative bodies, the structure of the legislative process itself and, more generally, the overall size of the arena. A further point of interest is the observation that much voting takes place along party lines.

When considering party lines, it is important to note that there are a number of political parties present on the EU stage. In many cases, national political parties will group together, often gathering along lines of political ideology. There is some debate, however, as to the importance and strength of political parties. Some submit that there is a weaker role at the EU-level, not least due to the fact that the EU was originally designed to focus on international relations and harmonisation, not domestic-level matters. This is not to say, however, that the political party is unimportant, whether from the perspective of the machinery of EU policymaking or – of particular importance in the present context – as a lobbying target.

Where there is perhaps a weakness in the role of political parties, it may be because the national interests of a particular member state will sometimes override partisan politics. One would submit, however, that this can be attributed more to the prevailing subject matter of EU law and policy than to the breaking-down of partisan politics. Lord, for example, observes that such behaviour is particularly notable in the Council.*

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66 Ibid.
As noted in Chapter 2, three principal categories of party groupings can be identified at the EU level: transnational parties, European party federations and national party delegations in the European Parliament.69 Within the European Parliament, MEPs’ attitudes align more closely to those of their home parties than to those of their EU party groups.70 Similarly, Lord observes that in the event of a conflict between the positions held by national parties and party groups, MEPs will tend to align with their national party. Of further interest is Lord’s suggestion that MEPs from a party that is also in government will be more likely to follow the home party line than those from a party in opposition.71

Of Commissioners, it appears that there may be less partisan alignment than can be witnessed in MEPs. Whilst MEPs generally hail from parties with which many will be familiar on the national stage and Council members originate from the elected governments of the day, Commissioners possess – at least notionally – a degree of independence. Nevertheless, it is unlikely that a Commissioner will come from a non-political background. Indeed, as Wonka has observed, Commissioners can be, and often are, chosen based upon their national party affiliations by governments sharing those affiliations.72

Returning to the notion that national interests may override party lines, this will likely be quite evident in the context of Commissioners. Indeed, when considering the example of Commissioner McCreevy, whose role is considered in more detail below, one can clearly see the importance of the software industry to the Irish economy. With that said, however, one must question whether any party would have viewed the industry’s value differently.

Nevertheless, it must be observed that party lines, particularly those of national parties, play a role in EU policymaking. Whether directly or indirectly, national parties remain an important source of influence. In certain instances, it may indeed be the case that national interests override party lines; however, the argument can be made that those same interests would override those same

69 Lindberg et al. (n67) 1108.
70 ibid 1115.
71 Lord (n68) 15.
party lines on the national stage. It is doubtful that any national party in Ireland, for example, would support any measure that would seriously jeopardise the wellbeing of the software industry. Party politics, then, remains alive and well on the EU stage but there also remains a clear value from a lobbying perspective in nurturing and utilising national-level contacts.

It is of interest then, that much (though by no means all) of Mueller’s EU lobbying experience in the context of the directive appears to focus more on member state level lobbying. Mueller’s account highlights his work alongside the German Green Party who assisted the anti-software patent campaign within Germany. More importantly, the party also sought to extend that influence into the Greens | European Free Alliance political group in the European Parliament. Of particular interest, not least because it demonstrates the significant differences in approaches to lobbying taken by the opposing camps, was a press conference and protest organised by the FFII and the Green Party in Brussels in March 2004. The press conference, of course, should not be seen as at all unusual; however, the notion of a protest in the realm of IP law is another matter entirely. Indeed, the peculiarity of the situation was not lost on Mueller himself:

And I was there as a strategic management consultant on behalf of a company. Talk about an unusual assignment! I thought it was hilarious that I should take to the streets of Brussels on a paid basis.  

Another early example of Mueller’s lobbying activity on the Directive points to the key role played by so-called gatekeepers: an important resource in any case, but particularly for those who may not be sufficiently well-resourced to have direct access to the most influential policymakers. Soon after the Brussels protest, at the behest of fellow activist Tom Chance, Mueller attended a meeting with British Conservative MEP, Nirj Deva, with the objective of securing a meeting with his colleague, former Conservative MEP, Malcolm Harbour, who himself had a significant role in the directive on behalf of the Conservative

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73 Mueller (n33) 16.
It does not appear that, in this case, a meeting with Harbour was arranged. Nevertheless, Mueller’s interaction with Deva, which focused on finding common ground – in this case a mutual interest and involvement with SMEs – assisted greatly in encouraging Deva to invite more information from the campaign which he would then forward to Harbour."

It is later in his account that Mueller highlights the value of lobbying in Germany. Below, we will observe a valuable example of the power of the press and of using the press to attract attention to issues over which one wishes to exert influence: The project undertaken by the city of Munich to convert their computer systems to Linux, known as the LiMux Project. Not only, as is shown, did the project gain the desired media attention, but it would also provide traction for further interactions with policymakers later on. Following what Mueller calls the LiMux crisis he turned his attention to the German parliament, the Bundestag. The key news article emerging from LiMux, a piece in the popular German newsweekly, Der Spiegel, became a valuable tool for Mueller in his meetings with German MPs."

Mueller’s primary goal in his Bundestag lobbying was to shore up support for the anti-patent campaign’s position from a major EU member state. As Mueller explains:

I went for the home game in Germany because I felt that a parliamentary resolution could be very helpful even though it wouldn’t be legally binding. Support from the parliament of the largest EU member state to our central demands would be a boost, and it might encourage other countries to reconsider their stance."

The impression that one may have of lobbying, particularly when considering the practice from the perspective of those interests with more resources and better networks of political contacts, is that it is a relatively simple and routine

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74 ibid 22.
75 ibid 154.
76 ibid 163.
matter for, say, a representative of Microsoft, to set up a meeting with an MEP to discuss a particular piece of legislation. Certainly, Mr D’s experiences lend credence to this impression. Through Mueller’s experiences, however, we can observe the other side: the somewhat haphazard, chance nature of things. Indeed, while the anti-software patent campaign was arguably successful in its endeavours, such an example illustrates well the imbalances inherent in the lobbying landscape. Recalling his work with Polish anti-software patent activist, Jan ‘Miernik’ Macek, Mueller highlights one such example: a chance telephone call that would provide a vital insight not only into the then current state of the directive, but would also help to ensure Poland’s support in the anti-patent campaign’s quest to shut the directive down.

The Polish government had opposed the Council’s amendments to the directive and, as Mueller recalls, all Polish MEPs were agreed in their opposition to software patentability.77 Poland, however, had been misconstrued in the Council as supporting the Council’s proposals and whilst there were steps that could be taken to revoke that mistakenly perceived support, the Polish government had not been entirely specific about its desire to do so, thus causing further uncertainty. Moreover, while permissible for a member state to withdraw support for a Council A item (that is, a dossier on which an agreement already exists, as opposed to a B item, which is still to be debated), it was rare and there were fears that other member states might put pressure on Poland not to act, complying with what appears to be an unwritten rule that members do not withdraw such support. What makes this example particularly interesting in the present context is that while the anti-patent campaign clearly required Poland’s support, they also needed to find a way to support Poland; to do some damage control that would make it less politically costly for Poland to act in the Council. One option would be to garner support for other member states to withdraw their support as well, however Mueller recalls that ‘there wasn’t really any other country that was likely to emulate Poland any time too soon’.78

77 ibid 242.
78 ibid 249.
A less politically costly option, it appeared, would be to have the legislative process restarted, as permitted under what was then Rule 55 of the European Parliament’s Rules of Procedure. This ultimately appealed to the Polish government and it is Mueller’s contact with the Polish deputy minister at the Ministry of Scientific Research and Information Technology that makes this example worthy of our attention. As Mueller recalls:

Miernik thought we might get valuable information from Polish deputy minister Włodzimierz Marciński as to the situation in the Council. From his cell phone, Miernik called Marciński’s office. While he was dialling, I asked: “Are they really going to put you through to him?” Miernik replied: “Sometimes it works”…A minute later he was connected to Marciński.

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Marciński indicated that it would be difficult for the Polish government to oppose formal adoption of the common position in the Council for much longer...Marciński immediately embraced the idea of lobbying the European Parliament for a restart of the legislative process.

Thus, with one chance telephone call, Mueller had gathered a valuable insight into the situation in the Council and had learned that ‘…it was also clear that the Polish government was willing to work with Polish MEPs to make [the restart] happen’.

Mueller provides many more accounts of his interactions with policymakers and of examples of the more activist-style lobbying shown above. A key point to observe, however, is the need to be adaptive and to make the best of limited resources through ingenuity and through seizing the smallest opportunities and chances. As is illustrated by the chance telephone conversation with

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79 ibid 262.
80 ibid.
Marciniński, the value of gatekeepers, particularly to those without significant in-house connections with those in power, should not be underestimated. The key observation to emerge from this example is that luck rather than resources appears to have been responsible for Mueller’s success. The anti-software patent campaign did not have the high level of resources (whether financial, political, legal, or otherwise) of many of their pro-patent opponents. As this example shows, and as will be seen in further detail as this account progresses, they were successful in accessing and influencing policymakers, but to suggest that the opportunities or means to do so were in any way equal to those of the pro-patent campaign would be incorrect. The apparent success of the anti-software patent campaign, then, must not only be viewed as the triumph of the lobbying underdog, but also as a cautionary tale. Not all under-resourced actors are likely to be so fortunate and success does not equate to a level playing field.

2.3.3 Observations on the EU Lobbying Framework

When compared to national-level policymaking, policymaking in the EU is open to criticism for being somewhat complex and perhaps a little opaque. Not only is it less clear to see policy taking shape for the individual citizen owing to the multiple bodies involved and the high numbers of individuals involved, but it is similarly difficult for the individual, organisation or lobbyist seeking to shape that policy.

