
Changing Aspects of Broadcasting: New Territory and New Challenges

This issue of IRIS *plus* is our “Christmas present” to you, providing another part of the jigsaw – the last for this year – on the theme of the convergence of the audiovisual media. Particular attention has been paid above all to national regulations on differentiating between broadcasting and the new media. This completes the last IRIS *plus* but one (enclosed with IRIS 2001-6), which set out the current European framework conditions for delimiting the various audiovisual services. Legal norms have since been negotiated, and public-service broadcasters must observe these as they extend their areas of activity to include the new media. From this it becomes clear not only what questions are being raised in terms of the public-service aspect of broadcasting by the change in the media scene brought about by digitalisation, but also what this change could mean in the end for the foundations of the democratic organisation of society.

The IRIS team looks forward to continuing next year to bring you up-to-the-minute articles on topics of international interest. We wish you a very happy New Year.

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INTRODUCTION

This article is of very clear parentage. It is both the logical complement to the earlier IRIS Plus article, "Does the Existing Regulatory Framework for Television Apply to the New Media?"² and a reaction to a round-table conference organised by the Institute for Information Law (IViR) of the University of Amsterdam in conjunction with the European Audiovisual Observatory (the Observatory), on 16 June 2001 in order to discuss the topics, "How to Distinguish between Broadcasting and New Media Services" and "Broadcasters' Access to New Media Markets".³

Whereas the earlier IRIS Plus article probed definitional matters and their application at the European level, the focus of the present article is largely on the same matters in a selection of national contexts. The choice of countries for examination suggested itself by very useful information shared at the conference. In this article, pride of place is also given to the (generally tentative) incursions of public service broadcasters into the world of new media services, not least because the idiosyncratic policy and regulatory features of public service broadcasting raise more issues than in the commercial broadcasting sector.

PART I

The Distinction Between Broadcasting and New Media Services

Definitions

Germany:

Freedom of expression is safeguarded by Article 5 of the *Grundgesetz* (German Constitution).⁴ At the statutory level, regulation of the electronic media is characterised by a three-pronged definition, coupled with a distinct division of regulatory competences. This state of affairs has been fashioned by a combination of historical development and pronouncements of the *Bundesverfassungsgericht* (German Federal Constitutional Court).⁵

The first category of services to be distinguished under German law is *Teledienste* (Teleservices). According to Article 2 of the *Teledienstegesetz* (Act on the Utilisation of Teleservices), these are individual (i.e. point-to-point) communication services without any editorial arrangement (i.e. no programme schedule (in the broadcasting sense of the term) exists). Teleservices are not subject to any licensing or registration obligations. Typically, such services would include Internet access, interactive database services, online banking and video-on-demand. They would not, however, include broadcasting or telecommunications services, or even broadcasting-like services, which would fall into the second category, *Mediendienste* (media services). Definitional differences between both types of services are not merely academic: they can also prove to be quite problematic in practice. Teleservices are, by their very nature, destined to fall between two different camps: telecommunications services *simpliciter* (which are subject to the extensive provisions of general telecommunications law) and media services (which are subject to their own regulatory regime). Another crucial distinction is that media services are subject to some specific content regulation, whereas teleservices are not.

Media services are governed by the *Mediendienstestaatsvertrag* (Interstate Agreement on Media Services), Article 2 of which defines them as distribution and on-demand services with emphasis on editorial arrangement and as having certain relevance for the public opinion-making process (in contradistinction to personal opinion-making in private, interactive, information services, i.e., teleservices). The definitional overlap between media services and broadcasting services is also riven with uncertainty. Again, the classification of a particular service as one or the other is not without practical significance as broadcasting services are subject to licence obligations as well as a different, stricter level of content and other regulations than media services.

Broadcasting is regulated by the *Rundfunkstaatsvertrag* (Interstate Agreement on Broadcasting, as amended on 7 February 1997), Article 2(1) of which sets out the operative definition of the term: "the provision and transmission for the general public of presentations of all kinds of speech, sound and picture, using electromagnetic oscillations without junction lines or along or by means of a conductor. The definition includes presentations which are transmitted in encoded form or can be received for a special payment. This Agreement is not applicable to Media Services as defined in § 2 of the Interstate Agreement on Media Services..."

As to the aforementioned division of competences: competition law is regulated at the Federal level, as are telecommunications services and infrastructure. The supervision of the implementation of the Interstate Agreement on Broadcasting, on the other hand, takes place at the individual *Land* (State) level and is entrusted to legal bodies known as *Landesmedienanstalten*. Individual *Länder* also have responsibility for media services.

