



**Expert Seminar on
“The European Convention on Transfrontier Television
in an Evolving Broadcasting Environment”**

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**“Does the Existing Regulatory Framework for
Television Apply to the New Media”**

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INTRODUCTION

The central *problématique* of this article, whether the existing European regulatory framework for television is applicable to the so-called ‘new media,’ can no longer be considered virgin territory. Despite its relatively recent introduction into legal debate, its expanses have already been explored in discussions on convergence, access rights, the advent of digital television, and so on. The law and relevant policy formulation, both at European and national levels, have struggled to keep pace of technological developments. Consensus has yet to be reached on the most suitable approach to the question of regulating the new media, thus guaranteeing the topicality of this question for some time to come. In the absence of any European legislation dealing squarely and definitively with the issue, any charting of the terrain that has already taken place would benefit greatly from the clarification that such legislation would provide.

In the first section of this paper, it is proposed to conduct an audit of existing definitions – at the European level - of broadcasting and other new media activities that are colourably of the same nature. The focus on the European regulatory framework, rather than on the relevant frameworks in a selection of individual States, can be explained by the fact that European legislation often strives to provide a blue-print for equivalent national legislation. The latter is usually required to give faithful expression to principles formulated at the international level with due allowance, where appropriate, for the cultural and other specificities of each State.

The second section of the article will focus on conceptual and substantive considerations. It is hoped that this will suitably complement the initial emphasis on definitional matters. By raising a panoply of relevant issues, this section aims to generate further discussion at the seminar. In light of this objective, firm stand-points are not always taken. The tenor of the article is – in the main – discursive, although it has also incorporated certain elements of personal reflection.

Finally, a number of pertinent conclusions will be drawn from the conceptual and definitional audits. These conclusions will emphasise the more salient points of both audits and reiterate certain policy considerations for the future.

I. DEFINITIONS

(i) Existing Regulatory Framework for Television

The existing regulatory framework for television broadcasting in Europe rests on two main pillars, the first of which to be elaborated was the European Convention on Transfrontier Television (ECTT), 1989,¹ as amended by the Protocol thereto in 1998.² The ECTT is the progeny of the Council of Europe. It has been ratified or acceded to by 23 States at the time of writing,³ and a further 11 States are signatories to the Convention, but have yet to ratify it. The Protocol amending the ECTT has not yet entered into force.

Chronologically, the second pillar to be constructed was EC Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the

¹ Adopted on 5 May 1989, E.T.S. No. 132.

² Adopted on 1 October 1998, E.T.S. No. 171.

³ See further, the website of the Treaty Office of the Council of Europe: <<http://conventions.coe.int>>.

‘Television Without Frontiers’ Directive).⁴ The Directive, which was amended by Directive 97/36/EC of the European Parliament and of the Council,⁵ is applied in the national legal orders of all Member States of the European Union (EU) (currently 15). Its provisions have also dictated some of the terms of accession agreements concluded with aspirant member states.

The story of these two pieces of legislation is one of intertwined destinies. The ECTT was elaborated primarily to facilitate freedom of expression through the television broadcasting media, irrespective of national boundaries. Other aims of the Convention include the cultivation of European heritage and the fostering of European audiovisual production. Its conception was also motivated by the need to provide the public with a full-range, high quality television service. A main stimulus for the drafting of the ‘Television Without Frontiers’ Directive was the classification of television broadcasting as a service within the meaning of the Treaty establishing the European Community.⁶ There was thus a perceived need to remove regulatory disparities between Member States and to co-ordinate applicable laws. The goal of facilitating the free movement of television broadcasting services would appear to have been more immediate than that of facilitating the unimpeded circulation of information and ideas. The interests of television viewers as consumers were also contained in the conceptual crucible from which the Directive emerged. In spite of their different objectives, these two pivotal legal instruments were negotiated in parallel in order to maintain coherence between them and in the interest of ensuring legal certainty for States and transfrontier broadcasters alike.

(a) The European Convention on Transfrontier Television

Some of the terms defined at Article 2 of the Convention are of cardinal importance to any consideration of the continued applicability of the Convention in a society that is becoming increasingly dominated by the new media. The first of these terms is ‘transmission,’ which is defined as “the initial emission by terrestrial transmitter, by cable, or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public.”⁷ The definition also contains a crucial qualifying clause, to the effect that a transmission “does not include communication services operating on individual demand”⁸ (see further *infra*). Retransmission, according to Article 2b, “signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public.” The term ‘programme service’ is, in turn, defined as “all the items within a single service provided by a given broadcaster.”⁹

The definition of ‘broadcaster’ in Article 2c was modified somewhat by the Amending Protocol to the Convention with a view to bringing it into line with the definition of broadcaster in the amended “Television Without Frontiers” Directive.¹⁰ It is now understood to mean, “the natural or legal person who has editorial responsibility for the composition of

⁴ Adopted on 3 October 1989, OJ L 298, 17.10.1989, p. 23.

⁵ Adopted on 30 June 1997, OJ L 202, 30.7.1997, p. 60.

⁶ See, in particular, Article 50 (ex Article 60).

⁷ Article 2a, European Convention on Transfrontier Television, 1989.