Mr D describes the EU lobbying framework as being, ‘a victim of its own size’:

You’ve got the Commission [which] is very difficult to get into. You need personal contacts almost to get into anything, which doesn’t seem quite the most sensible thing. With the Parliament, there are so many parliamentarians and they seem to vote very much on party lines. [It’s] very difficult to know how to get into the party approach [sic]. I don’t think you ever

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81 Interview 9 (n34) at 35:32.
get that sorted actually...how would you influence the party’s decision rather than individual decisions?

When referring to *party lines* it is important to note that Mr D does not refer directly to national-level political parties, rather to the larger political groupings noted above. These groupings, it seems, represent a particular challenge. Indeed, as Mr D observes, ‘I still don’t think we know how to get into those – to influence those’. Whether this refers to their unwavering thought processes and a deliberate impenetrability to lobbyists, however, is doubtful. Rather the sheer size of the EU party groupings appears to constitute a barrier in and of itself. Mr D clearly does not feel that the lobbying framework within the EU and the methods of lobbying appropriate for that framework are, at this point at least, properly established. Given the home party influence observed above, it may in fact be that influencing the EU political groupings as a whole is simply not practical and, possibly, not entirely necessary. Rather, one may suggest, national-level parties present a preferable target. This may be so not only because the national party line appears to prevail in many instances of conflict between EU-level and national-level positions, but also because national parties may be viewed, in a manner of speaking, as gatekeepers for the larger political groupings of which they are a part.

Returning to the Commission, which, as Mr D has observed, is particularly difficult to access, it would appear that considerable weight is required in order to gain access. Recalling Initech’s experiences dealing with the Commission, Mr D notes that:

...generally, if we wanted to get into the Commission, we pulled over someone very senior from the States who had a bit of gravitas and used them to get in that senior level within the Commission. [Then] if you could get in at a senior level they

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82 ibid.
83 ibid.
generally called their folks who were actually working on the
dossier. [That’s] always worked very well."

Mr D also refers to his organisation’s business conduct guidelines. Whilst little
detail is provided, he outlines the importance of the guidelines, noting that
anyone dealing with policymakers on the company’s behalf must always keep
them in mind, ensuring that business was conducted transparently and
ensuring that nobody was, ‘trying to do anything underhand’.« Interestingly,
however, the guidelines themselves in fact say little about lobbying, confining
the topic to two short paragraphs.«

More generally, of course, one must keep in mind that the guidelines are
doubtlessly intended to be taken as a whole, requiring employees and
representatives to conduct themselves in an ethical way.

The guidelines do, however, underline Mr D’s observation that using only
senior representatives to communicate with the Commission was necessary.
Not only would using lower-level individuals have had less impact but, as Mr
D points out, would also have likely breached the guidelines. He concludes,
noting that:

[The company’s]…very funny about how you deal with
politicians—I wouldn’t say ‘funny’, but it’s very straight on
such things.»

Indeed, one may reasonably assume that many similar organisations –
particularly those whose representatives frequently interact with policymakers
around the world – will share such an approach.

« Interview 9 (n34) at 37:13. It should be noted here that the reference to ‘someone very senior’ refers to an individual from the
upper echelons of the organisation, not the US government.
« Ibid.
» The guidelines in question are not referenced here in order to preserve Mr D’s anonymity and that of Initech.
» Interview 9 (n34) at 37:13.
3. The Role of Lobbying

3.1 Arguments, Information, and the Art of Persuasion

A recurring issue in this analysis of access and influence is the border between furnishing policymakers with technical facts and colouring those facts with opinions. Given the nature of much of the activity surrounding the directive, it would be incorrect to suggest that the line was at all subtle in this instance.

From Mr D’s perspective, technical information was indeed coloured with opinion and, therefore, with the intention of influencing policymakers:

We put in technical information but there was always an element in there of opinion...what we felt was common sense...[that] it was better to have something that conformed to TRIPS...and if you want interoperability, you need interoperability so it accords with the software directive...

All those sorts of things were in there, so they were...political arguments but framed technically to make them sound less like lobbying and more like...common sense."

To suggest that opinion or subjective views were being disguised as anything more objective, however, rather misses the point, as is demonstrated amply by other accounts addressed in this thesis. The intent of lobbying is to influence and inform. Its value as an information resource arguably comes to the fore when the lobbied policymaker makes use of it, stripping away the superfluous (though arguably not the important) subjectivity.

The proprietary software industry sought, then, to change the law to advance its own ends. But did it? It would be easy to boil the debate down to the proprietary software industry vs. the open source community. The debate was not,

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88 ibid at 20:54.
however, quite so clear-cut. As has already been observed, some organisations, such as IBM, have a foot in both camps. As noted above, a particular benefit of software patentability would be the creation, in effect, of a database of prior art – something that, at least in theory, would be of considerable benefit in a sequential development environment such as software. Mr D again points to this noting that:

...surprisingly...we did have a public interest element at the back of our minds...[We] had sympathy with the arguments of the open source movement, the FFII, SMEs...I think we needed clarity to get a level playing field...“

Moreover, Mr D noted concern that by simply putting innovations into the public domain, bypassing the patent system, prior art would be less useful to those seeking to develop and build upon existing technology.90 Indeed, IBM’s aforementioned royalty-free open source patent initiative and the subsequent formation of the OIN seem to support such a view. There is an inherent appeal to Mr D’s argument in that by pooling a body of patents rather than ceasing to use them for software, the OIN’s members have in fact taken steps towards creating a searchable library of prior art.

Might organisations with interests in both proprietary software and FOSS perhaps have been position to bridge the divide between the different sides of the debate? By understanding and appreciating the issues relevant to open source software, one might reasonably ask whether they were able to reach out to the anti-software patent lobby. This appears not to have been the case, however. Indeed, Mr D recalls little inter-organisational dialogue, suggesting few potentially valuable horizontal interconnections between policy network components. The resistance to the notion of software patentability was so strong that he did not believe a productive dialogue would be possible.91

89 ibid at 21:58.
90 ibid.
91 ibid at 23:45.
Certainly, given the detailed account of the directive’s life from Mueller and other accounts given by those such as Rapporteur Arlene McCarthy, Mr D’s statement here is not surprising. McCarthy, for example, is quoted in an early press release from the UK Labour Delegation in the European Parliament, describing the anti-patent lobbying as ‘dishonest and destructive’, treating her staff in ‘an aggressive and bullying manner’, again alluding to a less-than-perfect policy network.

To describe the opposing sides of the debate as being uncooperative would be an exercise in understatement. In some cases, a difference of opinion gave rise to considerable hostility and tactics, which gives one significant cause for concern. There were those within the FFII that Mr D found to be more cooperative and open to discussion. Alas for those with any hopes of cooperation, however:

They were all concerned that it was going to fuck with open source and I don’t think we were going to convince them otherwise.92

3.2 Channels of Influence

The story of the CII Directive is one of many blunt arguments and activist strategies. The channels of influence, therefore, were many and varied, suggesting less of a policy network and more of a policy circus! From practical demonstrations of patents in action to activist demonstrators in prison outfits, approaches to access and influence varied considerably from the traditional to the radical; from the sublime to the ridiculous. Indeed, no account of the lobbying surrounding the directive would be complete without highlighting some important examples.

93 Interview 9 (n34) at 23:45.
3.2.1 The Big Players’ Experience

In Mr D’s experience, Initech used two particular channels – both fitting the more traditional mould. Face-to-face meetings were common. In addition, related organisations such as the European Communities Trade Mark Association were used as conduits.

What, then, of the media? As with other case studies in this thesis, the most widely consumed media – the newspapers – did not take a great deal of interest in the activities surrounding the Directive. Indeed, as has been observed throughout this in itself represents a considerable problem in the modern-day lobbying landscape: the only time the general public hears of lobbying is when a scandal occurs. Battles being fought within industries and sectors, particularly those involving specialist subjects such as IP, go largely unnoticed and thus the day-to-day role of lobbying remains largely unknown and misunderstood.

The role of the media was thus relatively small. From Initech’s perspective, Mr D recalls that:

> We did talk to journalists in some of the specialist magazines but that was about the limit...We did that very little, actually.”

In the endlessly connected online world, particularly in the context of a battle between different sides of the software industry, one should examine the use of the web by private actors. Were the directive to be considered today, without question activists would take to Twitter, connect through LinkedIn, launch Facebook pages, and probably even conduct some sort of visual campaign over Instagram. LinkedIn first began at around the same time as the directive in 2003. Twitter, however, would not see the light of day until 2006; Facebook, 2005; and Instagram, 2010. Any online campaigning on the directive would thus be confined to traditional websites and the blogosphere.

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94 ibid at 27:08.
Mr D recalls that the FFII conducted a strong online campaign, focussed on a simple message: *No Software Patents.* Whilst one cannot say that the anti-software patent lobby were appealing to a lower standard than the pro-patent lobby, certainly the pro-patent lobby’s argument was, in Mr D’s opinion, more complex – much of it revolving around the TRIPS Agreement:

> You don’t want to breach TRIPS because if we breach TRIPS in Europe then third world countries could breach TRIPS for pharmaceuticals.

Mr D recalls that the industry was concerned that by formally disallowing the patentability of software, supposedly in breach of the TRIPS Agreement, a dangerous precedent would be set which could pave the way for the removal of patentability (or at least the side-stepping of it) for other categories of innovation:

> They were concerned that you could take a whole area out of patentability for political reasons and...if you could take software out of patentability, why can’t you take pharmaceuticals out of patentability?