On the evidence of the foregoing summary analysis, it is clear that the structural complexities of the German regulatory system are not conducive to the promotion of convergence. One may only speculate about how the existing system will be forced to react to the emergence of so-called integrated platforms offering teleservices, media services and broadcasting services from the one unit of technology. The question of access to set-top boxes, Electronic Programme Guides (EPGs) and so on, also amply demonstrates the inherent difficulties in maintaining the distinction between the regulation of broadcasting and non-broadcasting services on the one hand and between the objectives of competition law and sector-specific media law on the other.

Italy:

The right to freedom of expression is afforded protection by Article 21 of the Italian Constitution.⁶ Given that broadcasting is one of the most obvious means of exercising that right, it is curious to note that no piece of domestic legislation offers a home-grown definition of the term. Recourse is therefore had to the relevant definitions contained in the "Television without Frontiers" Directive and the European Convention on Trans-frontier Television. The Directive was transposed into the national Italian legal regime by the Law on Broadcasting (Law No. 223 of 6 August 1990). In June 2001, however, the European Court of Justice condemned the Italian Government for its failure to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with

a number of provisions of Directive 89/552/EC, as amended by Directive 97/36/EC.⁷ The Convention, for its part, was incorporated by Law No. 327 of 5 November 1991.

The Law on Broadcasting of 6 August 1990 provides *de lege* consolidation of the *de facto* situation *vis-à-vis* commercial broadcasting. A previous broadcasting law (Law No. 103 of 14 April 1975) had conferred a monopoly position on the public service broadcaster, RAI. A challenge to this law was mounted and resulted in private sector broadcasting being endorsed by the Constitutional Court in 1976. The practice developed but was only legislated for by the 1990 Law.

This Law is general in scope; applying to public service and private broadcasters alike. The distribution of television programmes (irrespective of the means of distribution) is, according to the Law, considered to be an activity of general interest.⁸ It obliges all broadcasters to honour the fundamental principles underpinning the Law.⁹ These include pluralism, impartiality of opinions and respect for various constitutionally-enshrined rights and freedoms.

Aside from these provisions of a general nature, the 1990 Law also outlines the divergence of regulatory regimes for the public and private broadcasting sectors. It provides for the public service broadcasting mission to be carried out by a single undertaking that is completely State-owned. This arrangement is bolstered by a Convention between the Minister for Communications and RAI which was adopted in 1994.¹⁰ Private broadcasters, for their part, are licensed by the State and regulated by the 1990 Law and Law No. 249/97.

To date, no specific legislative provisions govern new media services. By and large, broadcasters have yet to embrace new activities which would fall outside the definitional ambit of the “Televisions without Frontiers” Directive or the Convention.

The Netherlands:

Four distinctions are made in Article 7 of the *Grondwet* (Dutch Constitution),¹¹ which deals with freedom of expression: print, radio and television, others and advertising. The print category benefits from the strongest protection of freedom of expression, whereas advertising does not benefit from any protection whatever. As in other countries, there have been calls in the Netherlands for the abolition of divergent regulatory approaches grounded in technological differences. Two of the better-known proposals to amend Article 7 of the Constitution were initiated by the *Vereniging voor Media- en Communicatiewet* (VMC – Media and Communications Law Association) and the *Commissie Grondrechten in het digitale tijdperk* (Commission for Constitutional Rights in the Digital Era).¹²

The VMC proposal¹³ seeks to move away from the present medium-based formulation of the right to freedom of expression in favour of a technology-independent approach. The overriding aim of the proposal is to realign Article 7 of the Dutch Constitution in a manner that would show greater deference to the import of Article 10 of the European Convention on Human Rights (ECHR). Protection would, *ipso facto*, be extended to information and to commercial advertising.

Among the central recommendations of the Commission for Constitutional Rights in the Digital Era (also known as the Franken Commission after its eponymous chairman, Hans Franken) is the insistence that any reformulation of Article 7 should be technology-independent and lead to the same rules being applied to traditional and new media alike.¹⁴ The Commission also advoca-

ted the inclusion of advertising and product information within the sphere of protection offered by Article 7. It urged that express mention of the term “dissemination” be incorporated into the constitutional definition of freedom of expression.

At the statutory level, the *Mediawet* (Dutch Media Law, 1987 (as revised)) provides a straightforward definition of “broadcaster”: “an electronic media service engaged in the provision and broadcasting of programmes”.¹⁵ This definition is qualified by a number of related terms, such as “programme service” (“an electronic product with visual or audio content intended to be broadcast to and to be received by the general public or a part thereof, with the exception of data services, services available only on individual demand, and other interactive services”¹⁶); “programme” (“a clearly distinct and as such recognisable part of a programme service”¹⁷); “provision of a programme service” (“a broadcasting service, consisting of the preparation, compilation and carrying out of a programme service”¹⁸) and “programme service transmission” (“a broadcasting service, consisting of the encrypted or unencrypted distribution of a programme service to the general public or a part thereof by means of a broadcasting transmitter or broadcasting network”¹⁹). It is worth noting that these definitions replicate the European-level distinction between broadcasting (as traditionally conceived) and individualised services.