⁸ *Ibid.*

⁹ Article 2d, *ibid.*

¹⁰ Article 3, Protocol Amending the European Convention on Transfrontier Television, 1998.

television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party.”¹¹

(b) The ‘Television Without Frontiers’ Directive

The definitional parameters of the Directive are set out at Article 1. The definition of ‘television broadcasting’ has been retained in its original form at Article 1(a): “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services.”¹² The definition of ‘broadcaster’ was, however, amended, and now reads: “the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties.”¹³

(ii) New Media / Information Society Services

The convenient, wide-embracing term, ‘new media services,’ is generally regarded as being synonymous with the term ‘Information Society Services.’ The definitional contours of the latter term have already been drawn rather tentatively. They are given their clearest legal expression to date in Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations,¹⁴ as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998.¹⁵ The operative part of this Directive, as amended, describes an ‘Information Society Service’ as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”

Further elucidation of this definition is forthcoming: “at a distance” should be interpreted as meaning “that the service is provided without the parties being simultaneously present;” “by electronic means” is explained as “that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means” and “at the individual request of a recipient of services” means “the service is provided through the transmission of data on individual request.”¹⁶ It is also expressly stated that radio broadcasting services and television broadcasting services, as defined by Article 1(a) of the ‘Television Without Frontiers’ Directive (quoted *supra*), are beyond the purview of the definition of Information Society Services. This would appear to rule out the possibility of broadcasting services, at least as classically defined, being considered as Information Society Services. The definitional line of demarcation is the individual/public nature of any relevant service. This distinction is, however, problematic, as will be seen *infra*.

¹¹ *Ibid.*

¹² Article 1(a), The ‘Television Without Frontiers’ Directive, *op. cit.*

¹³ Article 1(b), *ibid.*

¹⁴ OJ L 204, 21.7.1998, p. 37.

¹⁵ OJ L 217, 5.8.1998, p. 18.

¹⁶ Article 1(2), Directive 98/34/EC, as amended, *op. cit.*

The definition of ‘Information Society Services’ provided by Directive 98/34/EC, as amended, may yet prove seminal. It has already been incorporated into other legal texts, foremost amongst which are Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access¹⁷ and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).¹⁸ The latter Directive states categorically that radio and television broadcasting (as defined in the Television Without Frontiers Directive) may not be brought within the definitional ambit of ‘Information Society Services’ as they “are not provided at individual request.”¹⁹ It thus makes the distinction between broadcasting, *stricto sensu*, on the one hand, and point-to-point services, such as video-on-demand and the provision of commercial communications by electronic mail (which it holds to be ‘Information Society Services’), on the other.

The Directive on electronic commerce then proceeds to enumerate different types of services that are not included in the definition of the Information Society: “the use of electronic mail or equivalent individual communications, for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons”; “the contractual relationship between an employee and his employer” and “activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient.”²⁰ Once again, the difference of approach for communications of an individual nature is conspicuous.

The seminal character of the aforementioned definition of Information Society Services may also be measured by its ability to transcend institutional barriers and gain acceptance in the Council of Europe; an achievement which it can boast already. For instance, the definition of ‘Information Society Services’ used in the Council of Europe’s Draft Convention on information and legal co-operation concerning “Information Society Services,”²¹ is identical to the one elaborated in Article 1(2) of Directive 98/34/EC, as amended by Directive 98/48/EC. The aim of the Draft Convention is to “set up a legal information and co-operation system in the area of new communication services following the example of Directive 98/48/EC.”²² Article 2 of the Draft Convention retains, as an integral part of its definition of Information Society Services, the three cumulative criteria stipulated in the corresponding definition in amended Directive 98/34/EC (“at a distance”, “by electronic means” and “at the individual request of a recipient of services”). The Draft Convention did not even divest itself of the economic element to the original definition (“any service, *normally provided for remuneration...*”²³); a defining feature of the EU’s traditional approach to such matters, as opposed to the pro-freedom of expression character of the Council of Europe’s approach. It should be noted, *en passant*, that the definition of ‘information society services’ in the European Convention on the Legal Protection of Services Based on, or Consisting of,

¹⁷ OJ L 320, 28.11.1998, p. 54.

¹⁸ OJ L 178, 17.1.2000, p. 1.

¹⁹ Para. 18, Preamble, *ibid.*, p. 3.

²⁰ *Ibid.*, pp. 3-4.

²¹ The text of the Draft Convention is contained in the request for an opinion from the Committee of Ministers, Parliamentary Assembly Doc. 8982 of 22 February 2001, available at:

<http://stars.coe.fr/doc/doc01/EDOC8982.HTM>.

²² Para. 1, Explanatory Report to the Draft Convention, *ibid.*

²³ Emphasis added.

Conditional Access²⁴ has a similar economic coloration, at least when examined in the light of its Explanatory Report.²⁵

The genesis of the Convention is candidly traced in its Explanatory Report back to Directive 98/48/EC. The overall tenor of the Explanatory Report would suggest that the guiding principle of the drafting process was to produce a text that would facilitate the harmonious and complementary interaction of the law of two intergovernmental organisations. The Report states: “It is clear that European Community legislation and international law need to evolve in this context as far as possible together and to this end, the two legal instruments need to have similar legal scope. As directives are binding legal instruments within the European Community legal order as far as the objectives are concerned, a convention-type binding international legal instrument appears to be the most appropriate Council of Europe instrument from an international law point of view.”²⁶

(iii) Definitional Discrepancies

Since their emergence from the chrysalis of traditional broadcasting, the new media have developed at a precipitous rate. Until recently, webcasting, simulcasting, live-streaming, interactive television, portal television, video-on-demand, near-video-on-demand and other technological innovations were considered to be experimental, ancillary or peripheral services provided by traditional broadcasters. The mainstreaming of these services into everyday life has prompted calls for a legal redefinition of broadcasting, as current practices no longer match the outmoded frameworks to which they are purportedly subject. Nevertheless, it is not the intention of this paper to scrutinise the minute details of the changing technological face of broadcasting, as this has been done elsewhere.²⁷

In the past, there has been a tacit endorsement of the view that the existing legal definitions of technological considerations germane to the audiovisual sector were adaptable. This view prevails in some quarters, despite the dynamics of technological change. Reliance on this perceived adaptability was not without its advantages. Its proponents would argue that the flexible interpretation of existing definitions is the most practical tactic to be employed in a race against technological innovation that will invariably leave the law breathless and ineffective. The drafters of the ECTT opted for the term “transmission” in a bid to “embrace the whole range of technical means employed to bring television programme services to the public.”²⁸ The significance of this is that their overriding concern was not which particular technical means was employed, but whether “the television programme service in question is designed for direct or indirect reception by the general public.”²⁹ The recurrence of the criterion of reception by the “general public” attests once again to its firm anchorage in the whole broadcasting regulatory construct.

