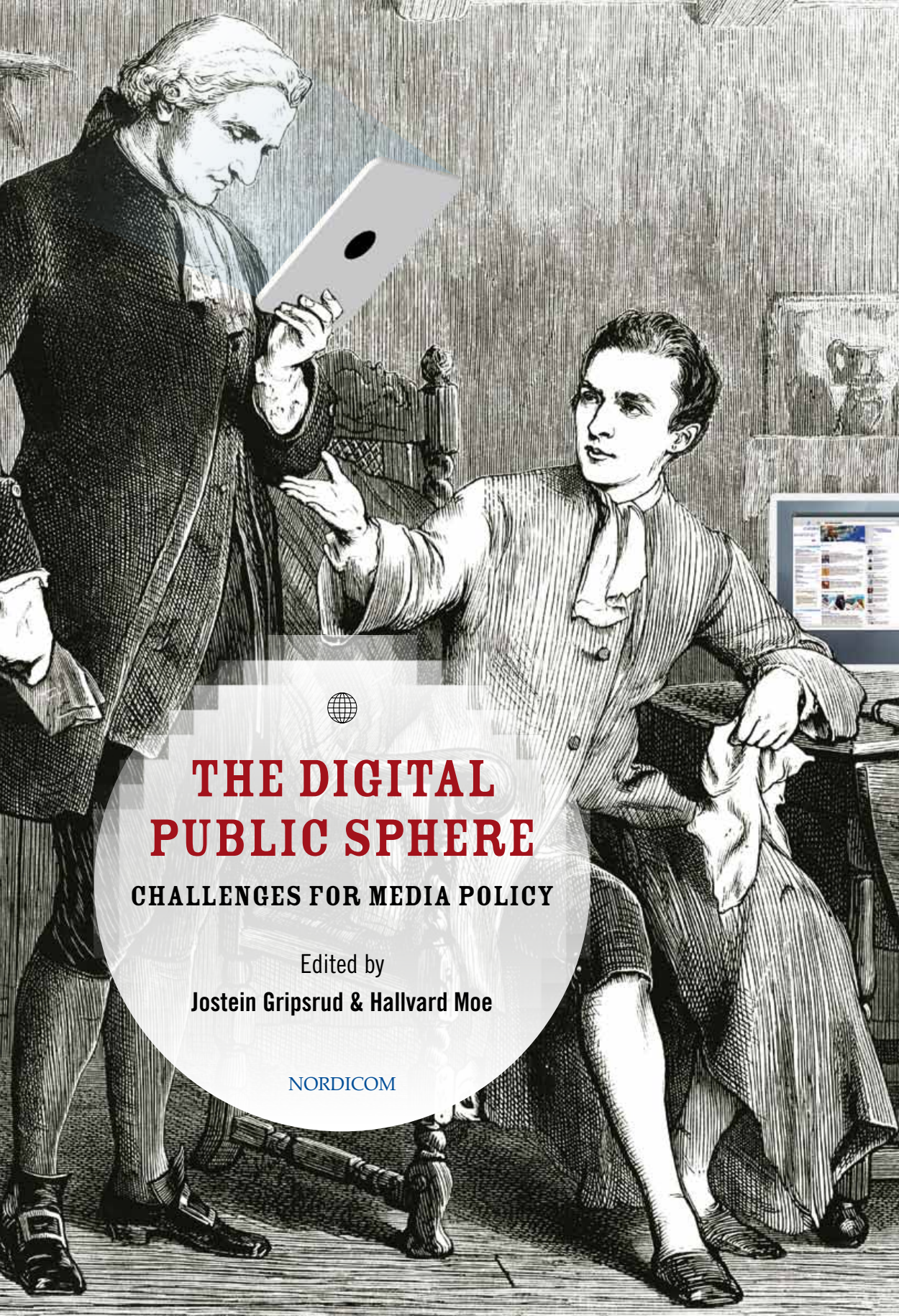




THE DIGITAL PUBLIC SPHERE

CHALLENGES FOR MEDIA POLICY

Edited by
Jostein Gripsrud & Hallvard Moe

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The Digital Public Sphere

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Challenges for Media Policy

Jostein Gripsrud & Hallvard Moe (eds.)

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The Nordic Ministers of Culture have made globalization as one of their top priorities, unified in the strategy: “Creativity – the Nordic response to globalization”. The aim is to create *a more visible Nordic Region, a more knowledge-based Nordic Region* and *a more prosperous Nordic Region*. This publication is part of “Creativity – the Nordic response to globalization”.

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Preface

The present volume is one of the outcomes of the internationally networked research initiative *Democracy and the Digitization of Audiovisual Culture (DigiCult)* in the Department of Information Science and Media Studies at the University of Bergen, Norway. More specifically, first versions of all contributions except the editors' introduction were presented to a symposium organised in Paris in late October 2008 by DigiCult in cooperation with the Institut Français de Presse at the Université de Paris II (Panthéon-Assas). Other relevant publications based on presentations in the same symposium include special issues of the journals *Javnost – The Public* (vol 16, 2009, no.1: *Digitising the Public Sphere*) and *Popular Communication – The International Journal of Media and Culture* (vol 8, 2010, no.1: *Digitizing Audiovisual Production*).

The editors would like to thank all authors for their contributions and for their patience as the preparation of the book took more time than expected. We would also like to express our gratitude to the University of Bergen for its funding of most of DigiCult's activities, to Heather Owen for excellent copy-editing and to Ulla Carlsson at Nordicom for her kind interest in the book and its publication.

Bergen and Paris, March 2010

Jostein Gripsrud and Hallvard Moe

Introduction

The Digital Public Sphere

Challenges for Media Policy

Jostein Gripsrud & Hallvard Moe

The public sphere is where citizens communicate about the rule of their society. Mass media have always constituted the necessary infrastructure for the modern public sphere: from the early print media to electronic media like radio, television and now the Internet, they have distributed essential information, diverse forms of knowledge and argumentation about facts, problems and possible solutions.

Digitization has been a buzzword in the media since the mid-1990s. By 2010, all media are fundamentally digital, not only the by-now more-than-a-decade-old World Wide Web. It also applies to television, radio and film, which have been digitized through and through. Even newspapers and books depend on digital technologies for their production and distribution, and they are also, as a rule, now produced in parallel digital editions. Consequently, the mediated public sphere is by now a digital public sphere.

Media policy deals with the technologies, processes and content which mediate the public in a broad sense (Braman 2004). It is now, in modern democracies, fundamentally about regulating the public sphere in accordance with central democratic ideals – based on what the Norwegian Commission on the Freedom of Expression (1999) termed the state’s “responsibility for the infrastructure”. This has not always been the goal, but all media have always been affected by media policy. Arrangements in different periods and places range from stamp taxes in pre-modern societies aimed to control the distribution of pamphlets and journals; via the rating of age limits for movies and the allocation of frequencies for radio and television distribution across the Western world in the early and mid-twentieth century; through to advertising rules on the web around the turn of the millennium. Media policy arrangements also include support measures such as press subsidies, radio and television licence fees, subsidies for literature and theatre, and film-production funding. Media policy has been developed differently in different countries and it has been directed differently at different media, but it has always treated the media as something other than pure goods in a market.

Media policy has, thus, until recently been thought of as national, media-specific, and as part of the cultural domain. All this is changing in a digital

public sphere: first, by the processes of globalization in a broad sense; second, by a blurring of borders between media, which can be summed up as convergence; and, third, by a thorough marketization of the media. The transformations triggered by these developments are ongoing, but they have been so for quite a few years. Thus, it is time to take stock. The different contributions in this book set out to do that.

This introduction describes the three dimensions of the recent and ongoing changes – globalization, convergence and marketization – and outlines how they impinge on media policy. On this basis, the introduction also lays out the organization of the rest of the book.

Globalization

Large migratory movements, developments in the world's financial markets or the entertainment industry, questions of ecology, or terrorism – processes of globalization in a wide sense permeate many areas of our societies. Our everyday lives are to a large extent influenced by actions taken elsewhere – sometimes on the other side of the globe. Conversely, actions taken locally can have global implications.