The United Kingdom:²⁰

The UK Broadcasting Act 1990 provides what may be perceived as rather dated definitions concerning broadcasting. A “television programme service” is defined in the Act as, basically, “a service consisting in the broadcasting of television programmes for general reception in, or in any area in, the United Kingdom, including a domestic satellite service...”.²¹ Of greater pertinence, perhaps, is the fact that the definition of “broadcast” provided by s. 202(1) of the Act is “broadcast by wireless telegraphy”, as defined by the Wireless Telegraphy Act 1949!²² In turn, s. 19(1) of the 1949 Act defines “wireless telegraphy” as:

“the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy of a frequency not exceeding three million megacycles a second, being energy which either –

- (a) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not), or for the actuation or control of machinery or apparatus; or
- (b) is used in connection with the determination of position, bearing or distance, or for the gaining of information as to the presence, absence, position or motion of any object or of any objects of any class,”

Also of relevance for present purposes is s. 46 of the 1990 Act, which states as the main features of the definition of “licensable programme service” that the service constitute the provision of relevant programmes for reception in two or more dwelling-houses or other places by persons or groups of persons who do not have a business interest in receiving them. The stipulation that this definition applies “whether the telecommunication system is run by the person so providing the programmes or by some other person, and whether the programmes are to be so conveyed [...] for simultaneous reception or for reception at different times in response to requests made by different users of the service” suggests that video-on-demand would be considered as “licensable programme services”. It is expected that any future definitional modifications will follow the definition contained in the “Television without Frontiers” Directive (which may be subject to revision itself in the meantime).



Although vested with the statutory authority to regulate certain types of Internet-based content, the Independent Television Commission (ITC) has chosen not to regulate these so far.²³ The 1990 statutory definition does not include a “real-time” criterion as the issue has yet to arise in the UK.

The UK Government's White Paper on Communications 2000 sets out its objectives and proposed framework for broadcasting regulation in an era that is increasingly defined by technological convergence. This framework comprises three tiers of regulation. The first tier will bind all broadcasters to negative minimum content standards; rules on advertising and sponsorship; the provision of fair, impartial and accurate news; EC quotas on the origin of broadcast material and so on. The second and third regulatory tiers will apply to all public service broadcasters. While the precise details have yet to be fleshed out, the second tier is likely to concentrate on compliance with production quotas; regional programming and the commitment to broadcasting news and current affairs programmes during prime time. The third tier will mainly involve the self-regulation by public service broadcasters of some of the more qualitative features of the services they provide. The first two tiers, however, will come under the supervision of the proposed new unitary regulator, OFCOM. There is no indication that this framework will change the notion of broadcasting.

Ireland:

At this juncture, it is interesting to note that even the most recent pieces of national broadcasting legislation²⁴ can be cautious in their approach to new, emerging forms of broadcasting. In Ireland, for instance, s. 2(1) of the Broadcasting Act, 2001,²⁵ defines “broadcaster” as “a person who supplies a compilation of programme material for the purpose of its being transmitted or relayed as a broadcasting service (whether that person transmits or relays that material as such a service or not)”. It proceeds to define “broadcasting service” as “a service which comprises a compilation of programme material of any description and which is transmitted or relayed by means of wireless telegraphy, a cable or MMD system or a satellite device, directly or indirectly for reception by the general public, whether that material is actually received or not, but does not include such a service that is provided by means of the Internet”. The caution here is categorical. Broadcasting over the Internet is beyond the purview of the Act. “The Internet” is defined in the same section merely as “the system commonly known by that name”; a sufficiently open-ended definition as to allow for its organic growth in parallel to the development of the Internet itself.

The United States:

It is not difficult to justify the inclusion of the US as a point of comparative analysis in this overview. Firstly, dating from the 1920s, commercial broadcasting in the US boasts a longer lineage than in Europe, where public service broadcasting has traditionally been more dominant. Secondly, the US has its own distinctive First Amendment culture, which necessarily influences the course of all developments in the broadcasting and communications sectors. As such, it is not subject to the same legal norms as Europe, but the prominence of broadcasting and new media services in contemporary society is amply and often instructively reflected there at the policy and jurisprudence levels. Moreover, comparative law and informed judicial eclecticism are certainly the way forward, as we increasingly and inexorably become witnesses to, and participants in, what has been termed “the emergence of a global village of precedent”.²⁶