This premise that existing legal definitions are adaptable would also appear to have informed the drafting of Recommendation No. R (99) 14 of the [Council of Europe] Committee of Ministers to Member States on Universal Community Service Concerning New

²⁴ Adopted on 24 January 2001, E.T.S. 178.

²⁵ See, in particular, para. 17 of the Explanatory Report.

²⁶ Para. 3, Explanatory Report to the Draft Convention on information and legal co-operation concerning “Information Society Services,” also contained in Parliamentary Assembly Doc. 8982, *op. cit.*

²⁷ See, for instance, N. Helberger, ‘Report for the Council of Europe on the Neighbouring Rights Protection of Broadcasting Organisations: Current Problems and Possible Lines of Action’, 1999, in particular, pp. 7 *et seq.*

²⁸ Para. 82, Explanatory Report to the revised European Convention on Transfrontier Television, T-TT(2000) 8.

²⁹ *Ibid.*

Communication and Information Services.³⁰ The Explanatory Memorandum to the Recommendation³¹ seeks to justify its use of the term “new communication and information services” without actually defining those services:

“...This term or similar variants are widely used, commonly referring to digital communications and information services, such as the Internet with its World Wide Web and E-mail. The express mention of the Internet is avoided by the Recommendation, because of the rapid and unpredictable technological development in this field and the possible limitation which might result from an exclusive reference to the Internet. The word ‘new’ indicates this recent and on-going development, although some aspects of this development might not be qualified as new in the near future. In the light of the descriptive nature of the term, member States have the discretion to be more specific in accordance with their national circumstances and policies. It must be acknowledged, however, that the word ‘Internet’ is commonly used as a generic term for these new communication and information services.”³²

The foregoing quotation focuses on practical and semantic considerations. However, another dimension to the question is conceptual and involves an examination of whether the adaptability of existing regulations is actually desirable. The debate will inevitably centre on the competing merits of adapting existing laws to cater for technological developments registered in the audiovisual domain and of creating new laws to serve the same purpose. There is no definitive, universally-applicable answer to the question of whether (i) existing instruments will prove sufficiently adaptable to cater for future developments or (ii) recourse to new instruments will prove necessary. Either way, it is probable that in the near future, the public opinion-making potential of individual new media services will move closer to the definitional centre of gravity, in so far as regulation is concerned.

The notion of transmission to the “general public” and “public” features prominently in the definitions of the ECTT and the ‘Television Without Frontiers’ Directive respectively. So too, does the express exclusion of individualised services from the scope of application of these legislative kingpins of European television broadcasting. The Explanatory Report to the revised ECTT offers illumination on the matter: “By ‘communication services operating on individual demand’, the authors of the Convention wished to exclude services which cannot be regarded as being designed for reception by the general public, such as video-on-demand, and interactive services like video conferencing, videotext, telefacsimile services, electronic data banks and similar communication services.”³³ The Report fails to clarify the entire definitional quandary, however. The provisions of the ECTT *do* apply to subscription television, pay-per-view, near video-on-demand or teletext services. Conversely, closed user-group systems do not qualify under the definition of ‘transmission.’ This is because “they are not intended for reception by the general public.”³⁴ The distinction between services sought and provided on individual demand, on the one hand, and specialised media markets, where the broadcaster responds to the needs and preferences of targeted individuals, on the other, is uncertain. The potential for overlap between the two is not negligible and future technological advances are not likely to simplify their relationship. Nor is the tendency, illustrated above, of legal instruments dealing with Information Society Services to exclude classical broadcasting activities from their scope.

³⁰ Adopted on 9 September 1999, available at: <http://cm.coe.int/ta/rec/1999/99r14.htm>.

³¹ CM(99)112 – extract, 30 July 1999, available at: <http://cm.coe.int/reports/cmdocs/1999/99cm112ext.htm>.

³² Para. 8, *ibid*.

³³ Para. 83, *op. cit*.

³⁴ Para. 84, *ibid*.

One possible way of resolving definitional difficulties would be to focus on the increasingly-accepted observation that the individualised nature of Information Society Services precludes them from being categorised as broadcasting services. As narrow, straightforward definitions of these two distinct types of services are mutually exclusive, there would appear to be no justification for subjecting them to the same regulatory regime. The question of the adaptability of the existing regulatory framework therefore does not arise.

The concept of technological neutrality suggests itself as another possible way of resolving definitional wrangling over the precise scope of broadcasting and broadcasting-like activities which might more readily be classed as Information Society Services. Natali Helberger, after adverting to the difficulties in classifying “services provided on the basis of new transmission techniques or converging media,”³⁵ concluded that “a definition of broadcasting should be given which is as technology-independent as possible and allows to cover satellite transmission, transmission in digitised and encrypted form as well as ancillary text.”³⁶ One attraction of the technology-neutral approach is that it allows policy- and law-makers to focus on substance rather than form. This should facilitate the channelling of intellectual activity into the shaping of clear priorities and policies that would not be at the mercy of largely unpredictable technological developments.