Importantly, the processes of globalization are far from new. Modern globalization has gone through several phases, for instance since slave trade and colonialism in the sixteenth century. The (often brutal) development of world capitalism since then has marked today's world – including its political and cultural domains – in a number of ways (e.g. Gripsrud 2001: 5–6). The sovereignty of nation states has not been challenged in the late twentieth century. Rather, it is a long, continuous but uneven process. Similarly, national media systems or public spheres have not been “autonomous” until the last decade or so. Flows of information across national borders were a fundamental feature of the earliest mass media and signalled the existence of broader social, political and economic connections that we, today, would label as signs of globalization. Modern mass media and their regulation have always been characterized by international concerns and influences. Still, in the current phase, globalization processes are perceived as more extensive, intense and forceful – not least, supported by computer-mediated communication. The digital public sphere, then, is fundamentally marked by globalization.

As with democratic theory in general, public sphere theory has always conceptualized the modern public sphere within a national framework. In the current situation, it becomes increasingly difficult to conceptualize the public sphere at all. Not only are borders between nation states of reduced importance, there is also in every developed country an internal differentiation or breaking up of the formerly more comprehensive and cohesive national public sphere. Merely “multiplying” the traditional concept is not enough. The problem relates to both the publics and the spheres: it is hard to connect a notion of valid public opinion to partakers who do not represent a political citizenry. And it is

complicated to “associate the notion of communicative power with discursive spaces that do not correlate with sovereign states” (Fraser 2007: 8).

According to Habermas, we are experiencing a post-national constellation which “touches on the most basic functions and legitimacy conditions of democratic nation states” ([1998] 2001: 61). He points to four levels on which the processes of globalization affect the nation state’s democratic processes ([1998] 2001: 68ff). Three of them apply primarily to institutions and practices at the core of the political system. The fourth deals with processes at the periphery that encompass the public sphere and its components: the idea of a nation of citizens rendered possible through cultural integration, which can be politically mobilized, is threatened by fragmentation. On the one hand, national majority cultures get hardened upon meeting new immigrant cultures. In a worst-case scenario, this ends with subcultures sealed off from each other. On the other hand, global mass-consumer culture, while partly levelling-out national differences, also fuels the construction of a new array of hybridized cultural forms. These tendencies are strengthening “centrifugal forces within the nation state” (Habermas [1998] 2001: 76). Consequently, the “one text of ‘the’ public sphere” with porous borders (Habermas [1992] 1996: 374), should to a lesser extent be conceptualized as corresponding to a nation state. Also, in some areas, the borders get less porous as subcultures get hardened. In other areas, borders get more porous as new, fleeting communities of interests defy existing boundaries.

Importantly, the post-national constellation does not mean a total disempowering of nation states (Habermas [1998] 2001). So we should be careful not to exaggerate the prospects of its suspension. As Oscar Ugarteche states, with recent US foreign policy as a prime example, “not only is the nation state alive and well, but it has sent a rather strong message that it does not plan to pass away in the near future” (Ugarteche 2007: 65). So far, nothing indicates the end of nation states as centres of democratic rule. Though its position is changing, the nation state is still indisputably important as a container, as “the main arena for the negotiation of and arbitration between conflicting social groups” (Ellis 2000: 70). Specific publics, arenas, and borders are changing, and changing in importance. It is, however, a process more of complementing than replacing.

In line with this, a transnational public sphere is not thought of as a multiplied national one (Bohman 2004: 139ff). Rather, it can be described as coming into existence when a minimum of two culturally-rooted public spheres start to overlap. These public spheres need not be national in scope but might as well be defined by thematic foci or regional senses of belonging. Defining transnational public spheres in this way presupposes a continued existence of public spheres where we can communicate based on common cultural assumptions. These spheres are still linked to territorial entities, among them nation states. As such, public sphere theory needs to conceptualize both territorial and “aterritorial” communication and spheres. Following this argument, the processes of globalization do set the terms for emerging transnational public spheres. As

a result, the concepts of public sphere theory need to be complemented by new considerations.

The same attitude – revising and adding instead of discarding – is also needed when studying how the processes of globalization challenge media policy. Media policy remains closely linked to nation states, and nationally-defined public spheres. Yet, a primary focus on national factors should not make us blind to other developments. For instance, through different transnational practices – from the actions of the European Broadcasting Union (EBU), via channels like Eurosport and Euronews, to programme and channel exports – broadcasting has at least contributed to a, admittedly limited and multilingual, European public sphere (Gripsrud 2007). The trans- and supranational levels need to be added to the national if we want to scrutinize the challenges posed to media policy by the processes of globalization.

Convergence

Digitalization blurs the borders between different media since, simply put, all digital media texts (content) have a physical existence as series of 0s and 1s. Thus, documentary or feature films can be enjoyed on television, mobile phones or in properly-equipped cinemas; video clips may be inserted into newspaper articles on the World Wide Web and picked up by a public that are, simultaneously, readers, viewers and listeners on a variety of portable devices. Even if one may also point to various forms of divergence, i.e. that different forms of media and media content are separated and live on apart in terms of their uses, the main trend of our times is the blurred distinctions between media both in terms of hardware and software: the same technical instruments – say, networks and computers – can handle different forms of communication and content.

Since this is the age of convergence, media policy is also necessarily moving away from media-specific to media-neutral approaches.

As the number of users of the Internet and the World Wide Web is growing, and an increasing portion of these users enjoys fast broadband connections, so increases the importance of the Internet's capacity for a many-to-many mode of communication where it is relatively easy for anyone to act as sender. Data transfers are built on a common open standard protocol which simplifies the introduction of such new services on the Internet as email, instant messaging, peer-to-peer file sharing, and the World Wide Web.

Since its inception in the early 1990s, the World Wide Web has made crucial contributions to the consumer appeal of the Internet. It became widely used as a tool for public communication, to the point where it is now commonly applied as a synonym for the Internet. The Mosaic web browser software, launched in 1993, was able to show both text and graphics within a well-functioning user-interface (Rasmussen 2002: 29ff). For entrepreneurs, this meant that the Internet's commercial potential became clearer. For media content producers,

it meant a new outlet. In 1994, the web housed approximately 3000 sites. Four years later, the number was estimated at 1.2 million (Rasmussen 2007: 88). And it keeps growing at a dizzying pace. These sites include everything from long-abandoned personal homepages, via an abundance of news providers and huge public and commercial databases, to all kinds of shops – to mention just a few obvious examples.

The Internet has taken up an increasingly important position in political, economic and social life. The average time that users spend on the internet is now estimated to equal time spent watching television in some Western states (e.g. IBM 2007). Money spent on online advertising is close to the amount spent on television advertising (e.g. Sweney 2009). OECD countries boasted a total of 221 million broadband subscriptions by June 2007 – equal to 18.8 per 100 inhabitants (OECD 2007). Importantly, to an overwhelming degree, internet use remains based in the wealthier parts of the world. Although the numbers of users are substantial, for instance, in China and India, the per capita statistics still put North American, European, Oceanian and rich Asian countries far ahead of the rest. This applies both to Internet use in general and, even more clearly, to broadband access. Africa accounted for 14.2 per cent of the world's population in 2007, but only 3.5 per cent of internet usage. In contrast, North America has 5.1 per cent of the population, but 18.8 per cent of world internet usage (Internet World Stats 2008). A list of broadband access per capita puts Chile as the highest-ranking Southern American country at #23. No African countries are found among the top 30 (NationMaster 2008). Such patterns reflect the political, economic, and social impact of the Internet worldwide.

Different internet services facilitate very different uses, and have diverse effects. The impact of email on both personal and professional communication has been immense. The consequences of peer-to-peer file sharing for everything from amateur creativity to the future of the music and audiovisual industries are indeed wide-ranging. Concentrating on the World Wide Web, we can identify different, often conflicting, implications for varied parts of our societies. The potential for economic utilization is vast, through advertising, by selling physical goods online, and by offering digital content from pornography to scientific research papers at set prices. Different genres of websites facilitate novel opportunities for public communication, based on both written and audiovisual content. At the time of writing, the web's potential as a tool for social networking – through services like Facebook and Twitter – has increasingly been subject to the strongest hype.