A somewhat convoluted regulatory regime has developed in the US, with different doctrines and tests being applied to the electronic media over the years. The so-called “strict scrutiny” doctrine applies to content-specific governmental activity. It tends to target certain types of material such as obscenity, indecency and hate speech. Relevant concerns here are whether: (i) the government is empowered to adopt the regulation in question; (ii) there is a compelling government interest in its adoption; (iii) it is designed to suppress expression and (iv) it is the most proportionate means of pursuing its stated objectives.²⁷

The “intermediate scrutiny” doctrine applies to governmental regulations that are content-neutral in character, i.e. regulations targeting particular modes of (expressive) activity. Again, consideration must be given to the Government's power to adopt a particular regulation; whether the objective corresponds to a substantial government interest; whether the regulation is designed to suppress expression and whether the regulation is tailored to its stated objectives.²⁸ In practice, the Courts do not always distinguish clearly between strict and intermediate scrutiny doctrines, either in terms of the character of government regulation (i.e. content-specific or content-neutral) or in terms of the appropriate test to be applied.²⁹ The interaction of these two doctrines with the so-called “scarcity doctrine” (which has traditionally applied to over-the-air electronic media) is also bedevilled by uncertainty.³⁰ One final, relevant criterion in this regard is the rationality of governmental activity, i.e. whether the Government, in the adoption of a given regulation, has acted “arbitrarily and capriciously”, or “irrationally”, etc.

On a case-by-case basis, it is notoriously difficult to predict with accuracy which doctrines and corresponding tests will be applied by the Courts to specific media. An approximate estimation would be along the following lines: print – strict scrutiny; broadcasting – intermediate scrutiny/scarcity; cable and Internet – intermediate scrutiny; direct broadcast satellites – still unclear and carriers – rational basis.

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 or safeguarding pluralism.

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, media ownership/anti-concentration measures, programme standards, must-carry rules and the regulation of advertising standards. Typically, the third category would include structural rules on (television) advertising (eg. 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 the third that could be said to be the most medium-, or indeed, television-specific.



However, notwithstanding the medium-independence of the other categories of regulation, they could not simply be applied reflexively to the new media services. 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.”³¹ This points up the need for international co-operation between states and self-regulation. The international dimension is also central to regulations combining prohibitive and facilitative elements. While the banning of racism or measures for the protection of minors could command universal support, the same could not necessarily be said of other measures.

The regulation of broadcasting is possible by an array of means: licensing, subsidies, the creation of public corporations (independent, pluralist and non-commercial), priority rights and must-carry rules.

There is no shortage of justifications for the application of special regulatory norms to broadcasting. Ensuring access to broadcasting outlets for minorities, balanced reporting and objectivity and high quality culture and education rank foremost among the aims of this class of regulation. These regulatory goals acquire added significance in the context of public service broadcasting (see further *infra*). Other justifications include the scarcity argument, public service considerations and programme production, export and balance of trade issues. Even today, the spectre of twentieth-century history casts a long shadow of fear that the mass media are susceptible to misuse. The vicious, if arguably slightly simplistic, circle which equates an absence of pluralism and the concentration of media ownership with the concentration of editorial power, is a related preoccupation. Hence the concern over capacity to influence public opinion which has consistently informed policy-making for the mass media. This influence/effect argument ranks among the most frequently-advanced arguments.

The viewpoint espoused by Eric Barendt that “[I]t cannot be right to subject more persuasive types of speech to greater restraints than those imposed on less effective varieties”,³² has had clear reverberations throughout the academic world. With the notable exception of certain views canvassed by Lee C. Bollinger,³³ 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.”³⁴ This point is directly linked to the issue of access broached *infra*.

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 jurisdictions. 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 *Mediendienste*, 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.³⁵ The so-called opinion-building or impact or pervasiveness argument has prompted much academic discussion, not least in the context of its applicability to an online environment. It leads to questions such as whether the popularity of a website could or should determine its influence-making potential and if so, how the level of impact requiring regulation could ultimately be defined. Nevertheless, such interesting questions ought not to detract from the reality that the very notion itself is contested in the analogue context, and fervently so in respect of the new media.

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, thereby reducing their ability to reach the masses as before. It is 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.

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.”³⁶ It can also be argued that the individualisation of broadcasting services erodes the perceived need for regulation arising out of impact on public opinion.

Need for deregulation?