The lobbyists, then, were themselves being lobbied. Described as being, ‘quietly in the background’, representatives of the pharmaceutical industry communicated with interested parties in the software industry, sometimes directly, other times through larger organisations such as the European Patent Institute. ‘They made it clear that TRIPS was sacrosanct...don’t screw [it] up!’

It is intriguing to observe, then, that the influence at work on a given policy issue or piece of legislation has the potential to extend beyond the immediately, or at least obviously, affected sectors, resulting in crossed paths among policy

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95 ibid at 27:36.  
96 ibid.  
97 ibid at 29:16.  
98 ibid.  
99 ibid.
networks. Not only, then, are both private actors and policymakers required to work with (or against, as the case may be) arguments and submissions from within a particular industry but they will also, in certain cases, be required to consider the implications of a broader view – encompassing other sectors – on their campaigns and decisions. As the concerns of the pharmaceutical industry clearly illustrate, whilst legislation arguably emerges from policy, a piece of legislation can – whether by design or by accident – reshape the policy from whence it came.

This, of course, is the bread and butter of a policymaker’s work – drawing together a wide range of ingredients from which will emerge policy and ultimately legislation. A further important point that one may draw from this, however, provides another argument underlining the importance and value of lobbying. As is repeated frequently, one cannot expect an MP, MEP, Commissioner, or any other variety of politician to be an expert in all fields of knowledge. That policymaker cannot, therefore, adequately envisage all potential knock-on effects of a particular policy change but he or she will, ultimately, be required to take them into account. The input of private actors, then, whether through traditional lobbying or through more structured means such as reviews and consultations, will provide those charged with crafting policy and legislation with the knowledge, opinions and (if one may use the term somewhat loosely), impact assessments required.

3.2.2 Campaigning with the FOSS Community
For the most part, Mueller’s tale recounts some very different experiences of lobbying methods. This is not to say that opponents of software patentability did not also have access to politicians, employing what one might call the traditional approach to lobbying; however, it would be unlikely to see executives from IBM and Microsoft taking to the streets in protest.

In search of ways in which the anti-software patent campaign could raise awareness of the practical implications of software patentability and attract further media attention to the issue, a seemingly ideal focal point presented itself in the form of the LiMux Project – an initiative undertaken by the city of Munich centred around migrating the city’s computer systems to Linux and
other open source software. For a high-profile example, Mueller and his colleagues could not have hoped for better. Indeed, the project had even attracted television news coverage in Germany.\textsuperscript{100}

At a meeting with a large number of free and open source representatives set up by Green party alderman, Jens Mühlhaus, questions were raised as to the potential impact of the Directive on the LiMux Project. When asked if the plan to switch would proceed in the event that the Directive became law, Wilhelm Hoegner, then head of the city administration’s data processing office, indicated that his understanding of the legal issues at stake was limited. However, Mueller then highlights the key:

> Then he confirmed that it would be “indispensable” to analyse the possible effect of the proposed…directive on open source, and he said that any related “mistake” would be “a catastrophe for Munich’s Linux migration project, and for open source in general.”

The campaign’s first step, then, was to highlight the disruption to which LiMux could be subject at the hands of valid software patents. The result would prove to be significant, stopping the bidding process for the LiMux base client while Munich evaluated the legal and financial risks involved.\textsuperscript{101} This, Mueller turned quickly into a press release, and from there the story rapidly began to gain momentum:

> I received various phone calls and emails. In the late morning, a reporter from Deutsche Presse-Agentur, the largest German news agency, called me.\textsuperscript{102}
In the following days and weeks, it became clearer than ever that the LiMux incident had put the software patent topic on the map. The German newsweekly Der Spiegel commented that the EU Council was “rushing to the aid” of Microsoft.**

This is not to say that the move was an unqualified success. Indeed, Mueller recalls some discontent from within the FOSS community, accusing him of causing damage to open source as a whole, causing people to question the safety of using it at all.”** Nevertheless, the LiMux incident serves, for our present purposes at least, as a valuable illustration of yet another means of attracting the attention of those with the capacity to act which extends beyond the simple convenience of being on first name terms with them.

A number of what may be termed *colourful* approaches were taken by the anti-patent campaign on various occasions. Demonstrations staged on multiple occasions would see participants in prison uniforms and in t-shirts featuring the famous Linux penguin motif adorned with Che Guevara-style caps. It is also interesting to note that such methods did not meet with universal approval within the anti-patent movement. Indeed some, recalls Mueller, felt that the anti-patent campaign should be conducting themselves in the same manner as their adversaries. Whether or not the dramatic difference in resources available to the respective camps could be addressed merely by the directive’s opponents donning smarter suits, however, is open to question. As the tactics employed clearly demonstrate, if the smaller voices could not make themselves heard in the same forums as the larger ones, they needed to shout louder.

Perhaps by far the most amusing and indeed a clear illustration of the attention such creative approaches to lobbying (if indeed one can use that term in this context) can raise, however, shows not only the tactics employed by the anti-patent campaign, but also how great care must be taken to avoid embarrassing oneself and helping one’s opponents at the same time. As Mueller explains:

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**ibid 150.
ترك 150-151.
Sometime during the day…demonstrators spotted a yacht next to the bridge connecting the two main buildings of the European Parliament in Strasbourg…The yacht, which stayed near the bridge, had been hired by Simon Gentry’s Campaign for Creativity, and it sported a huge banner that called on MEPs to vote for the “CII Directive”…Four of our demonstrators immediately hired a rowboat, which they rowed out next to the yacht. There they ran up a banner that read “Software Patents Kill Innovation”.

…

People inside the European Parliament who saw the scene from the bridge were amused, but they also admired our camp’s quick-wittedness. One MEP said: “That round certainly goes to them”, and by “them” he meant our side.

Mueller’s experience of the media’s role is, unsurprisingly, akin to that of his pro-patent counterpart. With some exceptions such as the LiMux project, the directive as a whole received relatively little media attention, whether in the specialist technology press or the general news media.

It appears that Mueller attributes the problem to at least two causes – firstly the prevailing disinterest among the general public with regard to EU affairs, secondly the ever-present issue of niche topics not selling newspapers:

…it’s unfortunate that EU politics don’t yet receive much media attention. This unprecedented historic breakthrough went largely unnoticed. We couldn’t even generate much publicity for it in the IT press at that time. There were a few mentions: one article on the Web site belonging to the UK’s PC Pro, titled "Support for software patents faltering in Europe", a couple in the German media, and a few on international Web sites. The general news media didn’t pick it up even though

106 ibid 365-366.
this parliamentary resolution transcended the special topic of software patents and had implications for EU politics in general.\textsuperscript{107}

If you’re a journalist and you want to write on a subject like that, you are likely to find it very hard to convince your editor and colleagues that this is truly an issue of general concern. At first sight, it looks like it’s only a story for “geeks”.

Most journalists wouldn’t even want to try to dig into it. If you don’t have the necessary specialized background, you have to spend a fair amount of time just to acquire a general understanding. Journalists are under pressure to be productive, either from their bosses or because they are freelancers trying to make a living.\textsuperscript{108}

Above, Mr D recalls the no software patents campaign conducted by the FFII. As has already been observed, without the now-familiar social media tools which find considerable favour with those seeking to influence policy, the campaign took a more traditional form. From Mueller’s recollections, we can observe a hybrid of online and offline campaigning working to build up awareness of NoSoftwarePatents.com.

In the early stages, traditional methods – real world networking rather than social – were required to gather support for the campaign. Supporters included key figures in the software and technology world such as web hosting company 1&1, self-proclaimed open source leader Red Hat, and MySQL AB.\textsuperscript{109} Further support was gathered through an open letter written by Mueller, urging the governments of EU member states to oppose the adoption of the aforementioned A item in the Council. This, recalled Mueller, not only resulted in press coverage but also, ‘noticeably raised the number of people who visited NoSoftwarePatents.com’.\textsuperscript{110}

\begin{flushright}
\textsuperscript{107} ibid 70.  \\
\textsuperscript{108} ibid 131.  \\
\textsuperscript{109} ibid 188.  \\
\textsuperscript{110} ibid 245.
\end{flushright}
Without question, were such a campaign to be conducted today, social media would form a key ingredient in Mueller’s front-line arsenal. Indeed today, Mueller himself is no stranger to social media, tweeting and/or re-tweeting on patent, IP, and FOSS related topics several times a day to his 14,700+ followers. Given the success of the NoSoftwarePatents.com campaign and the prominent role played by social media in lobbying and awareness today (not forgetting, of course, the social media presence of many politicians providing part of the would-be audience), one may speculate, not unreasonably, that the anti-patent campaign may have seen better and/or quicker results from their campaigning had the directive been proposed, say, in 2014.

Naturally one may counter-argue that those same social media tools would be available to those on the pro-patent side of the equation too; however experience seems to indicate that those more established technology companies, the old guard, seem to be somewhat less innovative – one might almost say less shrewd – when it comes to social media and embracing new methods of digital marketing. Conversely, the smaller players in the market – the start-ups, the rebels (as the anti-patent campaign would no doubt have enjoyed being described) – tend to be quicker to effectively employ new and emerging media tools in their work. To suggest that Mueller and the anti-software patent movement would outpace IBM, Microsoft et al in a social-media-based lobbying battle, then, does not seem an unreasonable notion.

4. Equality of Access and Influence

To ask whether or not all voices in the debate were equally represented would perhaps seem like something of a moot point given that certainly the two primary camps – the pro and the anti – were engaged in an intensely vocal battle. Nevertheless, with so many voices speaking, one should not necessarily assume that they were all heard.