Marketization

While the mass media in capitalist countries, historically, have always been private enterprises, the one really significant exception to that rule has been the public service broadcasting institutions operating in Western Europe

and elsewhere since the 1920s. The arrival of satellite and cable television in Western Europe around 1980 made national borders far more difficult to uphold for broadcasting signals. This technological development coincided with a right-wing, liberalist political turn and, in some cases at least, a degree of popular rebellion against overly-pedagogical or high-culture-dominated programming by public broadcasters. The result was a 'neo-liberalist' shift in media policies, i.e. a reregulation so that the former broadcasting monopolies funded by licence fees were exposed to tough competition over audiences with purely commercial radio and television channels. Consequences for programming were obvious almost immediately – for example a rapid growth in drama's share of programming in most countries (cf. e.g. Gripsrud 2010) but also a number of other changes in the forms and formats of radio and television catering to what was conceived and perceived as a widespread, popular taste.

It may well be that these changes in broadcasting inspired related changes in other media, e.g. increasingly tabloid newspaper journalism and a shift toward popular tastes in book publishing. But it may also be that it was largely business as usual in these other media – the impression of a more radical commercialization of content in print media may, at least in part, have been due to the change in broadcasting and its impact on the general character of the public sphere – which, as a whole, became markedly more dominated by blatantly commercial ambitions, initiatives, contents and forms. Our understanding of the totality of the changes that gained momentum around 1980 is complicated by the fact that the same time period saw a number of developments that would seem to run against the mainstreaming and shallowness of factual and fictional forms associated with commercial media. For instance, an increasingly self-reflective journalistic professionalism developed in different media in many countries from the 1970s on, symbolized and inspired not least by the Washington Post's reporting on Watergate. Furthermore, the opening up of broadcasting to private initiative could in some cases, at least for some time, lead to an increased diversity of voices as certain elements of civil society could start using radio for their purposes.

The question of how to support tendencies such as these last two – quality reporting and diversity in broadcasting – in a predominantly commercial media system would immediately have to be asked, if policymakers were to take seriously the government's responsibility for the infrastructure of the public sphere. But it is not evident what sort of policies would be the best response. While systems of subsidies for traditional art institutions and print media had been developed in many countries over many decades, the answers to the challenges posed by the commercialization of broadcasting had to be specific to the structures and functions of broadcast media. The outcome, so far, has been varied – to say the least.

The impact of the three dimensions of change

At present, the debates over whether, or how, to balance, or counter, the effects of commercialism that are negative from a democratic point of view are still going on. The issues are, however, different in 2010 than they were 20 and 30 years ago: the digitization of the media, including not least the rapidly-established centrality of the Internet, has thoroughly changed the premises of the previously-established system of regulations, subsidies, etc. The need to think through the fundamentals of media policy in the light of globalization, media convergence and increased commercialization is obvious.

An obvious first example is that the Internet tends to favour the Big Actors in any given field. What Manuel Castells (2009: 73ff) calls “the core of global media”, made up of large globalized media corporations, is characterized by increasingly-concentrated media ownership. The astronomical sums of money paid for services such as YouTube and My Space indicate how the global reach of web businesses is coupled with strong mono- or oligopolistic tendencies that result in huge profits to owners but also enormous concentrations of power and, at least potentially, threats against cultural diversity. The question is, of course, to which extent, and how, nation states and supranational authorities such as the European Union should respond to this situation.

A second example, in which commercial interests are somewhat differently positioned, is the question of file-sharing, or digital theft and illegal downloading and use of cultural artefacts such as music and movies. These practices are threatening the financial health of the media and the cultural industries since they go on at such a grand, global scale. On the other hand, the traditional copyright regimes are quite obviously in need of revision, since digital technologies have radically changed the conditions for creativity – specifically, and not least, for the creative re-use of previously published material in collective processes of production. The balancing of these and other considerations in the field of copyright law may exemplify the complexity and historical uniqueness of the challenges faced by today’s makers of media policy.

A third, specific illustration concerns the redefinition of audiovisual policy. By 2010, 30 nation states across Europe have been through a common revision of their respective media policies to accommodate the emergence of new forms of audiovisual media. The revision is steered by the European Union’s new directive on audiovisual media services – two decades after the Television Without Frontiers directive created a single market for television programmes (e.g. Krebber 2002). The crucial issue in the new directive is that television is no longer television. That is, it is no longer easy to define television based on its organizational form as broadcasting provided by a limited number of senders via one of a few networks to receivers within controllable borders. Instead, in principle, television is increasingly made available by anyone for everyone via the Internet. The EU calls it “audiovisual media services”, and it is up to each Member state to make it fit with native languages and regulations. The implementation of the directive, then, is a good example of how

the supranational level intervenes in national media policies. The introduction of audiovisual media services also illustrates how digitization and convergence “opens up” the policy field to new actors: the range and number of businesses and organizations – and their lobbyists – clearly make the policy processes more complicated and cumbersome.

The advent of audiovisual media services should not, however, be seen as the total and final convergence between television and other media. The new directive still upholds a distinction that regulates traditional broadcast television more strictly than the online, on-demand versions. Yet, what the directive does signal is the kinds of challenges posed to media policy in the digital public sphere. This book offers insights into how these challenges are played out in a range of contexts.

The organization of the book

The chapters that follow all deal with challenges to media policy in a digital public sphere. In Chapter 1, Slavko Splichal provides an historical discussion of conceptualizations from “the public” to “the public sphere”. The former, Splichal argues, gave way to the latter, entailing a dissociation of public opinion from the public and a de-socialization of public opinion, which imploded into public opinion polls. The chapter lays out often-overlooked key contributions to theories of public opinion and the public sphere, much needed in our field, where a token reference to Habermas’s 1962 habilitation thesis still too often seems to be the limit of engagement. In addition, Splichal shows how attention to the conceptual differences between the public and the public sphere helps us grasp the impact of globalization on the democratic rule of our societies. As such, Splichal provides a theoretical clarification and a fundament on which to base the remaining chapters.

The next four chapters provide cases in the sense that they each analyse a pertinent issue for media policy, or a controversial question. In Chapter 2, Hannu Nieminen studies a company – TVkaista – that redistributes Finnish TV via the internet to consumers anywhere in the world. As he shows, the case illustrates a number of key challenges for media policy. On the one hand, there is the respect for the rights of the creators of the programming, with which the service could seem to be at odds. On the other hand, TVkaista, one could argue, does provide a public service by making available a wealth of television programming – importantly across national borders. In so doing, does this kind of service open the way for transnational socio-cultural public space, or rather support cultural and social fragmentation?

Karl Knapskog also deals with issues of public access to audiovisual material, in Chapter 3. He does, however, look at a completely different kind of actor and different challenges: the public service broadcasters handling of their vast archives in light of their obligations to serve the public interest. Drawing on examples from different European countries, the chapter examines economic,

legal, political, and practical obstacles to the realization of a universal public access to, and use of, these archives. The situation today, Knapskog shows, is one where technology can make cultural artefacts accessible to a hitherto-unprecedented degree. Still, both public service broadcasters and the national archives are left in a situation where a lack of consistent policy restricts the terms of action. The case thus illustrates, argues Knapskog, a key task for media policy in the digital era.

Chapter 4 is an exploration of how the global media landscape is transformed, with Rupert Murdoch's News Corporation's leap into cyberspace as a case study. Ole J. Mjøs discusses the ramifications of the company's acquisition of the social-networking site MySpace. He shows how the modernized EU directive on audiovisual media services represents an attempt to tackle emerging challenges posed by the actions of entities such as News Corporation.