In the same vein, it could be argued that the reach of ordinary criminal law is sufficiently wide as to cover the use of the media for the dissemination of pornographic material or for inciting to hatred. Even if content control and prohibitions on unfair competition continue to feature prominently, these constraining forces will be subject to the specificities of the medium, eg. determination of jurisdiction and the international character of defamation. Rules on balanced programming which are central to broadcasting may well prove peripheral to new online services. Alternatively, more suitable approaches could include the drafting and enforcement of equitable rules of access and youth protection for all services.³⁷ The advent of a new media environment also brings with it attendant fears for the ability to safeguard pluralism. The reflexive application of existing ownership and concentration rules to the new media would not be feasible.

It has been argued that there is no longer a cogent case to be made in favour of retaining broadcasting licences, even for traditional broadcasting. The increasingly defunct scarcity rationale could be invoked in defence of this thesis. The continued adherence to a system of individualised licences, despite the reduced applicability of the scarcity argument in this context, is difficult to defend in light of the provisions of Article 10 ECHR. *A fortiori*, it would therefore be even more difficult to justify the existence of a general licensing system for the Internet in a democratic society.



If a licensing regime is to be maintained in the future, it is likely to rest on new conceptual premises. Access criteria, for example, are often proposed as an alternative to content criteria as the most suitable grounds for such regulation, not least because of the inadequacies of the push-/pull-services distinction which holds that only push services should be regulated (what about e-mail, for example?). The desirability of rules governing access to EPGs and to content providers also merits careful consideration.

PART II Broadcasters' Involvement in New Media Services

Broadcasting and public service in the broadest sense of the term can both boast long and strong traditions in Europe. They are capable of mutually-exclusive existence, owing to their distinctive aims, yet interaction between the two has great synergic effects on society and democracy. This was explicitly recognised in the Protocol on the system of public broadcasting in the Member States to the Treaty of Amsterdam.³⁸ The importance of public service broadcasting has similarly found resolute expression in an array of Council of Europe instruments and texts; with the *primus inter pares* being, perhaps, Recommendation No. R(96)10 of the Committee of Ministers to Member States on the Guarantee of the Independence of Public Service Broadcasting.³⁹

The extensive traditional rationales for public service broadcasting have been elaborated authoritatively by many commentators⁴⁰ and it is not intended to reproduce the full extent of other analyses here. It would, however, be useful to note that Georgina Born and Tony Prosser identify three essential normative criteria for public service broadcasting: citizenship ("enhancing, developing and serving social, political and cultural citizenship"), universality and quality of services and of output.⁴¹ Barendt, for his part, identifies six basic features of public service broadcasting: general geographical availability; concern for national identity and culture; independence from both the state and commercial interests; impartiality of programmes; range and variety of programmes and substantial financing by a general charge on users.⁴²

A more detailed recipe for public service broadcasting is also given by Born and Prosser (while acknowledging that not all of the proposed ingredients would command universal support): "universal access or availability; mixed programming or universality of genres; high quality programming in each genre, including innovation, originality and risk-taking; a mission to inform, educate and entertain; programming to support social integration and national identity; diverse programming catering to minorities and special interest groups, to foster belonging and counteract segregation and discrimination; programming reflecting regional identities; provision of independent and impartial news and fora for public debate and plurality of opinion; commitment to national and regional production, and to local talent; a mission to complement other broadcasters to enrich the broadcasting ecology; affordability; and limited, if any, advertising."⁴³ The foregoing provides a clear idea of what public service broadcasting entails.

The Role of Public Service Broadcasting in a New Technological Environment

The rationale of public service broadcasting is very much

based in the analogue environment; the world of the rationed spectrum and of shared advertising. As succinctly stated by Beth Simone Noveck, "[T]hrough the future is digital, our thinking about regulation is analogue."⁴⁴ The extension of the public service rationale from traditional broadcasting into the Internet would involve imposing public service obligations in an environment which has traditionally been largely unregulated, contentwise.

The increased incidence of new intersections between the philosophies and practices of public service and broadcasting is a direct consequence of rapid technological advances. Unsurprisingly, the nature of broadcasters' public service mandate is liable to change in respect of the new media. According to the Resolution of the Council of the European Union of 25 January 1999,⁴⁵ the notion of public service is not restricted to traditional broadcasting: it applies to the new media as well. Indeed, the Resolution positively encourages public service broadcasters to branch out into new media services and to exploit the potential of the new technological opportunities on offer in furtherance of their mandate. Recommendation No. R. (96) 10 of the Committee of Ministers of the Council of Europe on the Guarantee of the Independence of Public Service Broadcasting also legitimates public service broadcasters' exploitation of the new media in the fulfilment of their missions.⁴⁶ This approach is prompted – at least in part – by the likelihood that very forceful private undertakings are entering the market and that there are revived concerns over pluralism on account of this trend.⁴⁷

On a different level, the European Broadcasting Union has also been a source of vigorous encouragement for public service broadcasters to harness the full potential of new media services. It has stated:

"Public broadcasting organizations have always been at the forefront of innovation in the broadcasting field, both on the technical side and in terms of diversifying their programming offer. In line with this tradition, and except where expressly and exceptionally stipulated otherwise, they continue to be entitled, and indeed are obliged, to make their programme offer available to the public in the most appropriate manner and form suggested by the changing viewing and listening habits of the public in an evolving audiovisual environment. This includes a complementary and diversified programme offer (thematic channels), its technical delivery (digital transmission, bouquets, on-line delivery) and its mode of funding (pay-TV, pay-per-view). As long as the additional programme offer is provided by the public broadcasting organization itself, the same legal principles of funding apply as in the case of its traditional core service."⁴⁸

There is broad consensus that public broadcasters should stick to their main tasks even on the Internet. By design or default, public service broadcasters are generally the custodians of their respective countries' audiovisual archives. The digitalisation of these archives in order to exploit them as an additional resource, in particular on the Internet, prompts a number of questions about the expenditure of public funds for commercial purposes. The reason is that more often than not, members of the public must pay in order to benefit from the digitalised audiovisual archive. It has been posited that the increasing commercialisation of data held by government and what can loosely be termed the ramifications of government can be antithetical to the public service mission. It is hard to conceive of any possible justification for a public broadcaster to exclude anyone from its activities. Such fears of exclusion



from future access to the audiovisual archives are, however, likely to be offset by the recent adoption of the European Convention for the protection of the Audiovisual Heritage and its Protocol on the Protection of Television Productions by the Committee of Ministers of the Council of Europe.⁴⁹ The Convention aims to ensure the preservation and enjoyment of the audiovisual heritage of European states through a system of legal and voluntary deposits of “moving image material”⁵⁰ with relevant (national) archive bodies. The broader philosophy behind this Convention would appear to be in keeping with that of an earlier Recommendation of the Committee of Ministers of the Council of Europe on Universal Community Service Concerning New Communication and Information Services.⁵¹

A good example of restricting public service broadcasters to their primary tasks is the Dutch Media Act 1987, which provides specific guidance for the secondary, or so-called “sideline” activities of public broadcasters. The performance of such activities is only allowed when it “does not or cannot have a detrimental effect on” the public broadcaster’s basic duties, foremost among which is the duty “to provide a varied and high-quality range of programme services for general broadcasting purposes...”⁵² Furthermore, such sideline activities must be “connected with or support[s]” the public broadcaster’s primary tasks and must follow the rules of fair competition. In point of fact, the *Commissariaat voor de Media* (Dutch Media Authority) recently prohibited a regional public broadcasting station from the further exploitation of its commercial Internet site.⁵³ Article 55(1) of the Media Act has the further trammelling effect of prohibiting public service broadcasters from using “any of their activities in the service of realising profits for third parties.”

An idea which has already gained a considerable amount of approval, is that in general, efficient kite-marking could possibly obviate the need for the application of certain existing broadcasting rules in an interactive environment. Moreover, this would be consistent with the preferred approach of self-regulation of the Internet which has held its own thus far. In accordance with such an 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 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.⁵⁴ Thus, the maxim *caveat emptor* would apply. Consumers would be informed whenever they would access new services or enter a commercial environment, but would not be protected from themselves by paternalistic regulation. As an aside, it should be noted that in an online environment, this maxim is equally applicable to the consumer and commerce, on the one hand, and to the citizen and democracy, on the other. The poet e.e. cummings once astutely wrote: “democ/ra(caveat emptor)cy”;⁵⁵ a strident cautionary note in the euphoric chorus heralding the arrival of technologies that are promising to raise participatory democracy to higher planes.

The importance of offering guidance to the public could also be underscored in a slightly different context. Public broadcasters could assume the role of trustee by pointing the public in the right directions. It was suggested that public service broadcasters could have a “seal of approval” which could be awarded

to other, extraneous websites. Such a public service kite-marking initiative could develop to become a useful navigational tool in the online world; enabling the website of the broadcaster to become a portal which would editorialise external content. This initiative would lead any reputable public service broadcaster to be identified as a “beacon of trust”⁵⁶ in the online world.

Against the backdrop of globalisation, the importance of preserving and promoting a sense of cultural identity is becoming increasingly important. The role of safeguarding cultural specificity, including in the new media environment, could easily be played by public service broadcasters. The mission of public service broadcasting should be media-independent and transcend traditional borders.