II. APPLICATION

Perhaps the best starting point for the second section of this article is a quotation from Beth Simone Noveck: “[T]hrough the future is digital, our thinking about regulation is analogue.”³⁷ There is little doubt that the future of television in Europe will be shaped by digital, online and other technologies and there is no doubt whatsoever as to the veracity of the pointed second observation in the quotation. In a highly instructive piece of writing, she traces the development of the existing European regulatory regime for broadcasting and makes valuable, comprehensive recommendations for future orientations and priorities.³⁸ It is proposed to flesh out Noveck’s quoted remark in the forthcoming pages.

Any legislative change, or even any contemplation of such change, must not be driven solely by technical developments. Changes in the fundamental character of the media are not entirely index-linked to changes in methods of communication. It has been argued by Thomas Gibbons that the latter does not necessarily give rise to the former. The public interest in media activity is no less important; there will continue to be concern about free speech and editorial independence, together with the demands of quality and accountability, the argument runs. “What convergence does do,” Gibbons states, “is to challenge us to examine the grounds for traditional regulation and to ask whether it is based on old forms rather than some broader and enduring principles.”³⁹ This observation is not limited in its application to convergence. It is equally valid in regard to other new media services. Two main ways of exercising political

³⁵ *Op. cit.*, p. 12.

³⁶ *Ibid.*, p. 13.

³⁷ B.S. Noveck, “Thinking Analogue About Digital Television? Bringing European Content Regulation Into The Information Age”, in C. Marsden & S. Verhulst, Eds., *Convergence in European Digital TV Regulation* (Blackstone Press Limited, London, 1999), pp. 37-63, at p. 38.

³⁸ See also – in the same volume – C. Cowie & C. Marsden, “A Comparative Institutional Analysis of Communications Regulation”, pp. 191-215, for a helpful overview of different approaches to convergence.

³⁹ T. Gibbons, “Concentrations of Ownership and Control in a Converging Media Industry,” in C. Marsden and S. Verhulst (Eds.), *Convergence in European Digital Television* (Blackstone Press Ltd., London, 1999), pp. 155-173, at p.156.

control over the new media have been identified by Giampiero Giacomello: “*limitation and discrimination of access*” (which could conceivably include licensing or technological requirements) and “*copyright on contents exchanged on-line*”.⁴⁰ These will now be examined in turn.

(i) The Democratic Underpinning of Broadcasting Regulation

A selection of rationales are routinely proposed to justify the continued existence of broadcasting licensing systems. The more cogent of these include the frequency scarcity argument and the safeguarding of pluralism/diversity argument. Both justifications are outcrops of a particular conception of democracy; in short, “a conception of democracy which requires that the speech of the powerful not drown out or impair the speech of the less powerful.”⁴¹ However, against the background of dizzying technological changes, the legitimacy of these rationales is being subjected to sustained challenges.

A brief examination of the conception of democracy in question will provide an elucidatory preface to the subsequent entry into the specifics of each of the aforementioned rationales. The right to freedom of expression, opinion and information is central to the democratic paradigm. Indeed, this multivalent right was aptly recognised as being the “touchstone” of human rights by the United Nations General Assembly in 1946.⁴² An entire panoply of adjectives could be drawn upon in order to adequately extol its virtues: fundamental, foundational, instrumental, enabling... Its cardinal importance for individual self-fulfilment; advancement of knowledge and attainment of truth in society; participation in democratic politics; promotion of transparency in government and of a fair and open legal system, is uncontested.

Broadcasting – in what ever form – offers a particularly important opportunity for the realisation of individual and collective rights to freedom of expression. Obviously, there are huge logistical impediments to everyone claiming a right of access to broadcasting outlets. In the words of Judith Lichtenberg, “[T]o suppose that everyone has rights to communicate in the mass media is to open the way for such overload and chaos as to constitute a virtual *reductio ad absurdum*.”⁴³ As with similar problems in the process of democratic governance, the solution of representation has been *de rigueur* in the broadcasting sphere.

It stands to reason that broad access and some form of proportionality would be necessary in the broadcasting sector, if the defining tenets of democracy are indeed to be honoured and if the so-called “tyranny of the majority” is to be avoided. Social Darwinism and red-blooded capitalism would be the order of the day, were the “market” to be left, unregulated, to its own devices. It is for this reason that Eric Barendt has argued, forcefully, that “[T]rue freedom of speech in short requires the recognition of claim-rights for persons wishing to speak and the imposition of corresponding duties to afford them facilities and grant equal opportunities for the exercise of these rights.”⁴⁴ Thus, it has largely been in reaction to fears of market

⁴⁰ G. Giacomello, “Who is ‘Big Brother’?”, *5 International Journal of Communications Law and Policy* (Summer 2000), p. 3. Emphasis in original text. Available at: <<http://www.ijclp.org>>.

⁴¹ O.M. Fiss, *The Irony of Free Speech* (Harvard University Press, Massachusetts, 1996), p. 17.

⁴² UN General Assembly Resolution 59(1), 14 December 1946.

⁴³ J. Lichtenberg, “Introduction”, in J. Lichtenberg, Ed., *Democracy and the mass media* (Cambridge University Press, US, 1990), pp. 1-21, at p. 17. For a related discussion, see also, E. Barendt, “Inaugural Lecture – Press and Broadcasting Freedom: Does Anyone have any Rights to Free Speech?”, in E.M. Barendt, Ed., *Media Law* (Dartmouth Publishing Co. Ltd., England, 1993) pp. 241-260, at p. 258.