I think all…sides were heard, but I’m not sure all sides were listened to.\footnote{Interview 9 (n34) at 30:55.}
It is with this simple statement that Mr D raises one of the most important issues. Policymakers may indeed hear what is being said, but whether or not they take it in and act upon it is quite a different matter. Given the makeup of the EU, it is submitted that there may be the potential for the interests of particular member states to have more of an effect on the decisions and actions of their representatives than there may be in a purely domestic setting. An MP, for example, may be influenced by the interests of his or her constituency, but an MEP will be influenced by the interests of his or her country in a similar fashion. To further compound this, as is observed above, party lines may not play quite the same role at the EU level than they do at home with the national line rather than the EU group line sometimes being favoured in the event of a conflict and, particularly in the context of the Commission, with the national interest potentially taking precedence over the party-political position. Mueller’s account provides an example of such concerns and whilst it must be pointed out that there may be considerable elements of subjectivity in his recollections, the illustration of national interests influencing EU-level action remains useful.

Mueller and a number of his contemporaries would, during the course of the directive’s short life, express concerns over Ireland’s position in the debate. Arguably such concerns were quite justified. More so than other EU member states, Ireland had a vested interest in the wellbeing of major software companies. In part due to its somewhat favourable tax regime (combined, one may suggest, with the fact that it is an English-speaking country), Ireland serves as the European base for a number of international technology giants. At a meeting arranged by the FFII and the German Green Party in early 2004, Green MEP, Claude Turmes had expressed his own concerns, accusing the Irish government of, ‘acting on behalf of Microsoft and the other US high-tech corporations that use Ireland as a tax haven’, further noting that, ‘Those subsidiaries of US corporations were far more important to the Irish economy, and paid considerably larger amounts of taxes, than Ireland’s domestic software industry’.

As Mueller observes:

Mueller (n33) 15-16.
It was unsettling to hear that Microsoft could have such disproportionate influence over a European piece of legislation.\footnote{ibid.}

Such concerns would find further support in the shape of the actions of Commissioner Charlie McCreevy. McCreevy’s position as the Commissioner responsible for internal market policy was a great cause for concern for Mueller and the anti-software patent campaign and indeed considerable energy was expended in order to inform those involved in the debate of the potential bias at work:

I started publishing documents on NoSoftwarePatents.com explaining the Irish role in the push for software patents…\footnote{ibid 321.}

McCreevy, it appears, also made an attractive lobbying target, as Mueller recalls:

On February 1, Bill Gates visited the European Parliament in Brussels. During the same trip he also met with his loyal friend McCreevy as well as the two most important people in the European Commission, its president, José Manuel Barroso, and its vice-president Günter Verheugen.\footnote{ibid 306.}

In an intriguing twist, Mueller recalls a move made by the Commission that appeared to be designed to derail the abovementioned plans to restart the legislative process. Taking advantage of procedural rules, the Commission attempted to force the formal adoption of the Council’s common position earlier than planned. The plan, submits Mueller, ‘was a total setup by McCreevy’.\footnote{ibid 302.} Whether or not the Irish Commissioner was actually the architect of the plan, his support of software patentability appears to have been well
known. Indeed, some years after the demise of the Directive in 2008, he again lent his support to European software patentability in the form of a bilateral patent treaty between the EU and the US.\footnote{117}

The ferocity with which some parties chose to pursue their arguments resulted in the unfortunate (and ultimately self-defeating) consequence that more useful, nuanced, one might say quieter information became drowned out. It was this harmful type of lobbying that would eventually contribute to the demise of the Directive. Indeed, as Mr D recalls:

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\ldots\text{that’s why we ended up having to [make the decision],}\n\ldots\text{we’re not going to get anywhere with this so...we’re going to have to kill it.}^{118}
\]

Thus, those same lobbyists that initially sought to establish a legal foundation for the patentability of software would seemingly now turn their attention to stopping further legislative action on those attempts. It would certainly not be unreasonable to submit that the situation had clearly gotten out of hand. Mr D regrettafully offered no further comment in this respect, however Mueller’s account makes it quite clear that lobbying influence – at least from his perspective – certainly played a significant role in the Directive’s demise.

Out of the three case studies under consideration in this thesis, the CII Directive represents perhaps the best example of a debate in which each side comprised interests of unequal size and strength. To reduce the debate down to ‘big vs. small’ would perhaps be unduly simplistic; however, it would certainly be accurate to suggest that many on the pro-patent side were those from larger organisations whereas those on the anti-patent side were from smaller organisations or were perhaps independent developers concerned about the potentially chilling effects of software patentability on their livelihoods.


\footnote{118} Interview 9 (n34) at 31:25.
Presenting an important illustration of the helpful role played by representative organisations, Mr D recalls that many smaller organisations and individuals were brought together by the FFII. Surprisingly, however, whilst one might expect that mostly small organisations would be represented, it was in fact mostly individuals that responded to the FFII’s call:

The FFII managed to motivate and use huge numbers of individuals…and that appealed to quite a lot of people around – the fact that there were so many individuals who were interested in writing software [and] who wrote software…

The SME community was there to an extent, but not really very much.119

4.1 The Big Players
The larger organisations at work adopted somewhat familiar methods of gaining access to policymakers, clearly taking advantage of deeper pockets and greater resources:

The big companies were naturally there and were able to organise dinners and breakfast meetings with MEPs and things like that. All the usual rubbish!120

This, the popularly imagined view of lobbying, is without question not the only form of it, but the fact that it remains presents a problem, both in theory and in practice, for the justification of lobbying as a democratic exercise. Indeed, much the same activity is noted by Mr C in the context of the Digital Economy Act. In light of the concerns raised in Chapter 2 and the conditions of the model

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119 ibid.
120 ibid at 31:56.
of democracy enunciated therein, his words of caution, that such things must get harder, are arguably not without merit.\textsuperscript{121}

To what extent, one may ask, did organisations seek to influence policymakers using member states as a conduit? At a national level, accessing policymakers is arguably much simpler than at a multinational level. Certainly, this route appears to have been favoured by some in the anti-patent movement. Surprisingly, particularly when considering the earlier observations regarding party lines, Mr D does not recall many organisations on the pro-patent side doing this. Given Ireland’s presidency of the EU during 2004, for example, one might imagine that those multinational businesses with a European base in Ireland would use the member state as a means of access to the various law-making institutions of the EU. Indeed, the high number of international technology companies with offices in Ireland (established in no small part due to Ireland’s permissive corporation tax models designed to attract foreign companies) would seem to make this a highly likely strategy. It would appear, however, that in this case organisations preferred to liaise directly with the Commission.\textsuperscript{121}

At the state level, from Mr D’s perspective, few bodies became involved. The UK IPO, however, was a notable exception. Indeed, as he notes, ‘the only country that I remember doing anything smart was the UK and the IPO...’\textsuperscript{123}

4.2 The Little Guy

As has been demonstrated above, whilst the anti-patent movement was not entirely composed of SMEs and individuals and did not find itself barred from interactions with policymakers, it was clearly required to exercise more creativity and ingenuity to make itself heard. This in itself is not surprising for, as has been noted, the lack of resources – both in terms of finance and connections – would have inevitably created a certain impediment. Where Mueller and his contemporaries needed gatekeepers and good luck, IBM and

\textsuperscript{121} Chapter 4, 177.
\textsuperscript{122} Interview 9 (n34) at 33:15.
\textsuperscript{123} ibid.
Microsoft, to name but a few, simply had to put the right person on a plane from America.

This, however, risks oversimplifying the issue. As has been noted throughout this thesis so far, it is also a lack of know-how on the part of the smaller actors that creates barriers to entry. Indeed, as Mueller himself observes:

One major problem was that most of them thought that smaller companies couldn’t even influence political decisions and believed only big corporations had a chance of being heard. I know from my own experience that it’s simply not true.124

There is, then, perhaps an element of self-fulfilling prophecy at work. Smaller interests may not feel that they can influence the policy process and therefore will not try. They remain outsiders to policy networks because they do not believe they have a place in them. Furthermore, Mueller suggests, and particularly within the world of overlapping technologies wherein innovators of all shapes and sizes need to utilise one another’s technology, those fighting against the cause of the large organisations might place themselves at a disadvantage in business: ‘They feared they’d be in a worse position to strike deals with companies like IBM, Nokia and Siemens’.125 The pity that Mueller points out in this context, however, is that most large organisations tend to separate business and politics, noting that, ‘none of my campaign sponsors ever experienced any such problem’.126 Nevertheless, the very notion of fear of political retribution goes some way further toward explaining barriers to entry into the work of influencing policy – in this instance, self-made barriers.

It is perhaps Mueller’s final observation on what he terms the political naïveté of small and medium-sized companies that disappoints the most:

124 Mueller (n33) 333.
125 ibid.
126 ibid.
It’s also a fact that there are simply a lot of free riders out there: people who believe that they don’t need to spend money on something that has to be done because someone else will anyway.  

Disappointment notwithstanding, it is perhaps understandable that smaller organisations will prefer, not to say need to direct their financial efforts towards running their business rather than influencing politics. The importance of alliances and of larger, representative organisations, illustrated powerfully by the work of the anti-software patent campaign, is thus considerable. Once more, then, the clear need for a level playing field and the redistribution of valuable intangible resources presents itself.

5. For Whom The Bell Tolls
As noted above, the Commission, seemingly under pressure from Commissioner McCreevy, sought to stop the legislative restart in its tracks. A second reading in the European Parliament was thus inevitable.