In Chapter 5, Tanja Storsul takes stock of the discussion so far on a crucial policy issue, which embodies commercial and global forces as well as the result of technological convergence – namely network neutrality. Concentrating on consequences for audiovisual content distribution, Storsul shows how the increased use of the Internet for video and television services may challenge the Internet model itself. While the situation is still manageable, it might eventually interfere with the fundamental principle of maintaining a basic Internet service that can be used for all kinds of communications. In such a situation, the net-neutrality issue may be reactivated with a stronger conflict between network providers and content providers about their position in the market. By extension, it will become a major issue for media policy.

The book's last four chapters take one step away from empirical cases and apply a meta-perspective in the sense that they analyse the policy itself, or propose ways to rethink media policy.

In Chapter 6, Hallvard Moe looks at how the media user is pictured in actual policy. His starting point is recent criticism against public service broadcasting, and his analysis has a dual aim: First, to detect whether policy documents describe the users as constituting a public or an audience, and, second, to estimate the extent to which these users are seen as active participants in the digital public sphere. Moe argues that even though the documents analysed do make room for a notion of the users as a public, no comprehensive vision grounds the policy. Moreover, the policy documents give strikingly little attention to any substantial idea of the media users as participants. In the long term, he argues, a failure to tackle such significant issues of the legitimacy of media policy tools might have grave implications.

Karen Donders and Caroline Pauwels take a different approach. In Chapter 7, they evaluate the European Commission's role in the development of public service broadcasting policy in the EU Member States. Donders and Pauwels ask whether the intervention of the Commission has gone as far as some, notably the private sector, wished and Member States and public service broadcasters, especially, feared. The chapter focuses on the prevailing assertion of academics that the Commission's state aid control leads to a marginalization of public

service broadcasters' activities. On the basis of an analysis of the main critiques on Commission interference with public service broadcasting, the principles that guide the Commission in this respect, and an evaluation of the actual outcomes of the Commission's state aid practice, the authors assert that the state aid control of public service broadcasters' funding schemes fosters the ongoing transfer from public service broadcasting to public service media.

In Chapter 8, Helge Rønning addresses the question of the conditions for a fundamental value in liberal democracies – the freedom of expression – in the age of the Internet. The chapter provides an incisive overview of key issues in this area, among them the filtering practices of authoritarian states and private Internet-access providers, the problems of maintaining privacy when online businesses collect information about each and every one of us, how outright harassment of individuals can take place in forms hitherto unknown, and the complex problems of copyright or intellectual property regulations. A sensible form of regulation must be imagined as somewhere between authoritarian and non-accountable censorship on the one hand and untenable, extreme, anything-goes liberalism on the other.

In the final chapter, Sandra Braman examines “legal globalization as it appears in the *government* (formal institutions of the law), *governance* (decision-making with structural effect whether it takes place within the public or private sectors, and formally or informally), and *governmentality* (cultural predispositions and practices that enable and sustain governance and government)”. She shows how the various processes of legal globalization challenge the very fundamentals of media policy as it has hitherto been conceived. Her conclusions may be provocative to many. For instance:

Oligopolization of broadcasting remains a problem, but it may be more useful under contemporary political conditions to work with stockholders than it is to fight trends in regulation. Participatory governance remains a goal, but today the most fruitful activity may be that which engages governing epistemic communities.

Such views and the chapter as a whole certainly provide food for further thinking and debates.

Which is, incidentally, the main ambition of this book.

References

- Bohman, J. (2004) “Expanding Dialogue: The Internet, the Public Sphere and Prospects for Transnational Democracy”, in N. Crossley & J. M. Roberts (eds.) *After Habermas: New Perspectives on the Public Sphere*, Oxford, Malden: Blackwell Publishing, pp. 131–155
- Braman, S. (2004) “Where has Media Policy Gone? Defining the Field in the Twenty-First Century”, *Communication Law and Policy* 9(2): 153–182.
- Castells, M. (2009) *Communication Power*, Oxford and New York: Oxford University Press.
- Ellis, J. (2000) *Seeing Things – Television in the Age of Uncertainty*, London, New York: I.B. Tauris.

- Fraser, N. (2007) "Transnationalizing the Public Sphere. On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World", *Theory, Culture & Society* 24(4): 7–30.
- Gripsrud, J. (2001) "Globalisation and Cultural Diversity: Reasons for Measured Optimism", paper presented to the International Governmental Network on Cultural Policy, Oslo, 28 November
- Gripsrud, J. (2007) "Television and the European Public Sphere", *European Journal of Communication* 22(4): 479–492.
- Gripsrud, J. (2010) "50 years of European Television: An essay", in J. Gripsrud & L. Weibull (eds.) *Media, Markets and Public Spheres: European Media at the Crossroads*, Bristol, Chicago: Intellect Books, University of Chicago Press, pp. 71–93
- Habermas, J. ([1992] 1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Mass.: The MIT Press.
- Habermas, J. ([1998] 2001) *The Postnational Constellation – Political Essays*, Cambridge: Polity Press.
- IBM (2007) *The End of Advertising as we know it*. http://www-03.ibm.com/industries/media/doc/content/bin/media_ibv_advertisingv2.pdf. Accessed 20 May 2008.
- Internet World Stats (2008) *World Internet Usage and Population Statistics* <http://www.internet-worldstats.com/stats.htm>. Accessed 24 January 2008.
- Krebber, D. (2002) *Europeanisation of Regulatory Television Policy. The Decision-making Process of the Television without Frontiers Directives from 1898 & 1997*, Baden-Baden: Nomos.
- NationMaster (2008) *Internet Statistics, Broadband access (per capita) by country*, http://www.nationmaster.com/graph/int_bro_acc_percap-internet-broadband-access-per-capita. Accessed 20 May 2008.
- Organisation for Economic Co-operation and Development (OECD) (2007) *OECD Broadband Statistics to June 2007*, http://www.oecd.org/document/60/0,3343,en_2649_201185_395740_76_1_1_1,00.html. Accessed 20 May 2008.
- Rasmussen, T. (2002) *Nettmedier: Journalistikk og medier på Internett*, Bergen: Fagbokforlaget.
- Rasmussen, T. (2007) *Kampen om Internett*, Oslo: Pax.
- Sweney, M. (2009) *Internet overtakes television to become biggest advertising sector in the UK*. <http://www.guardian.co.uk/media/2009/sep/30/internet-biggest-uk-advertising-sector>. Accessed 30 September 2009.
- Ugarteche, O. (2007) "Transnationalizing the Public Sphere. A Critique of Fraser", *Theory, Culture & Society* 24(4): 65–69.

I. A Perspective

Chapter 1

Eclipse of “the Public”

From the Public to (Transnational) Public Sphere Conceptual Shifts in the Twentieth Century

Slavko Splichal

The disappearing public...

In *The Public and Its Problems*, Dewey wrote of a public in eclipse because “there is too much public, a public too diffused and scattered and too intricate in composition. And there are too many publics” (Dewey [1927]1991: 137). Since more recently, we may speak of another eclipse – eclipse of the very concept of “the public” that is largely being substituted by the concept of “the public sphere”.

With Rousseau and particularly Bentham, the concept of “the public” as a sort of popular tribunal expressing opinions and representing the general will gained prominence in political-philosophical discourses. The concept was essential for theorizations of public opinion in the nineteenth and twentieth century. Early normative-political theories of public opinion may be defined as *substantive*, in contrast to what Francis G. Wilson later named *adjective theories* (1962). In adjective theories, the term “public” is used as an adjective denoting the specific quality of an (individual or collective) opinion. In contrast, the substantive conceptualization of public opinion as “opinion of the public” stresses a firm, authoritative singleness of “the public” as a (universal) collective subject expressing *the* public opinion – as opposed to the irrational, emotional, and even violent behaviour of its antonyms – the crowd and the mass.

When public opinion became the superior authority and replaced that position as king, it was considered a process by which individuals incorporated into the public expressed approval or disapproval of any actions in particular places. In the eighteenth century, some references were made to authentic bearers of public opinion of the time. The concept of the public did not denote the people or citizenry at large but rather a small fraction of them, such as groups of erudite individuals critically discussing the matters of literature and art, and reading and occasionally contributing to newspapers. These were considered the men of letters, newspaper journalists and their editors who supposedly represented the new bourgeois class. When specific “tasks” of public opinion were referred to, surveillance of the execution of power and formation of the unified will were in the limelight.