⁴⁴ E. Barendt, *Freedom of Speech* (Clarendon Press, Oxford, 1985 – Reprint of 1996), p. 83.

dominance, the growth of “information-capitalism”,⁴⁵ the muscling to the sidelines, or worse, the progressive silencing of minority voices, that the case has consistently been made in favour of the State exercising some kind of countervailing or corrective or influence over broadcasting. It is important to stress that regulation need not necessarily rhyme with restrictive practices; it also contains the potential for introducing countermajoritarian measures for the greater good. Enter public service broadcasting. A plethora of illuminating quotations on this topic can be cherry-picked from the works of leading authors in the field. For present purposes, one quotation shall suffice: “Notwithstanding the extent of segmented, commercial broadcasting – indeed, because of it – public service broadcasting remains a significant element of democratic participation in a pluralist society.”⁴⁶

Public service broadcasting is not by any means the only way in which the State can seek to exert a stabilising influence over the market. Recourse is also frequently had to the adoption and enforcement of measures to safeguard pluralism. A crucial observation is that pluralism can take two forms – external (involving regulation and control of ownership of broadcasting outlets) and internal (involving content-related regulation; a typical feature of public service broadcasting). In other words, the protection and promotion of pluralism relies on both structural and behavioural regulation. It is now proposed to examine each of these in turn.

(ii) Structural Regulation

Writing in the early 1990s, Barendt drew attention to the viewpoint that the extant regulation of the broadcasting sector in Europe was “increasingly of a cosmetic character.”⁴⁷ Notwithstanding the revamping of European broadcasting regulations in 1997 and 1998, by amendments to the ‘Television Without Frontiers’ Directive and the ECTT respectively, this critique of the fundamental nature of the European regulatory scheme merits attention. The place and perceived role of regulation in an era increasingly moulded by new technologies are contestable. The advent of convergence technologies, multiplexing and so on, might already have sounded the death-knell for the scarcity rationale. As concerns the democratic character of the mass media shift from the lack of frequency resources to questions of access determined by gateways, bottlenecks, smart cards and other such features of the new digital-dominated regime, new reasons must be sought to justify the regulation of one branch of the media, and not of others (for example the press). Such differential treatment for one type of media seems anomalous.

It is sometimes argued that there is greater need for regulation of the audiovisual media as they are widely thought to have the greatest impact on public opinion. This argument could be countered by the assertion that the pervasiveness or effectiveness of different modes of expression is an inappropriate test for deciding whether they should be governed by State or other formal regulation. As Barendt observes, “[I]t cannot be right to subject more persuasive types of speech to greater restraints than those imposed on less effective varieties.”⁴⁸

⁴⁵ S. Curry Jansen, *Censorship: The Knot That Binds Power and Knowledge* (Oxford University Press, USA, 1988) pp. 167 *et seq.*

⁴⁶ T. Gibbons, *Regulating the Media* (2nd Edition) (Sweet & Maxwell, London, 1998), pp. 63/4.

⁴⁷ E. Barendt, *Broadcasting Law: A Comparative Study* (Clarendon Press, Oxford, 1993), p. 2.

⁴⁸ *Ibid.*, p. 7.

The viewpoint espoused by Barendt is one that also has clear reverberations throughout the academic world. With the notable exception of certain views canvassed by Lee C. Bollinger,⁴⁹ there is discernible antipathy among commentators towards the fact that what they consider to be conceptually obsolete distinctions continue to survive in fact. Nevertheless, the qualitative criterion of ability to influence public opinion cannot easily be jettisoned, for – in the example offered by Owen M. Fiss – “[C]ompare one day’s work of distributing pamphlets at a local shopping center with a half hour on TV.”⁵⁰ This point is directly linked to the issue of access broached in the previous section. The issue could more accurately be described as equitable or effective access. The fudge of limp lingo such as “reasonable” or “substantial” amounts of broadcasting time; these glib sound-bites that are notoriously difficult to define, should no longer be accepted. Access must be measured in both quantitative and qualitative terms if it is to be in any way meaningful. This desideratum is equally applicable to traditional forms of broadcasting and to the new media alike.

Despite the documented divergence of opinion on the notion of ability to influence public opinion, the notion remains at the heart of approaches to broadcasting in a number of states. In Germany, for instance, it is one of three main criteria on which the very concept of broadcasting is based (with the others being the transmission of content by electronic devices and that they be directed at the public. Under the rubric of *Mediendiensten*, different standards are applied to different types of media services. The criterion of impact of the medium is not unique to Germany. Sweden, for example, recognises a similar concept and in the UK, the notion translates as audience reach. To date, traditional forms of broadcasting have been perceived as having a greater ability to influence public opinion than multimedia services.⁵¹

Another question which could usefully be probed further is whether broadcasting – in its traditional forms – is likely to remain in pole position insofar as impact on public opinion is concerned. Broadcasting services in the digital and online worlds are becoming increasingly customised and personalised; a trend that is a source of anxiety for some commentators. Cass R. Sunstein, for instance, fears the deleterious effects that such individualising trends will have on democracy. The proliferation of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas. He argues that this is corrosive of the democratic ideal, or at least the ideal of deliberative (and thus participative) democracy. He writes that:

“[...] people should be exposed to materials that they would not have chosen in advance. Unplanned, unanticipated encounters are central to democracy itself. Such encounters often involve topics and points of view that people have not sought out and perhaps find quite irritating. They are important partly to ensure against fragmentation and extremism, which are predictable outcomes of any situation in which like-minded people speak only to themselves. I do not suggest that government should force people to see things that they wish to avoid.

⁴⁹ See generally, Lee C. Bollinger, “Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media”, 75 *Michigan Law Review* (1976).