The importance of Ireland’s software industry has already been noted, as indeed has McCreevy’s desire to avoid legislation that would put that industry at a disadvantage. The influence carried into Commission proceedings would thus be considerable. Also of interest is Mueller’s suggestion that McCreevy may not have had to try particularly hard to exert that influence. As is observed frequently in this thesis, specialist legislation is often made by non-specialists:

That made it easy for someone like McCreevy to base his reasoning on some of the usual pro-patent propaganda, which seems logical to those who know little more about a computer than how to turn it on…”

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127 ibid.  
128 ibid 323.
In early March 2005, efforts were made by the anti-patent campaign to prevent the Council from adopting its common position on the directive. As further testament to the value of member state-level lobbying, a number of national parliaments appeared inclined to stand against the common position including those of Germany, Spain, the Netherlands and Poland.\(^{129}\) Unfortunately for anti-patent aspirations, however, the Competitiveness Council nevertheless adopted the common position for what it described as institutional reasons – preferring not to set a precedent that could lead to costly delays in the future.\(^{130}\) Mueller, however, suggests that it was the failure of the Danish Economic Affairs Minister to follow his home parliament’s instructions that was to blame. The expected domino effect that a Danish rejection may have had, never took place.\(^{131}\)

Despite the apparent setback, the anti-patent campaign pushed forward. The Council’s common position had still been robbed of credibility – a factor that would contribute significantly to the directive’s eventual demise.

The second reading of the directive in the European Parliament began in April 2005. Dealing something of a blow to the anti-patent campaign, the Committee on Legal Affairs ("JURI"), in its first second reading debate on the directive appeared to swing in favour of it, despite previously indicating support for the restart initiative.\(^{132}\) A number of amendments palatable to the anti-patent campaign had been proposed by the directive’s new rapporteur, Michel Rocard. It was considered particularly important that JURI supported them:

> We needed the amendments proposed by Michel Rocard to go through. That way, the Council’s proposal to legalize software patents would have been turned into its opposite, a bill that would abolish software patents in the EU more clearly than ever.\(^{133}\)

\(^{129}\) Although the latter, it appears from Mueller’s account, agreed only to support others in their opposition. ibid 324.  
\(^{130}\) ibid 327.  
\(^{131}\) ibid.  
\(^{132}\) ibid 336.  
\(^{133}\) ibid 342.
This was not to be, however. Representing something of a victory for software patent proponents, few of the amendments were accepted. In a compromise move to seemingly appeal to both sides of the debate, new amendments were proposed, still palatable to the anti-patent movement, but less poisonous to the pro-patent forces. Much work remained, therefore, for the anti-patent campaign. Either the amendments would require sufficient support to be passed in their entirety, or at least enough would need to be supported in order that the Council would not accept the Parliament’s second reading position, thus forcing the directive into conciliation.134

A number of high profile supporters were lined up by the campaign in support of the effort including 1&1 Internet AG, Opera ASA, and Benchmark Capital.135 The latest push would help to ensure that the new package of proposed amendments would be filed on time. In accordance with parliamentary procedure, new amendments would have to be introduced by a political group or a minimum of 37 MEPs. The anti-patent campaign sought (and indeed secured) considerable support:

The plan hatched by the FFII and its political allies was highly ambitious: not only did they want to get the necessary 37 signatures from the ranks of the EPP-ED group’s 268 members, but they also wanted to put together a separate list of 37 signatures from MEPs of the ALDE group…136

Ultimately, over 40 European People’s Party-European Democrats (“EPP-ED”) group signatures and the desired 73 Alliance of Liberals and Democrats for Europe (“ALDE”) group signatures would be obtained.137 In addition to such support, the campaign were surprised to learn that the EPP-ED may have been inclined to reject the Council’s common position,138 at least in part due to the weak de facto support for the position in the Council.139

134 ibid 345.
135 ibid.
136 ibid 348.
137 ibid 355.
138 ibid 358.
139 ibid 363.
5.1 Risk or Rejection?

Parliamentary procedure in the European Parliament allows for the rejection of the Council’s common position at the second reading. If a parliamentary group or at least 37 MEPs proposes a rejection amendment, that proposal will be voted on before any other amendments up for consideration.

It was this procedure to which the anti-patent campaign would ultimately turn, as it seems would some on the pro-patent side of the debate, as noted below. The proposed amendments, in an ideal world at least, still held much appeal for the directive’s opponents; however, as Mueller recalls, ‘Maybe [we could have gotten] a good directive from the Parliament, but [there was] no chance of one in the near term from the Council and the Commission’.

By early July, only days before the vote that would finally seal the fate of the directive, arguments continued on both sides of the divide, both amongst policymakers and private actors. The prevailing view however, that no directive at all was better than this directive, was becoming clear. As Mueller recalls:

…just before the UK assumed the EU presidency, some of the large corporations had written a letter to…Tony Blair stressing that they’d rather have no…directive than one thatrestricted the scope of patentability compared to the EPO’s practice.

The two sides had finally come together – at least ostensibly – to put an end to the mess. The degree to which there was any agreement beyond the death of the Directive, however, is arguable and is considered below.

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140 ibid 358.
141 ibid 364.
5.2 We’re Going to Have to Kill It…

Everybody started to realise that something stupid was going to happen and [that] therefore it was best to kill [the directive]…companies like [ours] realised by killing it, the status quo would remain and we’d carry on getting software patents…The FFII thought that if the…directive was kicked into touch, although we might carry on getting software patents, they wouldn’t be legitimate.

So, we ended up on the same side in the end. That was a big moment!"  

One might however question the degree to which big software and the FFII truly ended up on the same side. The desired result may have been shared at the most abstract level, but delving deeper, such agreement is perhaps doubtful.

Such accord may, it is submitted, be viewed as what Sunstein has termed an incompletely theorised agreement. In essence, the parties in question may agree upon the end result and possibly on narrow or low level explanations for that result, but not on the fundamental principles underlying it."

Of particular relevance to our present context is Sunstein’s observation that incompletely theorised agreements, ‘can conceal the fact of large-scale social disagreement about particular cases’." Mr D’s statement above makes it appear (and indeed was made to sound during our interview) as if the opposing sides on the debate ended up almost as friends, or at least allies. One would however submit that this was not in fact the case. Both wanted the directive to end, but for quite different reasons.

142 Interview 9 (n34) at 03:00.
144 ibid 1739.
Might lowering the level of abstraction assist us in explaining the convergence surrounding the CII Directive’s demise? One would suggest not. Indeed, it seems reasonable to argue that reasons for wanting the directive to die off remained some distance apart. Those who initially favoured the directive can arguably have only wanted to see it shut down out of fear of it turning against them – being reshaped into something that would harm their interests rather than support them. Shutting down the directive, on the other hand, would mark a return to the status quo – a situation in which software patents, whilst not strictly blessed in statute, were de facto permissible thanks to established EPO practice. Those who never wanted the directive in the first place, however, never wanted software patentability either. Indeed, they would much more likely have preferred the directive to further underscore the exclusion of computer programs as such from the scope of patentability. Since it was not designed to do so, however, it did not have their blessing.

At the most basic level, then, the absolute end result may have been agreed upon but even at that, only in the narrowest of terms – certainly not extending beyond solely the demise of the directive to the practical import of that result, most notably that the EPO could continue granting software patents in exchange for some clever drafting.

For judges, Sunstein argues, an important virtue of incompletely theorised agreements is that they often make it possible to, ‘achieve convergence on particular issues without resolving large-scale issues of the right or the good’. For judges, one tends to agree. In the context of policymaking, the benefit is less clear. If law and policy are to best serve the interests of their subjects, one must submit that the resolution of differences ought, wherever possible, to extend beyond the low levels. Had the two camps agreed on certain issues or principles behind the directive (whether in its favour or otherwise), perhaps an incompletely theorised agreement would be more palatable, whilst still leaving certain differences of opinion unresolved. The higher-level philosophical differences would surely remain (the causes and justifications for free and open source software as against those for proprietary software, for example) and in

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145 ibid 1744.
this context it is arguably important that they do, but finding more common ground at the lower levels would surely be desirable.

Mr D himself notes that some big players had a foot in both camps, as highlighted above. Notwithstanding this, however, Initech would not have shared the concerns held by many smaller, less well-off members of the open source community. To take but one example, Initech would be in a far stronger position to defend itself against a patent infringement action than would a smaller developer owing not only to far greater financial means entitling it to better legal counsel, but also to the ability to explore other means of conflict resolution such as cross-licensing.

It might, it is submitted, be preferable to view the concept of an incompletely theorised agreement as rather less useful in this scenario. In the legislative and policymaking arena, particularly where the input of those affected by law and policy is concerned, much value for policymakers is to be derived from the range of differing opinions available. With this said, however, it may nevertheless be helpful for a policymaker to know if there are any areas at all where opposing camps agree. Even if opposing sides to a debate disagree on the reasons for which a particular policy change is needed, the very fact that they agree on the ultimate outcome may be useful to the policymaker. Whilst accommodating the positions of all is arguably of great importance, there must come a point at which differences must be smoothed over or cast aside and some actual legislating is done. Viewed in this light, it may be argued that perhaps Sunstein’s incompletely theorised agreements may not be quite so far removed from the context of the CII Directive after all.

This does not entirely conclude the issue, however. Loose accord on an outcome, whilst it may be preferable to none in practical terms, does not necessarily mean that the outcome is for the best. Indeed, whilst the FOSS community may have perhaps preferred the status quo to the CII Directive, that would only represent their preference in a vacuum. Certainly, few among the FOSS community can have found the status quo a great deal more agreeable than the directive. As is observed above the many pro-patent organisations would have indeed preferred the patentability of software to be enshrined in
statute, but would not be entirely devastated to see the status quo preserved – succeeding as they had in obtaining software patents for quite some time – albeit with a little effort required in a number of cases.