The public has challenged and eventually replaced the monarchic power, while it has also captured and retained its transcendental nature of the supreme authority. Public opinion was considered an almighty impersonal “tribunal”, and the voice of the public, or public opinion, was nearly identical to the divine voice once exclusively belonging to monarchs. Tocqueville believed that “the King still used the language of a master but in actual fact he always deferred to public opinion and was guided by it in his handling of day-to-day affairs. Indeed, he made a point of consulting it, feared it, and bowed to it invariably” (Tocqueville [1856]1955: 174–175). In theory, public opinion “replaced the powers of heaven and earth in returning men to possession of their decisions” while preserving the appeal to a divine authority that can never be disrespected (Ozouf 1988: S11, S13). Tönnies (1922) even compared the role of public opinion in *Gesellschaft* with that of religion in *Gemeinschaft*, as did many scholars before him.

Bentham conceived of publicness as a necessary precondition “for putting *the tribunal of the public* in a condition for forming an enlightened judgement” (Bentham [1791]1994: 590; emphasis added).¹ In Bentham’s theory, surveillance over political power could only be exercised by concrete, physically-existing social group(ing)s, “the body of the curious at large – the great *open committee* of the tribunal of the world” (Bentham [1787]1995: 47–48). The “Public Opinion Tribunal” consisted of all “auditories” at meetings and assemblies dealing with political questions, and all individuals “taking, for the subject of their speeches, writings, or reflections, any act or discourse of any public functionary, or body of public functionaries belonging to this state” (Bentham [1830]1983: 36). The public was clearly detached from those in power, who were subject to its surveillance.²

By the beginning of the twentieth century, two distinct theoretical paradigms had been established: (1) the normative-democratic paradigm linking the public and public opinion to political participation and democracy (represented by Tarde, Tönnies, and Dewey among others), and (2) the authoritarian paradigm emphasizing the repressive role of public opinion that hinders individuals’ freedom of expression (e.g. Tocqueville, Bryce, Ross, and Lippmann). Both paradigms nearly crumbled in the face of the polling industry, which challenged traditional theories of public opinion.

Normative-democratic paradigm

Gabriel Tarde conceived of the public as “a purely spiritual collectivity, a dispersion of individuals who are physically separated and whose cohesion is entirely mental” (Tarde 1969: 277). For Tarde, the public could not exist without the press, since reading newspapers creates individuals’ “simultaneous conviction or passion and in their awareness of sharing at the same time an idea or a wish with a great number of other men” regardless of his or her specific location (ibid: 278). No less important are private conversations among them, in which they discuss and interpret news that newspapers provide. Thus, on the one

hand, "the press unifies and invigorates conversations, it standardized them in space and diversified them in time"; on the other hand, it helps cultivate conversation from mere gossip.

Tönnies followed Tarde's conceptualization of the public as a social category of mentally-connected people. Unlike earlier theories which have focused on the public as it occurs in specific social places (e.g., as a tribunal, a visible group), Tönnies conceptualized "the public" beyond the boundaries of physical settings as a form of imagined intellectual grouping, whose members share similar ideas and opinions without interacting directly, with the "republic of the learned" (*Gelehrtenrepublik*) at its core.

Tönnies conceived of "the public" as a transitory social formation – a group like the mass or "dispersed crowd" and "present crowd". The "republic of the learned" – individuals who have "educated opinions" – constitutes the core of opinion of the public, and around them the "large public" emerges. According to Tönnies, a physical bond is neither essential nor typical for the public (although possible for a short period of time); rather, it is the spiritual connection among members of the public that is decisive. What distinguishes the public from an incidentally-connected, dispersed, or present crowd is its capability to clearly articulate opinions. In Tönnies's words, "the subject of opinion of the public is a fundamentally connected totality (*Gesamtheit*), politically in particular, that has been united by thought and judgment, and that is precisely why it belongs to the public, to public life." However, it "is not assembled as a public or as a subject of opinion of the public, except in spirit – and is normally much too large to be conceived as an assembly" (Tönnies 1922: 131–132). Even if the public is becoming very large and dispersed (i.e., composed of a "limitless mass of people"), it represents those "who, in spite of being dispersed and infinitely diverse, may think and judge similarly" (ibid: 84).

For Dewey, the public was more than a simple social category of individuals sharing the same information provided by newspapers and discussing them in small groups in the cafés, and more than people who think and judge similarly. He conceptualized the public as a large body of persons having a common interest in controlling the consequences of social transactions in which, for any reason, they did not participate. It consists of "all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for" (Dewey [1927]1991: 15–16). Since a large number of transaction generates important consequences for those not directly involved, those people to whom "the public" refers comprise a continuously emerging, overlapping, and disintegrating group.

Dewey's definition of the public is based on the assumptions that public conversation is essential to participation, and that participation is intrinsic to democracy. Both communication and democracy are closely linked with education, which is as essential to social life as "nutrition and reproduction are to physiological life...This education consists primarily in transmission through communication. Communication is a process of sharing experience till

it becomes a common possession" (Dewey [1916]2003). The knowledge one needs to participate in political life is continuously generated in the interaction of citizens among themselves and with experts, politicians, and others, through the mediation of the press. In his model – which is in contrast to the long tradition of normative theory – the public is related directly to the state, which provides the necessary means for the public to become organized as a distinct entity. However, Dewey did not use the term "state" in the Weberian sense of an organization that has a monopoly on the legitimate use of physical constraint to enforce its order over the population in a given territory, but rather in the sense of the general regulatory and administrative functions that have to be performed in any society.

Early normative theories considered publicness one of the fundamental principles of democratic governance and emphasized the principal role of the public as the fourth power or watchdog maintaining surveillance over the government. In the late eighteenth and early twentieth century, the term "the public" retained its constitutive status in the public opinion theories of American pragmatists Park and Dewey, and European sociologists Tarde and Tönnies. Dewey, for example, defined public opinion as "judgment which is formed and entertained by *those who constitute the public* and is about public affairs" (Dewey [1927]1991: 177; emphasis added). Even in the beginning of the twentieth century, when "the public" had lost its strictly political and rational character, it remained an "elementary and spontaneous *collective grouping*" (Blumer [1946]1966: 46–50, emphasis added; also Park, [1904]1972: 57).

Authoritarian paradigm

Since the mid-1800s, control over the ruling authorities by the public has been increasingly substituted by control over individuals as the main function of public opinion. It was Tocqueville who first realized that public opinion was not only a safeguard against the misrule of those in power but also a means of coercion in the hands of the majority against any minority of those who would not share the majority opinion. A re-conceptualization of public opinion in psychological and sociological theories emphasized the impelling power of public opinion to discipline the people liberated of their critical function as an active part in forming public opinion. Edward Ross believed that public opinion was merely a "primitive technique" that became "simply one coercive agent alongside of others" (Ross [1901]1969: 98). Similarly, Tarde recognized that "the need to agree with the public of which one is a part, to think and act in agreement with [public] opinion, becomes all the more strong and irresistible as the public becomes more numerous, the opinion more imposing, and the need itself more often satisfied" (Tarde 1969: 318).

Tönnies clearly identified controversial conceptualizations of public opinion and required not only a strict separation of different meanings of "public opinion", but also distinct concepts for them. He differentiated between "un-articulated" public opinion (*öffentliche Meinung*) and "articulated" opinion

of the public (*die Öffentliche Meinung*). The former is "a superficial whole of multifarious, contradictory opinions, which are publicly voiced", and the latter denotes "a uniformly effective power" with a "*politically united public*, which has agreed to opine and judge in a particular way and which, therefore, belongs naturally to the public sphere (*Öffentlichkeit*), to the public life" (Tönnies 1922: 131; emphasis added).