⁵⁰ O.M. Fiss, “Why the state?” in J. Lichtenberg, Ed., *Democracy and the mass media* (Cambridge University Press, USA, 1990), pp. 136-154, at p. 151. He continues, “Effective speech in the modern age is not cheap.”

⁵¹ T. McGonagle, “How to distinguish between broadcasting and new media services / Broadcasters’ access to new media markets”, Report on a Round Table organised by the Institute for Information Law (IViR) of the University of Amsterdam and the European Audiovisual Observatory on 16 June 2001 (publication forthcoming).

But I do contend that in a democracy deserving the name, people often come across views and topics that they have not specifically selected.”⁵²

These individualising trends in new forms of broadcasting also engender social fragmentation, by eroding the potential for shared experience through broadcasting. Furthermore, “[W]ithout shared experiences, a heterogeneous society will have a much more difficult time in addressing social problems.”⁵³

(iii) The Suitability of Existing Licensing Regulations for the New Media

It must be remembered that licensing – as understood in the context of the European Convention on Human Rights⁵⁴ – merely refers to positive measures to ensure the orderly control of broadcasting in a given country. The European Court of Human Rights held in *Groppera Radio AG & Others v. Switzerland* that “the purpose of the third sentence of Article 10 § 1 (art. 10-1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole.”⁵⁵ In its ruling in *Informationsverein Lentia & Others v. Austria*, the Court commented that “[T]echnical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international instruments.”⁵⁶

Another commentator points out that “the driver for new developments in technology and media has always been the functionality.”⁵⁷ The upholding of standards and diversity of content are perceived as being somewhat less determinative priorities. This frank observation partly explains the inexorable globalisation, commercialisation and individualisation of communications⁵⁸ in recent times. These trends have, in turn, led to the spawning of special interest services in the media sector. It is when viewed against such a backdrop that the pluralism/diversity rationale for the regulation of broadcasting services is at its most forceful. The positive, empowering purpose of State regulation to secure a plurality of content (including minority voices) in broadcasting should not necessarily be dismissed as an abridging influence. Much, of course, depends on the details and actual implementation of such State regulation.

⁵² C.R. Sunstein, *Republic.com* (Princeton University Press, US, 2001), pp. 8, 9.

⁵³ *Ibid.*, p. 9.

⁵⁴ The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, E.T.S. No. 5.

⁵⁵ Judgment of 28 March 1990, Series A, no. 173, para. 61.

⁵⁶ Judgment of 24 November 1993, Series A, no. 276, para. 32.

⁵⁷ M. Ezekiel, “The development of digital platforms for audiovisual services: technological and market implications”, Paper (CONF/AD (2000) 8) delivered at the Council of Europe Conference on New Digital Platforms for Audiovisual Services and their Impact on the Licensing of Broadcasters, Strasbourg, 13 September 2000.

⁵⁸ See P. Donges, “Future policy frameworks for the dissemination of new audiovisual services on digital platforms: web casting, web radio, web television etc”, Paper (CONF/AD (2000) 6) delivered at the Council of Europe Conference on New Digital Platforms for Audiovisual Services and their Impact on the Licensing of Broadcasters, Strasbourg, 13 September 2000.

The question of whether licensing remains a social imperative in the Information Society is currently under consideration by the recently-constituted Council of Europe Group of Specialists on the Democratic and Social Implications of Digital Broadcasting (MM-S-DB).⁵⁹ At its inaugural meeting, the Group examined the steady undermining of the legitimacy of licensing requirements based on, *inter alia*, the frequency scarcity argument. It also explored suggestions for the abolition or simplification and liberalisation of licensing regimes. The Group has decided to prepare a draft report on the democratic and social implications of digital broadcasting. The draft report should provide an overview of the current situation and allow the Group to adopt a policy position and issue any recommendations it may have, within its terms of reference.⁶⁰ The further probing of a range of pertinent questions was also pledged.⁶¹

The EU has also demonstrated its preoccupation with rights of access to new technologies. Its preoccupation is of predominantly economic/commercial hues. Article 4 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals⁶² sets out some of the conditions governing conditional access to digital television services to apply “irrespective of the means of transmission.” Of particular interest for present purposes is Article 4(c), which reads:

“Member States shall take all the necessary measures to ensure that the operators of conditional access services, irrespective of the means of transmission, who produce and market access services to digital television services:

- offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters’ digitally-transmitted services to be received by viewers authorized by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears [...]”

A further safeguard aimed at preventing the abuse of a dominant position in connection with conditional access technology is to be found in the subsequent provision, Article 4d: “when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems shall ensure that this is done on fair, reasonable and non-discriminatory terms [...]”

By way of synopsis, it can be stated that the Council of Europe and the EU attach importance to the licensing of broadcasting for different reasons, in keeping with their respective institutional priorities. The frequency scarcity rationale is practically redundant as far as the new media are concerned. Further, the validity of the justification based on competition law is also tenuous in the new, emerging environment that has witnessed the widespread elimination of certain barriers to individual access to modern technology. The time is ripe for a thorough reappraisal of all dimensions to broadcasting regulation as its theoretical foundations were quite simply not designed to support the new media.

⁵⁹ Appendix III: Pointers for discussion on possible lines of action by the MM-S-DB, Report (MM-S-DB (2001) 5) of 1st Meeting of the MM-S-DB, Strasbourg, 21-23 March 2001.

⁶⁰ Report, *ibid.*, para. 43.

⁶¹ *Ibid.*, para. 44.

⁶² OJ L 281, 23.11.1995, p. 51.