We might, then, view incompletely theorised agreements as simply the best of a bad situation. Sunstein observes that stability is often achieved by such agreements and that is often not an undesirable result. However, ‘a system that is stable and unjust should probably be made less stable’. Moreover, ‘Progress in politics and even in law is often fuelled by failures of convergence and by sharp disagreement on both the particular and the general’. The demise of the CII Directive might well have marked a return to relative stability, but ultimately one must lament that relatively little progress was made and certainly very little in return for the time and work invested on all sides. Shaking up a jar of oil and water may give the illusion of mixing; but ultimately when the water settles, the two substances remain apart. After considerable shaking, Initech and the FFII may have both wanted to see an end to the directive; afterward, however, the end result would leave neither in any better position.

6. All That for That…

On 6th July, the outcome of much debate, wrangling, lobbying and counter-lobbying would be finally revealed. It seems only appropriate to let Mueller tell this final part of our tale in his own words:

Rocard made a short speech before the vote, rightfully blaming the impending rejection on the Council and the Commission. Then the chairman of that part of the session, European Parliament vice-president Gérard Onesta, started the voting procedure.

…

\[146\] ibid 1764.
\[147\] ibid 1768.
The chairman reminded MEPs that this was an electronic roll-call vote, and called on them to vote. There was silence for a few seconds, which seemed like an eternity. Everyone pushed a button.

Then the scoreboard displayed the result in a very large size: 648!

The landslide figure provoked audible astonishment, and roaring applause from many MEPs and some of us in the gallery...

...The chairman announced that the ‘amendments’ (which were proposals for rejection) had been adopted, the common position had been rejected, and the legislative process had been terminated.\textsuperscript{148}

With that, the bitter battle was over. Whether or not the outcome could be seen as a decisive victory for either side, however, is at the very least open to question. Indeed, as Mueller points out himself, only half of those 648 votes at the most would have been from those genuinely opposed to software patents – whether of their own opinion or as a result of lobbying – whereas the remainder were voting down the directive for tactical reasons. The result itself may have been the one the anti-software patent campaign wanted, we must ask how much of it can be seen as a success. Moreover, as Mueller points out, ‘It looks like a clear result and doesn’t reflect the struggle that it took to get there’.\textsuperscript{149}

However much one might question the outright victory of the anti-software patent movement, however, one thing is clear: coordination and tactics can, when employed correctly, outpace sheer size, resources, and financial strength. The software giants behind the push for software patentability in Europe included those with practically limitless resources – companies whose software products make the modern world possible – companies without whose

\textsuperscript{148} Mueller (n33) 368.
\textsuperscript{149} ibid 372.
products perhaps even the anti-software patent movement would not have been able to function and yet, with the careful application of relatively scant resources, the anti-software patent campaign was able to bring about an end to the directive. The irony, it seems, was not lost on some:

One of our activists was sitting close to EICTA’s Mark MacGann in the public gallery of the Hemicycle during the European Parliament’s second-reading vote. At the moment of the vote, MacGann reportedly sighed: “All that for that!”

7. Conclusions

In a number of ways, the CII Directive stands apart from the other two examples considered in this thesis. In the most obvious respect, it is a creature of the European Union rather than one from domestic pastures. Consequently, different approaches to lobbying have been observed, often requiring those parties involved, particularly the less well-resourced, to make the choice between playing at home or away. The value of national-level lobbying has been consistently shown to be significant, and this is particularly true for those with fewer resources. Large organisations may face few barriers when attempting to access and influence the Commission, but for SMEs and individuals such opportunities are far from plentiful.

The strength of one’s resources will have a bearing on the ears one is able to get to listen. Such disparity appears to be taken to another level in the EU context for not only is the smaller actor less likely to get the opportunity to convey its message to those high-level policymakers wielding the most influence, but it may be the case that it will not even be able to get directly in to an EU body at all, instead working at the national level – lobbying as one would on domestic policy, but with the eventual goal of forcing a much larger hand.

One of the most concerning observations to arise in this chapter is the element of the self-fulfilling prophecy under which smaller players do not feel that their

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158 Ibid 373.
efforts will yield a result and, consequently, do not make those efforts in the first place. Again, then, one can observe the disparity of resources – financial and otherwise – at work, undermining the democratic potential of lobbying and the effective functioning of policy networks under a pluralist model. Given the sheer scale of a system of governance like the EU, however, redistributing knowledge resources and ensuring that smaller players have the requisite know-how to gain more effective access to and influence over policymakers may not be sufficient. The role of representative, umbrella organisations, then, comes to the fore. This topic will be discussed in more detail in the next chapter, but the valuable role played by grouping on the part of the anti-patent campaign must not go unacknowledged here.

Whilst unquestionably a tribute to the ingenuity, creativity, and organisation of the anti-software patent campaign, however, this chapter also has a more sombre tale to tell – or at least a cautionary one – for it shows that as much as lobbying can be a valuable part of the policymaking process, it can also serve as a force of considerable disruption, not to say destruction.
Chapter 6
Conclusions, Final Thoughts & Suggestions for Future Research

At the very beginning of this thesis, the question, ‘why intellectual property?’ was addressed. As the reader may recall, the reasons for framing this work in IP were threefold: First of all, a broad range of interests, from the individual citizen to the multinational corporation, are affected by IP law and policy and may seek to influence its form and function in some way. Secondly, as a specialist niche, IP represents a policy area in which few policymakers will have a great deal of knowledge or experience. Thirdly, IP has presented an almost made-to-measure opportunity to examine the high levels of complexity and diversity in law and policymaking through the lens of three quite different forms of policymaking from the first part of the twenty-first century: a policy review, a piece of domestic legislation, and a European Union directive.

At the heart of the thesis is the model of democracy presented in Chapter 2, a model founded on multiple conceptions of governance and democracy with a view to providing a framework that accurately reflects the contemporary policymaking landscape, qualified with conditions designed to improve the democratic legitimacy of lobbying as a practice. The model has provided an important lens through which to view each of the three case studies and, while it has been used to focus on IP, it is submitted that IP is merely a framework – one that has produced conclusions applicable to a wide range of policy areas in which complex and diverse interests compete for access and influence.

1. Core Themes

Early in the introduction to this thesis, a number of core themes were identified – running throughout the case studies explored herein, sometimes consistently, sometimes less so. To conclude our journey, then, we must now revisit these themes, tying together the various threads emerging throughout.
1.1 A Model of Democracy

The central theme of the thesis as a whole is the model of democracy set out in Chapter 2, built on a strongly pluralist foundation. Many conceptions of democracy and governance were considered in drawing this up, and while it is without question less democratic than most classical models, it is because it is designed to be more applicable in the world of policymaking that we witness today, subject to important qualifying conditions.

The horizontal, two-way relationship between public and private actors that forms the keystone of policy networks has been shown to be a key element in IP policymaking, with a high degree of mutual reliance between policymakers and private actors from the world of IP. Of central relevance here is the role of input from such actors, as considered in the second theme, below.

Groups and networks play an important role, particularly when it comes to the representation of smaller actors such as individual citizens and SMEs. Indeed, the example of the CII Directive in particular illustrates the importance of grouping and coordination well. It is clear that such representative groups are central to increasing the democratic legitimacy of lobbying in light of the model upon which this thesis is founded.

What, then, of government as a central arbiter: a body which gathers input on law and policy from a broad range of affected interests and produces a balanced output designed to work as best it can for the good of all? It is clear that in many ways, this conception is reflected in reality. From the earliest stages in the legislative process, whether in the form of a review, consultation, or otherwise, stakeholders are presented with numerous opportunities to speak. As has been clearly illustrated, however, there is no guarantee that the eventual outcome will please all concerned. Indeed, as the case studies show, this is often far from the case. Moreover, a significant imbalance in access and influence means that policymakers will often not be privy to the wants and needs of those with fewer resources: individuals and SMEs in particular.

As is seen below in theme three, then, inequality represents the greatest impediment to the democratic justification of lobbying. The Hargreaves
Review provided a useful example of how a proactive approach can help to fill the gaps in input from smaller concerns and is indeed worthy of praise for its efforts; however as has also been seen, this represents only one step in the policymaking process that followed and more powerful actors were quite able to continue lobbying as normal, thereby arguably preserving their advantage. Transparency and regulation and their role in addressing inequality arguably have a key role to play in solving this missing piece of the model’s puzzle and this role is thus recommended below as an area for further research. Present transparency measures are arguably not fit for purpose and certainly do little, if anything, to address the issue of inequality.

1.2 The Importance of Stakeholder Input

Of the reasons stated for choosing IP, one was its specialist nature. As former MP, Mike Weatherley, recalled when interviewed for the Hargreaves Review case study, when he joined Parliament after the 2010 general election, ‘…there were about a dozen MPs that understood what ‘IP’ stood for and the rest of them were hoping that someone else knew…’¹. The input of expertise to fill the gaps, then, is of great value. As former BPI lobbyist, Richard Mollet, pointed out, an important role for lobbying is to provide lay policymakers with the information and understanding that they will, through no fault of their own, generally lack.

The Hargreaves Review perhaps best illustrates this theme. Indeed, the entire point of the review was to gather the first-hand knowledge, experiences, and opinions of IP stakeholders from across the spectrum. This is reflected not only in the range of responses to the review’s call for evidence, but also in the makeup of its panel, selected, as Mike Weatherley recalled, ‘in order to equip the review with a range of relevant expertise, including business, innovation, economics, and aspects of intellectual property’.² Not only, then, did the Review seek to gather expert information to feed into the IP policy-making process, but it also put that information into the hands of other experts who would thus be in a strong position to arrive at well-informed, carefully balanced conclusions.