The authoritarian paradigm had paved the way for the eclipse of the public as the subject of public opinion. The shift to adjective theories of public opinion after the 1930s indicates the ultimate "theoretical disillusionment" with a rational-critical, "politically united" (bourgeois) public of the Enlightenment. The early dominant paradigm of close connections between opinion of the public, political democracy, and freedom of the press was overwhelmed by the empirical current, which rejected the traditional normative-theoretical conceptualization of public opinion and focused on public opinion polls, propaganda, and public relations. Sigmund Freud's nephew Edward Bernays, who ingeniously used his uncle's ideas to manipulate the masses, considered public opinion "a term describing an ill-defined, mercurial and changeable group of individual judgments. Public opinion is the *aggregate result of individual opinions* – now uniform, now conflicting – of the men and women who make up society or any group of society" (Bernays [1923]1961: 61; emphasis added).

The public as a subject ("tribunal") of public opinion was substituted with a disperse mass or just any group of individuals. Childs (1965: 13) suggested that "the word 'public' and the word 'group' are for all practical purposes interchangeable." The social-psychological conceptualization made public opinion equal to the sum or average of attitudes on a (controversial) issue held by members of a social group of any size. Soon after the invention of opinion polls, Allport (1937: 9) completely eliminated "the public" from the definition of public opinion as "superfluous for the purpose of research" and reduced public opinion to a "multi-individual situation", as earlier suggested by Bernays, and opinions to mere "reactions of individuals". Finally, Helmut Bauer bluntly questioned the meaningfulness of the very concept "public opinion", stating that it should be conceived of as "the sum of all relevant individual opinions" and identical to "summing of equal or at least similar opinion expressions of citizens inquired by ballot or opinion polls" (Bauer 1965: 121).

...and the rising (confusion with) public sphere

After commercialization of publicity, "authoritarianization" and "adjectivization" of public opinion, and finally the implosion of public opinion into opinion polls, the "invention" of the concept of the "public sphere" seemed to reinvigorate the ethical norm of publicness. It was introduced into English written works with the translation of Habermas's book *Strukturwandel der Öffentlichkeit* (1962), translated as *The Structural Transformation of the Public Sphere* (1989), and it rapidly and almost completely eliminated the traditional

concept of “the public” from critical-theoretical discourse. Ebscohost’s “Communications and Mass Media Complete” database documents four scholarly journal articles referring to “the public sphere” in their titles in the period from 1900–1984, 11 in the period 1985–1989, and 343 in the period 1990–2005. Of 265 book titles that include the words “public sphere” displayed at the amazon.com Web site, seven were published before 1990 but none before 1984. The once prominent concept of “the public” that dominated for two hundred years almost disappeared from theories dazzled with the splendor of the new concept.

The translation of Habermas’s book *Strukturwandel der Öffentlichkeit* into English, French and many other languages had an important “collateral damage”: the English (and French) word “the/le *public*”, which had dominated academic discourse for the last two centuries, has been largely – but mistakenly – substituted with “*the public sphere*” or “*sphère publique*”. The book challenged the English-spoken frameworks of thought prevailing in the US-lead international academic community because the conceptual capacity of the traditional English term “the public” is much narrower than its German counterpart *Öffentlichkeit*. Not only are the two terms far from being synonymous, the German term actually stands for entirely different concepts – as Tönnies has argued already – that are represented by different terms in English.

Reducing *Öffentlichkeit* to “the public sphere” misses the fundamental distinction between “the public” and “the public sphere”: while the public is a social category, whose members (discursively) act, form, and express opinions (similarly to nationality or political affiliation) – a social category into which someone falls due to their specific characteristics, and to which someone believes they belong, provides a self-definition essential to the self-concept –, the public sphere is only its infrastructure. Of course it is more than just “technical” in the sense of availability of communication channels; it also comprises important political, cultural, and economic components, but nevertheless, it remains “just” infrastructure or a “public forum” resembling the ancient Greek *agora* or *forum Romanum*.

Of course, Habermas himself cannot be blamed for the confusions deriving from translation, and even less for the outcast of the traditional concept of “the public”. He actually clearly defined “the public sphere”, in contrast to the public, as “all those conditions of communication under which there can come into being a discursive formation of opinion and will on the part of a public composed of the citizens of a state” (Habermas 1992: 446). A public sphere cannot act, it cannot communicate, but a/the public can. The public sphere is a necessary but not sufficient condition for a/the public to emerge; an infrastructure that enables the formation of the public as the subject, the bearer of public opinion (“opinion of the public”) separated from the realms of the state and private property.

The long intellectual history of the disappearance of “the public” proves that the widespread conceptual confusion with “the public sphere” is not just a problem of translating the German term *Öffentlichkeit* into English and other

languages. Terminological and conceptual changes and perplexities that took place during the last century reflect wider and deeper social changes and shifts in research epistemologies.

The public sphere is commonly understood as a specific sphere, domain, or "imagined space" of social life existing between, and constituted by, the state and civil society, which represents an infrastructure for social integration through public discourse – a kind of "opinion market" – in contrast to political power in the sphere of politics and market mechanisms in the sphere of economy, both of which represent specific forms of social integration through competition. It is activated in the communicative interdependence and rational-critical discourse among citizens potentially affected by transactions in which they do (or did) not participate – thus creating the public as a social category – where the legislated laws of the state and the market laws of the economy are (or ought to be) suspended.

The growing popularity of the concept "public sphere" was given a strong impetus by rapidly growing computer-mediated communication of the Internet in the 1990s. In contrast to the "mediated publicness" based on the operation of traditional, non-interactive press and broadcast media, the Internet and intranets offer new opportunities for participatory communication. The Internet technology further expands the process of the transformation of an individual opinion into public opinion. With the new interactive networks it has created, the Internet substantially increased the feasibility of citizens' participation in public discourse. It helped develop a deterritorialized (transnational) public sphere not bound to particular locality. In this way, the Internet had a constitutive role in the development of global communication networks of individuals, organizations and movements.

In its early period, the Internet was believed to radically challenge the hierarchical, top-down mass communication model typical of traditional media, and to democratize not only communication but also political relations in general. It was thought to offer new possibilities for political participation leading to a kind of direct democracy not only locally but even at the (trans)national level: a genuine or "strong" electronic democracy was expected to oust populist democracy dominated by traditional mass media, particularly television. Similar hopes are invested in digitization of television. While there is no doubt that new types of engagement are made possible by new communication technologies (in developed societies), it is much more questionable if they indeed stimulate and revive political participation and civic engagement, and the development of a genuine public sphere.

Civil society and the public sphere

The public sphere is the arena in which civil society informs itself and exchanges ideas and opinions with other social actors "representing" the two remaining realms: those of the state and the economy. The concept of civil society is closely related and often confused with that of the public sphere³

since the central part of civil society is occupied by associations that form opinions and serve as a hub for an autonomous public sphere. As Calhoun argues:

the importance of the concept of public sphere is largely to go beyond general appeals to the nature of civil society in attempts to explain the social foundations of democracy and to introduce a discussion of the specific organization within civil society of social and cultural bases for the development of an effective rational-critical discourse aimed at the resolution of political disputes. (Calhoun 1993: 269)

Civil society is the social realm – a pattern of social organization – established between, and different from, the state, the economy (the market), and the private domain of family, friendship, and intimacy. It is constituted by uncoerced associations, organizations, and activities that reach beyond economic and political “consumption”, through which citizens as economic and political beings contribute to the production of economic (profit) and political power. In contrast, in civil society opinions are formed and goals defined to influence opinion formation and, consequently, decision-making in given institutional and normative frameworks. Civil society is often seen as a locus for limiting the power of the state and capital, but it does not seek to replace either state or private actors. Its institutional core “comprises those non-governmental and non-economic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the life-world” (Habermas 1996: 367).

While civil society consists, in principle, of self-governing organizations and activities detached from the state and the market, we can often experience relatively deep interpenetration between the three realms. Think of such organizations as universities, non-commercial media, churches, trade unions and workers movements, associations of “men of rank” and charity, movements and associations of national and ethnic minorities, professional associations and chambers. In all of them, people may freely associate and communicate not to gain profit or power, but in order to socialize and/or promote a common cause. But they can be heavily influenced by bureaucratic structures of the state, political parties, and private for-profit corporations as well. They can also quite frankly – publicly – promote their private (commercial) interests or support political parties.