(iv) Behavioural Regulation

The regulation of expression has traditionally lent itself rather easily to categorisation, particularly in the broadcasting sector, where regulation has customarily been divided into negative, positive (affirmative) and hybrid measures. In order to avoid the possible value-judgment connotations of such appellations, one could also refer to prohibitive or facilitative regulatory measures, or a mixture of both. In the interests of clarity, it should be stated that for present purposes, “prohibitive” means restrictive of certain content, whereas “facilitative” means assisting the creation and/or implementation of a public service remit. The first category could include measures for the protection of minors or for the prohibition of racism, incitement to hatred or crime, war propaganda and hard-core pornography. The second could include access rights, programme standards, must-carry rules, the regulation of advertising and rules on the origin of programmes. Typically, the third category would include rules on (television) advertising (maximum duration, minimum intervals, etc.), rules on the national or European origin of programme material and rules prohibiting the transmission of films before they have been shown in the cinema. Of the three categories, it is only the third that could be said to be medium-specific.

(v) The Suitability of Existing Content Regulations for the New Media

The seemingly relentless technological advances that have been instrumental in redefining modern society hold a revolutionary potential of immanent contradictions. Unprecedented sophistication in private and public forms of communication and access to vast sources of information counterbalance the more documented down-side to this potential, the so-called “dark side of the new diversity.”⁶³ The very existence of such tenebrous pursuits as the dissemination of pornography, child pornography, racist and hate speech, and other forms of socially-noxious cyber-crime, means that it is probable that the new media will continue to be regulated. These are, after all, concerns that are independent of distinctions between different kinds of media and transcend cultural and national frontiers as well.

Nonetheless, given the global and complicated nature of information technology and the modern media in general, regulatory difficulties abound. As concisely stated by Lawrence Lessig: “[R]elative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption – all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace.”⁶⁴

It has also been noted that “the international nature of the Internet and of other forms of new media will mean that future controls will have to be international in nature or involve self-regulation by parts of the industry itself. New attempts at content regulation are thus likely to look very different from techniques adopted in the past.”⁶⁵

Self-regulation by the Internet industry has been described as “a technique of regulation rather than an alternative to regulation.”⁶⁶ As such, it is not only an increasing trend in many

⁶³ D. Goldberg, T. Prosser & S. Verhulst, *Regulating the Changing Media* (Clarendon Press, Oxford, 1998), p. 16.

⁶⁴ L. Lessig, *Code and other laws of cyberspace* (Basic Books, New York, 1999), p. 166.

⁶⁵ D. Goldberg *et al.*, *op. cit.*, p. 17. For a detailed exposition and analysis of the legal and technical difficulties concerning regulation of new forms of media, see generally, pp. 1-27; 295-314.

⁶⁶ *Ibid.*, p. 312.

jurisdictions, but an appropriate basis for “the control of parties working in the Internet field.”⁶⁷ However, the precise model of self-regulation opted for should not allow the Government to abdicate its ultimate responsibility for the protection of the public from the illegal and harmful use of the new media. The adoption of a model of co-regulation, on the other hand, would obviate such concerns, at least in theory. At the European level, there are increasing indications of a nascent consensus in favour of a coherent regime/approach for broadcasting and the Internet, with some form of co-regulation being the most appropriate form of implementation of such a regime.

This approach would be likely to command widespread support – it certainly appears to be *au goût du jour* in the EU (where involvement of all interested parties in regulatory approaches tends to be styled as ‘self-regulation’).⁶⁸ In the words of Patrick Donges: “Regulation should rely more on forms of self-regulation or co-regulation. Generally, self-regulation is a very demanding concept. The precedent for establishing forms of self-regulation is that there are organisations with the mandate to negotiate rules and to observe the compliance of these rules. Even in forms of self-regulation, the presence of a forceful public regulator is needed in order to ‘guard the guardians’ (“regulated self-regulation”).” He proceeds to stipulate that “[V]iewers – regarded as citizens, not as consumers – and their interests should play a greater role in the formulation and implementation of objectives concerning broadcasting.”⁶⁹ The stipulation is a useful reminder of the underlying premise of co-regulation, i.e. the synergic effects of co-operation and discussion between a maximum of interested parties.

Presuming that some level of regulation of the new media is, in fact, appropriate, the effectiveness of whatever regulatory model is ultimately chosen will undoubtedly be enhanced by widespread reliance on rating systems and filtering mechanisms by Internet and other new media service providers. Furthermore, there will be nothing to prevent individual users of Information Society Services from exercising personal control over content-matter by investing in end-user filtering software and devices, personal codes and so forth. This is of particular relevance to questions of parental control and the protection of minors.⁷⁰ On a more theoretical level, the greater responsabilisation of users of the new media could be perceived as the logical corollary of (i) general moves towards self-regulation for the new media, and (ii) the highly individualised character of the new media.

Indeed, an idea which has already gained a considerable amount of approval, is that in general, efficient kite-marking would obviate the need for the application of certain existing broadcasting rules in an interactive environment. In accordance with this approach, the relevant rules on, say, advertising, could be relaxed after the viewer has made the decision to consciously click on an option that would lead to further advertising than would ordinarily be

⁶⁷ Legal Instruments to Combat Racism on the Internet, Report prepared by the Swiss Institute of Comparative Law for the European Commission against Racism and Intolerance, Strasbourg, 2000, p. 6.

⁶⁸ See, in particular, Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ L 270, 7.10.1998, p. 48. See generally: http://europa.eu.int/comm/avpolicy/regul/new_srv/pmhd_en.htm.