Despite broad acceptance of the principle that States should be entitled to fund public broadcasting services,⁵⁷ unfair competition allegations and proceedings are not uncommon in this domain.⁵⁸ A recent Communication from the European Commission has clarified the nature of State aid to public service broadcasters, not before time.⁵⁹ The Communication requires States to provide a clear and precise definition of the public service remit, where such a definition is not already in existence. It allows States to define this remit, and to provide for the financing and general organisation of the public broadcasting sector, in a manner that would give due recognition to relevant national specificities. All of this is, however, subject to the important proviso that any measures adopted for the financing of public service broadcasters will have to conform to certain standards of transparency in order to allow for the assessment of the proportionality of such measures.⁶⁰

CONCLUSION

The first part of this article scrutinised some of the specificities of national definitions of broadcasting and whether the elasticity of those definitions would allow them to cover new media services. The brief answer is that they do not. As at the European level, there is a marked tendency to develop new, specific definitions to deal with new media services – with varying degrees of regulatory complexity. In consequence, the regulatory theories that prevailed in the domain of traditional broadcasting have had to be revisited and revised. The applicability of some of these theories – and practices – will not be imported into the online world. Separating the proverbial wheat from the chaff will be an inherently subjective exercise and notwithstanding any pertinent guidance from the European level, it is almost inevitable that national approaches to the question will prove to be divergent.

The second part of the article considers the similar process of soul-searching that is ongoing in the public service broadcasting sector. The challenges of adaptation to new technological realities are magnified in respect of public service broadcasters on account of the specificity of their mandate. This is the forced evolution of a unique principle of broadcasting and a central pillar in the edifice of every democratic society.

The uncertain future of broadcasting regulation in Europe has already begun to unfold before our very eyes. It promises to make fascinating viewing.