¹ Chapter 3, 156.
² ibid.
A significant initial concern when it comes to stakeholder input, however, is that much (if not most) of it will be highly subjective or at the very least be objective fact presented in a manner that supports the case of whomever presents it. It is here, however, that a significant part of the value of such input can arguably be found when it comes to the crafting of democratically valid law and policy. The law must work for those it serves (and indeed those who are subject to it) and it must be accepted by them in order for them to follow it. Only by understanding the wants and needs of subjects will policymakers be in a position to carry out their work effectively. This is not to say that undue influence is in any way acceptable, nor is it to say that all stakeholders will all be satisfied – indeed as has already been observed, quite the contrary. Moreover, subjective input can only truly be justified and valued if it is received from all sides. The resulting law and policy may ultimately still favour economically stronger actors out of necessity: protecting the interests of the state as a whole, not least its economy, may prevail. As the third and final theme observes, however, it is the opportunity and means to make that contribution that is of greater importance, ensuring that policymakers are equipped with the broadest, most balanced range of information and views possible upon which to base their deliberations.

1.3 Equality of Access and Influence

History has shown a gradually broadening class of influencers. Beginning with only the highest ranks of society, as time passed, increasing numbers of individuals and organisations saw greater levels of access and influence open up to them. As the historical accounts early in this thesis demonstrate, the increase in the dissemination of information in no small way fuelled debate, resulting in a more informed populous with a desire to shape law and policy to its own ends. In the realm of IP in particular, one may observe that stakeholders have long been actively involved in the crafting of law and policy.

Despite such expansion, however, it is clear that imbalances remain. And it is here that the single greatest bar to the desired conclusion – that lobbying is an important and acceptable ingredient of democracy – can be found. At the core of democracy is the notion that the weak must be secured from dominance by
the strong. The case studies in this thesis have demonstrated that, while resources do not entirely dictate a private actor’s chances of success – the CII Directive and the work of the Free and Open Source Software movement being a case in point – they remain a key factor in determining opportunities for access to, and influence over, policymakers. Inequality will often be a case of resources: strength in numbers, financial means, and political know-how. As has been seen, however, this is not the only reason for inequality. Indeed, some suggest that the lack of involvement of smaller private actors in the policymaking process may be something of a self-fulfilling prophecy: they do not think they will be heard, and thus do not try. If, as Mr D, interviewed for the CII Directive suggests, all sides are heard but not all are listened to, could it be that the smaller voices wish to speak but, assuming they will not be heard, simply acquiesce to the perceived inevitable? Certainly, there is evidence of this attitude. Consider, for example, the proactive approach taken by Ian Hargreaves in seeking out SMEs, meeting them on their home turf to discuss matters important to them for inclusion in his Review’s recommendations. Such an approach is to be applauded, but the fact that it is necessary highlights the necessity of redressing the balance to ensure that IP law and policy are crafted to best serve the interests of all to whom they apply. Moreover, it is clear that even where such a proactive approach is taken, opportunities for more powerful actors to influence policymakers through traditional, less-formal lobbying channels remain.

In addressing inequality further, it is evident that grouping, organisation and, one might suggest, unification have an important role to play, as has been usefully illustrated in the case of the CII Directive. By grouping together, those representing small software developers, and individual users were able to speak to policymakers in a louder, more coordinated voice. Nevertheless, regrettably another qualifier to such success must be added for, while the anti-software patent campaign were undeniably successful in their efforts to prevent the patentability of pure software, the evidence suggests that their lack of resources when compared to multinational software giants necessitated a

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3 Chapter 5, 250.
4 Chapter 3, 169.
more inventive, one might even say haphazard, approach to lobbying, relying upon lower-level policymakers by comparison.

How, then, is this imbalance to be addressed? One option which has been suggested is to increase the number of Hargreaves-style reviews – actively seeking out the smaller voices which might otherwise go unheard. The view of those involved, however, seems to be that too many reviews would simply become, ‘part of the wheel spinning process itself...’ : Moreover, as noted repeatedly, equality at the review stage is helpful, but it may still be offset by more powerful interests later in the process. Transparency, it is submitted, has an important role to play in terms of highlighting inequalities by painting a clearer picture of exactly which inputs from external actors feed into law and policy outputs. Crucially, however, a system of transparency must be supported by more formalised codes of conduct and means of access to policymakers, ensuring that those external actors with fewer resources have a better understanding of how to lobby, and a better opportunity to do so, while simultaneously helping to cancel out the disproportionate advantages derived from the current use of less formal channels and the benefits of stronger resources.

2. Suggestions for Future Research
A number of possible topics for further research emerge from this thesis. Of particular personal interest to your author is the possibility of conducting similar studies in other jurisdictions, such as the United States of America, arguably the lobbyists’ paradise; China, with its often intriguing take on the protection of well-known western IP; and the United Arab Emirates, a country with its sights set on moving beyond its traditionally oil-based economy into one firmly based around knowledge and innovation. Not only is IP an ever-growing sector in these territories, but each is built around a significantly different model of governance and democracy. The lessons to be learned from such examinations comparisons could, it is submitted, be invaluable.

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5 Chapter 3, 174.
Equality of access and influence forms the foundation of the second suggestion. Notwithstanding the options proposed throughout this thesis, the issue is one that clearly merits a great deal more thought. Indeed, it is quite clear that solutions to such problems appear to elude even the most prominent of democratic theorists. Of particular focus, it is suggested, is the aforementioned self-fulfilling prophecy. If the smaller voices are opting not to speak to policymakers because they think nobody will listen, how are we to convince them otherwise? One would also submit that any such inquiry necessitates a close look at regulation – regulation that would, as suggested herein, assist those lacking in lobbying know-how, while being sufficiently unburdensome as to be palatable to those more seasoned private actors already subject to industry-led self-regulation.

On a related theme, a further suggestion focuses on the representative capacity of interest groups. As noted above, it is often questionable whether or not such groups truly represent their members. There is considerable theoretical literature in the area, but there appears to be little in the way of empirical support. A first-hand examination of such groups, it is submitted, would certainly go some way toward enriching the field of knowledge in this area.

3. Final Thoughts and Contribution to Knowledge

As this thesis approaches its terminus, then, one must speak of implications and its original contribution to knowledge. From the outset, the goal has been to create a practical, workable model of democracy that strikes a realistic balance between classical conceptions of democracy and governance and contemporary practice, and that seeks to answer the question of whether lobbying can be justified as a component of democratic policymaking. IP has been used as a lens to focus that examination on a complex area of law and policy rich in diverse interests, actors of all shapes and sizes, and powerful and varied lobbying activity.

It is in this combination that the original contribution of this thesis resides. As observed at the outset, the examination of IP lobbying is far from new; indeed, it is the existence of such studies that highlighted the practice to begin with and lead to the further question of whether it could be justified as a democratic
exercise. It is by pairing such an examination with the model of democracy, however, that gives this thesis its value. Many classical models see lobbying as inherently incompatible with democracy, as its antithesis. It is respectfully submitted that this need not be the case. The central features of my model of democracy can clearly be seen in practice, but as has been observed in the case studies in this thesis, the normative aspects, the conditions, are generally less well-realised. Lobbying is indeed a vital element of democratic policymaking, but much work remains before it can perhaps be considered entirely democratic in and of itself.

At the start of the thesis, then, I observed that the word *lobbying* is not one that sits well alongside the concept of democracy. Considering classical conceptions, it does not. Considering the realistic nature of contemporary policymaking, particularly in an expertise-intensive area like intellectual property, however, it must. It is my fervent hope that you close this thesis with a better appreciation of the need to continue reshaping the lobbying landscape to eliminate the grave inequalities that continue to distort lobbying impact. It has been my goal to illustrate that lobbying need not be considered the opposite of democracy, but indeed an essential ingredient of it, if only some key conditions can be satisfied.
## Appendix 1
### Interview Questions

### 1. Hargreaves Review Panel Members Interview Questions

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<tr>
<th>Topic: Participant’s Position</th>
<th>Lead Question:</th>
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<tr>
<td></td>
<td>As an expert in this field were your views already well established at the outset? Did any of the evidence submitted (or any other form of influence) change your position (or that of another panel member) on any of the issues?</td>
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<tr>
<th>Topic: Participant’s Role</th>
<th>Lead Question:</th>
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<td></td>
<td>What motivated your involvement in the Review?</td>
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<tr>
<th>Topic: External Actors and Policy-Makers</th>
<th>Lead Question:</th>
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<td></td>
<td>What interaction did you have with other policy-makers and external actors and what role did they play? (Outside of the normal responses to the Call for Evidence)</td>
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<tr>
<th>Optional Follow-Up Prompts:</th>
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<tr>
<td>Was additional information provided outside the scope of standard responses to the call for evidence? How would you characterise the additional information and the reasons (if known) for providing it?</td>
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<td>Do you distinguish (and indeed did you during the Review) between the provision of factual information and the provision of a view or opinion? How so?</td>
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<tr>
<td>Did you have any association or connection with those responding to the call for evidence? Did this lead to any unofficial &quot;submissions&quot; or other involvement?</td>
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<tr>
<td>Please provide examples of the parties that you interacted with.</td>
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<td>Did any individuals / organisations use channels other than the official ones (i.e. responding to the call for evidence) to communicate with those running the review? Did organisations with an interest in the review, to your knowledge, attempt to &quot;lobby&quot; each other - to influence each other’s evidence submissions?</td>
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<th>Topic: External Influence</th>
<th>Lead Question:</th>
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<td></td>
<td>What particular role do you feel that lobbyists play in democratic policy making?</td>
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<th>Optional Follow-Up Prompts:</th>
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<tr>
<td>Do you feel that all sides of all issues addressed by the review were equally addressed? Were all voices equally represented and - more importantly - equally heard?</td>
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<tr>
<td>Does size matter? Does economic wealth or strength in numbers impact a particular group’s ability to gain access and influence? Do you feel that reviews of this kind give voices to those who might have a difficult time being heard in the legislative process?</td>
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</table>
Do you think that reviews like this should stand in lieu of lobbying? They provide evidence on which to base policy, but would they adequately serve the informational / educational role that lobbying can? Would you suggest more reviews like this as part of the policy-making process?