Although constantly under the pressure of capital and political power, actors in civil society participate in a genuine (re)production of publicness – in contrast to organizations, political parties, interest groups, and similar actors who occupy an already constituted public sphere in order to use it, and the media as gatekeepers who set the agenda of public discourse and who control the access of contributions and authors to the mass media. In other words, civil society is constituted by social actors who historically set up the public sphere and whose participation in it is still unavoidably constitutive. Actors

constituting civil society – if truly independent of both public authorities and private economic entities – are capable of deliberating about collective actions in pursuing their interests. Their engagement proceeds from specific interests and experiences but always casts an eye over the brim of personal or group interests and experiences to care for general well being.

Civil society generates the public sphere in which different social actors express their opinions while citizens can make the exercise of power by those actors more accountable. Through public discussion and persuasion, civil society influences regulative forces of the state and corporate institutions. The communication structures of the public sphere enable actors on the periphery of civil society, who, in contrast to those at the political centre (the state), often have a higher sensitivity for the identification of problems, to activate new political and nonpolitical themes. Through often-controversial discussions in the media, these new themes can become public themes. In contrast to the classical model of the liberal public sphere as a realm where people are individually included in the rational discussion, the contemporary public sphere is predominantly characterized by the appearance of identity politics, as manifested in nationalistic, ethnic and religious movements, feminism, youth movements, and so on, which shape a sort of secondary public. In short, against the state there does not stand an undifferentiated, unified public sphere, but rather a network of "specific publics" that preserve their borders with the general public and have relatively strong internal cohesion based upon their concern for public good rather than private interests.

The public and the public sphere

When civil society or one of its components is connected with a particular kind of public discourse taking place in the public sphere, it becomes "the public" or "a public". There is no public sphere without civil society, but there is also none without the public. However, in addition to the public(s) there are many other actors appearing in the public sphere, whose interests significantly differ from those of the public or civil society.

Mass media are the case in point for a dual and controversial role in the public sphere. Newspapers, film, radio, television, and the Internet significantly contribute to the organization of the public sphere. Ever since Bentham, first the press and later other media were considered constitutive of the public. Bentham thought of the press as "an appropriate organ of the Public Opinion Tribunal", and "the only constantly acting" organ of public opinion (Bentham [1822]1990: 45). In his essay "On the Liberty of the Press" (1820), he equalized the rule of publicity with "the liberty of the press [which] operates as a check upon the conduct of the ruling few; and in that character constitutes a controlling power, indispensably necessary to the maintenance of good government." In "Securities against Misrule", Bentham even suggested that a newspaper editor is not only one of the "leading members" or "Presidents", but also "the President of the Presidents" in the "Committee of the Public Opinion Tribunal", thus

having the power to arbitrate on behalf of the entire Public Opinion Tribunal (Bentham [1822]1990: 61–64).

As the press developed into “a link in the chain of modern commercial machinery” (Bücher [1893]1901: 216) and became strongly influenced by political parties, newspapers lost their leading position in the “Public Opinion Tribunal”; as Tönnies argued, instead of being organs of the public to represent its opinion, newspapers became organs of political parties. The subsequent development of new media – from film to the Internet – and the enormous increase in the size of audiences made the controversial role of the media in relation to “the public” undeniable. From the normative point of view, mass media became one of the actors in the public sphere with particular (private) interests not necessarily congruent with their “duty” to (re)present public opinion. Consequently, the concept of “the press” (or mass media in general) had to be clearly detached from the concept of “the public”, as not all “mass media” act as “media of the public” (for example, as “public service media”). The difference between the media, which are “organs of the public”, and those whose main task is to influence the public (or rather, audiences), may be used as an indication of the polarization taking place in the public sphere between those constituting the public sphere (= the public) and others appearing in the public sphere before the public to derive their legitimacy from it.

In his early work Habermas rather clearly differentiated between the public consisting of the *bearers* of publicness (and of public opinion) and the public sphere as a *sphere* regulated by the principle of publicness, in which the public is acting together with other actors. Nevertheless, “apart from introducing a greater internal differentiation of the bourgeois *public*”, he later also seemed, in reaction to his critics, to “admit the coexistence of competing *public spheres*” (Habermas 1992: 425). Does indeed a “plurality of competing publics” necessarily entail the “plurality of public spheres” as the critics suggest (Fraser 1992: 116–117)? I would disagree even if the relation between competing publics were conflicting. Public(s) and public sphere(s) are not the same thing.

A/the public is a specific grouping that appears or is imagined as a social actor or agent (once a “tribunal”) in relation to some important and controversial social issues (traditionally conceptualized in contrast to crowds or the masses) and based in already-existing social groups in civil society. The existence of a public sphere is vital for a public to become visible through public opinion, and an acting public is a necessary condition for a public sphere to really exist. There is no public without a public sphere, and no public sphere without a public. They are inseparably connected to each other – like a system and its component that must produce results congruent with the defined goal – or else they are “dysfunctional”. Nevertheless, the difference between the two is important and we have to draw a clear distinction between them.

As Garnham (2001) suggests, the idea of the public sphere builds a bridge between Marxist theories of ideology and the liberal free-press tradition, which Marx in his early works also defended (Splichal 2002). The concept revalidates “the specificity of the political, by giving due weight to the emancipatory poten-

tial of liberal bourgeois concepts of free assembly and debate, and by shifting attention from worker to citizen" (Garnham 2001: 12586). But the idea of the public sphere also follows Marx's critique of the bourgeois idea that the press might attain its freedom more easily and fully by adopting the laws of free economic operations that rested on the right to private property, which paved the way to the subordination of the press to freedom of ownership as a peril no less dreadful to a genuine freedom of the press than ideological censorship (Splichal 2002: 113, 115).

We may think of the public sphere as a kind of communication framework of the "body public", a sphere of channels of opinion-circulation binding and protecting its constituent publics. In addition, it includes publics. It would be delusive, however, to equate "the public sphere" with "the sphere of publics". Beside "the public(s)" whose participation is constitutive of the public sphere, two major groups of powerful actors confront the public(s) in the public sphere: (1) state authorities, political parties, interest groups, commercial corporations, and similar actors who provide information subsidies and, thus, "occupy an already constituted public domain in order to use it"; and (2) media gatekeepers who set the agenda of public discourse and control the access of contributions and authors to the mass media that control the public discourse (Habermas 1992: 440, 453–454). This is why a constant danger exists of equating any "public activity" of elites – especially the creation, transformation, and running of local 'civic' organizations – with a political public sphere" not only in China, to which Calhoun (1993: 277) refers here, but in general.

In a more recent essay that focused on the empirical findings and pathologies of political communication, Habermas took up an even more critical and thorough position on the issue. He lengthened the list of "intruders" with seven (partly overlapping) additional key actors "who make their appearance on the virtual stage of an established public sphere" rather than (re)produce it: (1) journalists, (2) politicians, (3) lobbyists, (4) advocates, (5) experts, (6) moral entrepreneurs, and (7) intellectuals (Habermas 2006: 416). But the list is not yet exhaustive. First, in addition to "politicians" (the legislative and executive branch of power), we should add the judiciary. Then the list should be expanded with (at least two) distinct groups of interest in the performance of mass media – (1) media owners' interest in using their media as a means of self-expression and profit maximization; (2) the general interest of capital to advertise commodities on an ever larger scale – which are able to materialize their interests *through* the media, which, historically, they did very effectively. All these actors acting "on the virtual stage of an established public sphere" potentially imperil publicness of the public sphere in the measure that they bring manipulative publicity into the public sphere by subsidizing information and setting the agenda of public issues and framing the public discourse.