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- 2) Issue 2001-6.
- 3) The experts who participated in the round table were drawn from a number of different European countries and were all invited on the basis of their personal expertise.
- 4) Article 5:
 - (1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There will be no censorship.
 - (2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor.
 - (3) ...
- 5) See further, H. Simboeck, "Public service broadcasting and state aids: an EC Commission decision", 4 *Tolley's Communications Law Journal* (Issue No. 5, 1999), pp. 187-189.
- 6) Article 21 [Freedom of Communication]
 - (1) All shall have the right to express their thoughts freely by speech, in writing, and by all other means of communication.
 - (2) The press shall not be subjected to any authorization or censorship.
 - (3)....
- 7) See further, R. Mastroianni, "Court of Justice of the European Communities: Italy Condemned for Failure to Implement Directive 97/36/EC", *IRIS* 2001-7: 3.
- 8) Article 1, Para. 1.
- 9) Article 1, Para. 2.
- 10) Decree of the President of the Italian Republic of 28 March 1994, published in the *Gazzetta Ufficiale* No. 188 of 12 August 1994.
- 11) Article 7 [Expression] of the Dutch Constitution (1983 version) reads:
 - (1) No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
 - (2) Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
 - (3) No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
 - (4) The preceding paragraphs do not apply to commercial advertising.
- 12) See further, "Dossier Grondrechten", Institute for Information Law (IViR), University of Amsterdam, available at: <http://www.ivir.nl/grondrechten.html>
- 13) "Preadvies inzake een nieuwe tekst voor de artikelen 7 en 13 van de Grondwet", available at: <http://www.ivir.nl/grondrechten.html>
- 14) The recommendations of the Commission also include a new classification of "public media services" (to include, *inter alia*, public service and commercial broadcasting, Internet-based web-/broadcasting, daily newspapers and magazines) as well as proposals to abolish general content regulation (in favour of self-regulatory measures) for "public media services", save where pluriformity is threatened. These recommendations are contained in the Commission's Final Report of 24 May 2000, the full text of which is available at: <http://www.ivir.nl/grondrechten.html>. See also the Dutch Parliament's (largely favourable) response to the Report, *Kamerstukken II 2000-2001*, 27460, nr. 1, available at: <http://www.overheid.nl>
- 15) S. 1(c), the Dutch Media Act, 1987 (as revised).
- 16) S. 1(f), *ibid*.
- 17) S. 1(g), *ibid*.
- 18) S. 1(m), *ibid*.
- 19) S. 1(n), *ibid*.
- 20) See generally, T. Gibbons, *Regulating the Media* (2nd Edition) (Sweet & Maxwell, London, 1998).
- 21) S. 2(5), The Broadcasting Act, 1990, available at: http://www.legislation.hmso.gov.uk/acts/acts1990/Ukpga_19900042_en_1.htm. See also s. 71(1).
- 22) The text of the Wireless Telegraphy Act 1949 is available at: www.radio.gov.uk/topics/legislation/wtact1949.pdf
- 23) See further, A. Williams, D. Calow & N. Higham, *Digital Media: Contracts, Rights and Licensing* (2nd Edition) (Sweet & Maxwell, London, 1998), pp. 112, 113.
- 24) See further, M. McGonagle, "Broadcasting Bill Becomes Law", *IRIS* 2001-4: 9.
- 25) The text of the Act is available at <http://www.gov.ie/oireachtas/frame.htm>, by clicking on 'Legislative Information' and then on 'Acts of the Oireachtas 1997-2001'.
- 26) K. Boyle, address at the Human Rights Centre, University of Essex, 8 December 1999.
- 27) See, for example, *Miami Herald Publishing Co. v. Tornillo*, 418 US 241 (1974).
- 28) See, for example, *United States v. O'Brien*, 391 US 367 (1968) and *Turner Broadcasting System, Inc v. FCC*, 520 US 180 (1997)
- 29) See, for example, *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 US 727 (1996).
- 30) See, for example, *Red Lion Broadcasting Co. v. FCC*, 395 US 367 (1969).
- 31) L. Lessig, *Code and other laws of cyberspace* (Basic Books, New York, 1999), p. 166.
- 32) E. Barendt, *Broadcasting Law: A Comparative Study* (Clarendon Press, Oxford, 1993), p. 7.
- 33) 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).
- 34) 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."
- 35) 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).
- 36) C.R. Sunstein, *Republic.com* (Princeton University Press, US, 2001), p. 9.
- 37) *Ibid*.
- 38) The text of the Protocol is available at: <http://europa.eu.int/eur-lex/en/treaties/livre347.html>
- 39) The text of the Recommendation is available at: <http://cm.coe.int/ta/rec/1999/99r14.htm>. See further, A. van Loon, "Recommendation on the Guarantee of the Independence of Public Service Broadcasting", *IRIS* 1996-10: 4.
- 40) See, for example, E. Barendt, *op. cit.*, Chapter III 'Public Broadcasting', pp. 50-74 and T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, Malaysia, 2000).
- 41) G. Born & T. Prosser, "Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations", 64 *The Modern Law Review* (Issue No. 5, September 2001), pp. 657-687, at p. 671.
- 42) *Op. cit.*, p. 52.
- 43) *Op. cit.*, p. 671.
- 44) 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.
- 45) Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, available at: http://europa.eu.int/eur-lex/en/lif/dat/1999/en_499Y0205_01.html. See further, A. de Kroon, "Council of the European Union: Resolution on Public Service Broadcasting", *IRIS* 1999-3: 4.
- 46) See s. VII, which is entitled 'Access by public service broadcasting organisations to new communications technologies'.
- 47) In Germany, public service broadcasters are actually required to exploit the new media insofar as this is consistent with their *raison d'être*.
- 48) "The Public Service Broadcasting Remit: Today and Tomorrow", Statement by the European Broadcasting Union (Legal Department) of 29 April 1998, available at: http://www.ebu.ch/leg_public_service.pdf
- 49) The texts of the Convention and Protocol, which were adopted on 19 September 2001, are available at: <http://www.humanrights.coe.int/media>. See further, T. McGonagle, "Adoption of New Convention for Protection of Audiovisual Heritage", *IRIS* 2001-9: 3.
- 50) This term is not defined in the Convention, presumably in order to avoid being left in the slipstream of technological change.
- 51) Recommendation No. R(99)14 of the Committee of Ministers on Universal Community Service Concerning New Communication and Information Services, adopted 9 September 1999, available at: <http://cm.coe.int/ta/rec/1999/99r14.htm>
- 52) Article 13, the Dutch Media Act, 1987 (as revised).
- 53) R. Lambers, "Dutch Media Authority Bans Broadcaster from Exploitation of Internet Site", *IRIS* 2001-8: 12.
- 54) 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*.
- 55) e.e. cummings, "a salesman is an it that stinks Excuse", in G.J. Firmage, Ed., *E.E. CUMMINGS COMPLETE POEMS 1904-1962* (Liveright, New York, 1994), at p. 549.
- 56) D. Docherty, "Empires and evolution: public service content in the new media", 27 *Inter-media* (Issue No. 2, May 1999), pp. 20-23, at p. 23.
- 57) The pith of the Protocol on the system of public broadcasting in the Member States to the Treaty of Amsterdam, *op. cit.*, is: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."
- 58) For a comprehensive overview of these cases, see L. Márton, "The Impact of EU Competition Law on the Financing of Public Service Broadcasters", 6 *Tolley's Communications Law Journal* (Issue No. 2, 2001), pp. 56-62.
- 59) Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting, available at: http://europa.eu.int/comm/competition/state_aid/legislation/public_broadcasting/communication/en.pdf
- 60) See further, T. McGonagle, "European Commission – State Aid Rules to Public Service Broadcasters Clarified", *IRIS* 2001-10: 4.