Do you consider the role played by external actors to be a valuable one? Would the policy-making process be better or worse-off without the influence of external actors?

Do you feel that the media plays an influential role in the democracy of policy-making? Is their reporting sufficiently unbiased and informative or does it instead serve to paint a more one-sided picture? Do you feel that the media gives sufficient coverage of reviews like this one?

**Topic: Transparency and Regulation**

**Lead Question:**

Would you favour a regulatory framework for lobbying, access and influence that would promote more equality between different lobbyists and greater transparency?

**Optional Follow-Up Prompts:**

If you have previously indicated that you find lobbying to be undemocratic, do you think that greater regulation and/or transparency would make it more democratic?

How strict do you think regulation should be? Should it be, for example, a set of broad guidelines or - at the opposite end of the scale - placed on a statutory footing?
### Topic: Participant’s Position

**Lead Question:**
With a background in creative industries did you have established views at the outset? Did any of the evidence submitted (or any other form of influence) change your position on any of the issues?

### Topic: Participant’s Role

**Lead Question:**
What motivated your involvement in the Review?

### Topic: External Actors and Policy-Makers

**Lead Question:**
What interaction did you have with other policy-makers and external actors and what role did they play? (Outside of the normal responses to the Call for Evidence)

**Optional Follow-Up Prompts:**
- Was additional information provided outside the scope of standard responses to the call for evidence? How would you characterise the additional information and the reasons (if known) for providing it?
- Do you distinguish (and indeed did you during the Review) between the provision of factual information and the provision of a view or opinion? How so?
- Did you have any association or connection with those responding to the call for evidence? Did this lead to any unofficial “submissions” or other involvement?
- Please provide examples of the parties that you interacted with.
- Did any individuals / organisations use channels other than the official ones (i.e. responding to the call for evidence) to communicate with those running the review? Did organisations with an interest in the review, to your knowledge, attempt to “lobby” each other - to influence each other’s evidence submissions?

### Topic: External Influence

**Lead Question:**
What particular role do you feel that lobbyists play in democratic policy making?

**Optional Follow-Up Prompts:**
- Do you feel that all sides of all issues addressed by the review were equally addressed? Were all voices equally represented and - more importantly - equally heard?
- Does size matter? Does economic wealth or strength in numbers impact a particular group’s ability to gain access and influence? Do you feel that reviews of this kind give voices to those who might have a difficult time being heard in the legislative process?
- Do you think that reviews like this should stand in lieu of lobbying? They provide evidence on which to base policy, but would they adequately serve the informational / educational role that lobbying can? Would you suggest more reviews like this as part of the policy-making process?
- Do you consider the role played by external actors to be a valuable one? Would the policy-making process be better or worse-off without the influence of external actors?
- Do you feel that the media plays an influential role in the democracy of policy-making? Is their reporting sufficiently unbiased and informative or
does it instead serve to paint a more one-sided picture? Do you feel that the media gives sufficient coverage of reviews like this one?

**Topic: Transparency and Regulation**

**Lead Question:**

Would you favour a regulatory framework for lobbying, access and influence that would promote more equality between different lobbyists and greater transparency?

**Optional Follow-Up Prompts:**

If you have previously indicated that you find lobbying to be undemocratic, do you think that greater regulation and/or transparency would make it more democratic?

How strict do you think regulation should be? Should it be, for example, a set of broad guidelines or - at the opposite end of the scale - placed on a statutory footing?
### Topic: Participant’s Position

**Lead Question:**
At the time of the review you were shadow minister for CMS if memory serves. Did you have established views on the subject matter of the review at the outset? Did any of the evidence submitted (or any other form of influence) change your position on any of the issues?

### Topic: Participant’s Role

**Lead Question:**
What motivated your involvement in the Review?

### Topic: External Actors and Policy-Makers

**Lead Question:**
What interaction did you have with other policy-makers and external actors and what role did they play? (Outside of the normal responses to the Call for Evidence)

**Optional Follow-Up Prompts:**
Was additional information provided outside the scope of standard responses to the call for evidence? How would you characterise the additional information and the reasons (if known) for providing it?

Do you distinguish (and indeed did you during the Review) between the provision of factual information and the provision of a view or opinion? How so?

Did you have any association or connection with those responding to the call for evidence? Did this lead to any unofficial “submissions” or other involvement?

Please provide examples of the parties that you interacted with.

Did any individuals / organisations use channels other than the official ones (i.e. responding to the call for evidence) to communicate with those running the review? Did organisations with an interest in the review, to your knowledge, attempt to ”lobby” each other - to influence each other's evidence submissions?

### Topic: External Influence

**Lead Question:**
What particular role do you feel that lobbyists play in democratic policy making?

**Optional Follow-Up Prompts:**
Do you feel that all sides of all issues addressed by the review were equally addressed? Were all voices equally represented and - more importantly - equally heard?

Does size matter? Does economic wealth or strength in numbers impact a particular group’s ability to gain access and influence? Do you feel that reviews of this kind give voices to those who might have a difficult time being heard in the legislative process?

Do you think that reviews like this should stand in lieu of lobbying? They provide evidence on which to base policy, but would they adequately serve the informational / educational role that lobbying can? Would you suggest more reviews like this as part of the policy-making process?

Do you consider the role played by external actors to be a valuable one? Would the policy-making process be better or worse-off without the influence of external actors?
Do you feel that the media plays an influential role in the democracy of policy-making? Is their reporting sufficiently unbiased and informative or does it instead serve to paint a more one-sided picture? Do you feel that the media gives sufficient coverage of reviews like this one?

**Topic: Transparency and Regulation**

**Lead Question:**

Would you favour a regulatory framework for lobbying, access and influence that would promote more equality between different lobbyists and greater transparency?

**Optional Follow-Up Prompts:**

If you have previously indicated that you find lobbying to be undemocratic, do you think that greater regulation and/or transparency would make it more democratic?

How strict do you think regulation should be? Should it be, for example, a set of broad guidelines or - at the opposite end of the scale - placed on a statutory footing?
### 4. Digital Economy Act Policy-Maker Interview Questions

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<tr>
<th>Topic: Factual Background</th>
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<tbody>
<tr>
<td><strong>Lead Question:</strong></td>
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<tr>
<td>What was the original position of various groups, parties and committees in Parliament at the outset. Did this change as the legislation progressed?</td>
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<tr>
<td><strong>Optional Follow-Up Prompts:</strong></td>
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<tr>
<td>Prior to the legislation's official passage through Parliament, did any committees (esp. back-bench committees) have a particular position on it? Did any such position differ from the party line?</td>
</tr>
<tr>
<td>How smoothly did the legislation proceed through Parliament? Were there any notable members or lords who were particularly vocal (either for or against)?</td>
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<td>What interaction did you have with external actors and what role did they play? Did you seek information, did they seek influence? How so?</td>
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<td>Did the provision of information or lobbying that took place here influence your stance? How so?</td>
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<td>Please provide examples of the parties that you interacted with.</td>
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<td>What channels did external actors use? Did they, for example, use personal or professional connections, the media, the internet etc. Do you feel that any of these channels were noticeably more used and/or effective than others?</td>
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**Topic: Transparency and Regulation**

**Lead Question:**

Would you favour a regulatory framework for lobbying, access and influence that would promote more equality between different lobbyists and greater transparency?

**Optional Follow-Up Prompts:**

If you have previously indicated that you find lobbying to be undemocratic, do you think that greater regulation and/or transparency would make it more democratic?

How strict do you think regulation should be? Should it be, for example, a set of broad guidelines or - at the opposite end of the scale - placed on a statutory footing?
## 5. Digital Economy Act External Actor Interview Questions

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<td>In cases where your role was to provide information, was that information presented in a way which influenced the course of the legislation or was it used more to enhance the understanding and knowledge of the issues involved among policy-makers?</td>
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<td>Do you feel that the provision of information, however intended, can sometimes be influential in any case - particularly where policy-makers are non-experts in the subject matter of the legislation?</td>
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<td>Did you or any colleagues of note have any connections to particular Lords / MPs that were relevant to the legislation? If so, what role - if any - did those connections play in the provision of information and/or lobbying that took place?</td>
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<td>Did your provision of information or lobbying influence any MPs / Lords’ stance? How so?</td>
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Do you feel that the media plays an influential role in the democracy of policy-making? Is their reporting sufficiently unbiased and informative or does it instead serve to paint a more one-sided picture?

**Topic: Transparency and Regulation**

**Lead Question:**

Would you favour a regulatory framework for lobbying, access and influence that would promote more equality between different lobbyists and greater transparency?

**Optional Follow-Up Prompts:**

If you have previously indicated that you find lobbying to be undemocratic, do you think that greater regulation and/or transparency would make it more democratic?

How strict do you think regulation should be? Should it be, for example, a set of broad guidelines or - at the opposite end of the scale - placed on a statutory footing?
### 6. CII Directive External Actor Interview Questions

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<td>As the legislation changed over the course of its life, do you feel that you played a role in this change?</td>
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**Topic: The EU Lobbying Framework**

**Lead Question:**

What are your views on the framework for lobbying in the EU at present?

**Optional Follow-Up Prompts:**

If you have previously indicated that you find lobbying to be undemocratic, do you think that greater regulation and/or transparency would make it more democratic?


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