⁶⁹ P. Donges, *op. cit.*

⁷⁰ The European Commission has been very active in this domain. A kingpin of its activities is the commissioning of studies within the framework of the ‘Television Without Frontiers’ Directive, on which it then acts. See further: http://europa.eu.int/comm/avpolicy/stat/studi_en.htm. For additional commentary, see also: IRIS 1998-10: 5+6; IRIS 1999-4: 4; IRIS 2001-5: 4.

allowed within the legal parameters of traditional broadcasting. In other words, the higher the level of active viewer choice, the lower the level of regulation.⁷¹

It is inconceivable that the provisions governing content regulation in the current legal regime for television broadcasting would be transposed *en bloc* and applied to the new media. The reason is that many of these provisions are largely sector-specific (see *supra*). Provisions on advertising, for instance, are often contingent on the existence of programme schedules and other structural considerations. The same is true of provisions aiming to promote the production and use of content of European origin. Insistence on production quotas in the new media would not only be incongruous, but also a potential impediment to the development of the new media, given its global nature.

If, however, the *raison d'être* of content regulation provisions is the protection of minors or the prevention of the dissemination of racist and xenophobic material, a plausible case could be made for the adaptation of such provisions to a putative regulatory order which would govern the new media. The reason is that these goals represent immutable values in every society. In the European context, they are non-negotiable constraints on freedom of expression. In any event, an ever-increasing array of legal instruments regulate these matters, so the regulation of such content in respect of the new media would not be fashioned solely by existing norms in the traditional broadcasting sector.

Be that as it may, any self-contained consideration of the situation in Europe is incomplete. At the risk of sounding tautological, it must be accepted that the character of the new media services is truly global. The aftermath of the recent bombing of the World Trade Center in New York provided ample evidence, should such be required, of the inextricable links between Europe and the US. Similar links, although probably of a looser nature, bind Europe to other parts of the world. This constant contact with the rest of the world inevitably adds an extra dimension to the question of regulation of the new media.

It has been quipped that “what is ‘harmful to minors’ in Bavaria is Disney in New York.”⁷² However, the flippancy of this remark is deceptive for two reasons. Firstly, it correctly assumes the global nature of the new media and secondly, it points up the infinite subjectivity that exists in understandings of, and approaches to, specific types of content. An Atlantic Ocean of difference separates Europe from the US in terms of certain freedom of expression issues and there are Urals, Himalayas and Atlas mountains of difference between Europe and the rest of the world in this regard as well. Thus, in the event of any retouches being applied to the existing European regulatory tableau, the overtones of such differences would inevitably become evident in the background.

The highlighted examples of advertising on the one hand and the protection of minors and anti-racism strategies on the other, illustrate two very different possible approaches to content regulation. Nonetheless, the question of the appropriateness of other forms of content regulation is less clear-cut and the debate which it will generate promises to be stimulating.

⁷¹ See further, R. Calleja, “Interactive Television – the First Click and Beyond”, 11 *Entertainment Law Review* (Issue No. 7, August 2000), pp. 163-164. See also B.S. Noveck, *op. cit.*

⁷² Lessig, Lawrence and Resnick, Paul, “Zoning Speech on the Internet: A Legal and Technical Model”, 98 *Michigan Law Review* November 1999, pp. 395 – 431, at p. 395.

CONCLUSION

The dawn of the Information Society in Europe has been much-heralded. After witnessing the first flushes of this dawn, the time has now come to assess the new age that is being ushered in. It is a world of exhilarating technological changes; of shifting legal and regulatory paradigms and increasingly blurred definitional boundaries. Traditional distinctions between telecommunications and broadcasting, whatever their imperfections, have been largely eroded by the advent of convergence. Technology and the law seem to have entered a very Heraclitean state. In the interests of certainty and consistency, it is no longer satisfactory for the law to be in a continuous state of reaction to technological change. In consequence, it is likely that any attempted legal regulation of the new media in the future will have to be technology-neutral and sufficiently flexible to cater for unforeseen technological developments.

It is imperative that policy- and law-makers at the European level address the challenges presented by the definitional discrepancies catalogued both here and elsewhere, between (i) the existing regulatory framework for television broadcasting and (ii) the (as yet) somewhat incohesive legal regime governing the new media. The inappropriateness of the traditional television broadcasting framework as a regulatory model for the practices of the new media is becoming increasingly evident. While there are undeniable similarities between traditional and new media, the conventional theories and regulatory structures currently *de rigueur* would be stretched beyond their elastic limit if applied reflexively to the new technological order. Legislators recognise this and are consequently adopting the practice of underlining the mutual exclusivity of the traditional and new media at the definitional level. For the moment, the semantic and conceptual wedge separating the two is the individualised nature of certain new media services.

Criteria other than the specifics of technology will have to be drawn on for the governance of this brave new world. Reflection on the need for, or desirable extent of, regulation is also called for. A return to basic principles would be timely. Any regulation of the media, old or new, must remain firmly rooted in its erstwhile pro-freedom of expression values. In 1982, the member States of the Council of Europe resolved to “intensify their co-operation in order [...] to ensure that new information and communication techniques and services, where available, are effectively used to broaden the scope of freedom of expression and information.”⁷³ The passage of time has done little to detract from the value of such a commitment. Indeed, the Preamble to the ECTT reaffirms this ideal.⁷⁴ Participants in the ongoing debate could do a lot worse than place their faith in this Thread of Ariadne to guide them through the labyrinth of complex and constantly-changing technologies.

⁷³ III. (e), Declaration of the Committee of Ministers of the Council of Europe on the Freedom of Expression and Information, adopted on 29 April 1982.

⁷⁴ See, in particular, the paragraph: “Convinced that the continued development of information and communication technology should serve to further the right, regardless of frontiers, to express, to seek, to receive and to impart information and ideas whatever their source.”