However, the public sphere is safeguarded only when economic and social conditions giving everyone an equal chance to meet the criteria for admission to the public sphere are effectively met. A clear interest in the (re)production of a genuine public sphere derives from less-numerous and less-powerful actors,

which may be classified into three main categories: (1) audiences' demand for media uses and interest in receiving information and opinions; (2) various civil society groups' interest in having access to the media to publish their opinions; (3) a general (ethical) interest of citizens in maintaining the citizen rights and in the media performing their public service functions. Citizens *qua* citizens – either as “publics” or as “audiences” – are not among key actors in the public sphere anymore but rather, as in the old Lippmann's theorization, spectators observing the public stage from the balcony.

Global governance and the public (sphere)

A natural consequence of the decline of “the public” and the rise of “the public sphere” was a further dissociation of public opinion from the public and the de-socialization of public opinion, which imploded into public opinion polls. It is true that the theoretical de-socialization of public opinion through polling (this really began in the 1930s) historically preceded the subordination of the public to the public sphere, but the neutralization of the public by the public sphere gave to the process a new and strong impetus (Splichal 2008).

Another major challenge to the concept of “the public” has been spurred by globalization: the tacit assumption that the public (sphere) “belongs” to the nation-state has been challenged. Contemporary ideas of the transnational public sphere and cosmopolitan democracy are obvious reactions to the development of the complex, interconnected, but at the same time diversified and hierarchically stratified, world that we live in. The states of the twenty-first century definitely lost the exclusive power of “guardians of custom, as legislators, as executives, or judges” (Dewey [1927]1991: 35) who may effectively protect public interest by regulating actions of individuals and groups. An often implicit understanding of the public, public opinion, and the public sphere as “national phenomena” prevailed throughout history because they were all dominated by the pursuit of national “public” interests eventually supported, organized and regulated by the state. Or rather, due to empirical circumstances, this question never attracted much theoretical concern.

Processes of globalization go together with the dispersal of authority in all directions, which is the core idea in the concept of “governance”. Whereas globalization denotes the extension of social space, governance refers to the expansion of regulation beyond government. Broadly conceived, the idea of governance explores the changing boundary between the state and civil society. It denotes the transformation of government (or governance for that matter) in an increasingly interdependent world and reflects fundamental changes in the decision-making process compared with the classical model of government. In contrast to “government”, “governance” refers to both state *and* non-state forms of making *and* influencing decisions that significantly affect population in a particular locality or the entire world community. Consequently, the idea of governance blurs the boundaries of the traditional dichotomy, “the state –

civil society", or in the more recent trichotomy, "the state – economy – civil society".

Paradoxically, the conceptualization of governance excludes "the public" but it comes confusingly close to the traditional conceptualization of "the public". While differentiating between two types of multi-level governance – general-purpose jurisdictions vs. task-specific jurisdictions⁴ – Hooghe and Marks define the latter:

They are set up to *solve particular policy problems*...The constituencies of [these] jurisdictions are *individuals who share some geographical or functional space and who have a common need for collective decision-making* – e.g., as irrigation farmers, public service users, parents, exporters, homeowners, or software producers. These are not communities of fate; *membership is voluntary, and one can be a member of several such groups*. (Hooghe & Marks 2003: 40; emphasis added).

This is very close to what Dewey had in mind when he defined the public as consisting of all those affected by indirect consequences of specific transactions in which they could not have participated, to such an extent that they consider it necessary to take some action. The concept of global governance treats governance as "the public" in the Benthamian, Deweyan, Tönniesean, or Habermasian sense – as a network or (imagined) "tribunal" of individuals and groups discursively engaged in global issues that seriously affect a significant part of the population in order to find a solution and/or come to decision, which may even be based on argumentative rationality.

However, there is *one fundamental difference*. The democratic participation of citizens, which is essential for any political conceptualization of "the public", is marginalized or even completely left out from the process of governance. The inclusion of non-state actors (e.g., nongovernmental organizations, but also private for-profit corporations) in (global) governance who act primarily in a non-hierarchical environment does not necessarily increase the communicative and decision-making power of citizens. The opposite scenario, even, is the case, namely that the democratic participation of citizens is de-privileged or even restrained because issues previously subject to formal political scrutiny by more-or-less representative political bodies at the national level are relegated to political institutions operating at the transnational level or to a market-driven deliberation and accountability.

The absence of a democratic transnational institutional infrastructure, e.g., in the form of a public sphere, seems to be less a problem than the non-existence of a transnational public. A realistic solution seems to be building a more decentralized and diffuse system of governance, which ultimately depends upon the creation of an appropriate transnational public sphere. Global governance should provide opportunities and sites for public deliberation among stakeholders to expose the decisions of powerful actors to transnational public scrutiny. By having access to communication media in a global environment, citizens and

non-governmental organizations may contribute to the formation of transnational culture. By participating in the public discourse, citizens and civic associations may even increase transparency, promote accountability, and enhance the democratic legitimacy of the rules and institutions of global governance.

Yet it is questionable whether a transnational public sphere would pave the way to the formation of transnational *public(s)*, which could link the governance with deliberative democracy. The public can only be effective in assuming its democratic functions of influencing and controlling decision-makers if its communicative actions have a clearly defined addressee with an effective decision-making power, as it used to be (at least normatively) the state. The “postnational constellation” requires a kind of transnational “equivalents” to the nation state and national public – effective transnational decision-making powers accountable to effective transnational public(s). For democracy it is crucial that a two-way communication exists between governors and governed and that decision-makers enter the public sphere to justify their decisions and to gain public support.

Transnational governance implies new actors or networks that could overcome the “democratic deficit” but this does not suppress the role of states. The fact that global issues and interdependencies exist does not imply that nation states have no responsibilities. The call for a transnational public sphere and transnational institutional political power does not mean that their national “counterparts” lose responsibility; rather, they need to develop new and effective forms of cooperation and, thus, the capacity to supervise transnational bodies of governance. Although the existing national institutions of representative government still seem to be the most effective institutions to link different forms of sub-national, national and supra-national governance, the existence of democratic deficit in global governance does not indicate that democracy can only be restored by greater reliance on national institutions. National parliaments and public spheres in themselves are not ideals of publicness, open access and democratic participation. National parliaments should be much more involved in the debates and decisions on international affairs and agreements, which are now largely reserved to the executive power. Debates in national parliaments would provide a democratic input for transnational bodies and increase the importance of European and global issues in national public spheres and thus help them to “transnationalize” or “Europeanize”.

Globalization did not reduce the power and responsibility of democratic nation states to protect (national) public spheres. If democracy is central to governance, the democratic states remain its most important guardians since they are the only democratically-organized political actors which legitimately represent their (territorially defined) populations and can effectively control (other) stakeholders in global governance. As the 2009 London summit of “the Group of Twenty” eventually had to admit, there is a need for a “stronger, more globally consistent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens.”⁵

Only under more democratic circumstances, both national and transnational publics as "stakeholders" in global governance would breathe civic engagement into an anaemic public sphere now dominated by official state actors, expert elites, and mass media, and thus strengthen its fourth and most vital component – civil society.

Notes

1. For a more detailed discussion of Bentham's concepts "publicity" and "public opinion", see Splichal 2002: 35–63.
2. Bentham draws a distinction between three segments of the public: (1) the most numerous class is formed by those who can hardly occupy themselves with public affairs because they "have not time to read, nor leisure for reasoning", (2) those who borrow judgements from others because they are not able to form opinions on their own, and (3) the elite, i.e. those who are able to judge for themselves (Bentham [1822]1990, 58). The latter – those "by whom actual cognizance is taken of the matter in question in the first instance" – represent the "Committee" of the Public Opinion Tribunal; those who join their publicly expressed opinions form "the body of public opinion at large", which may consist of any number of members up to the total number of members of society (p. 121). See also Tönnies (1922).
3. "Public sphere" and "civil society" are not always considered compatible concepts. Jodi Dean, for example, argues that "in light of the possibilities and dangers posed by the new digital technologies, ... critical and democratic theorists [should] jettison the idea of the public sphere and adopt a more complex model of civil society" (Dean 2001: 247). Hannah Arendt is perhaps to be blamed most for "attacks" on the concept "civil society" because of her extremely negative view of what civil society is supposed to mean – "that curious and somewhat hybrid realm which the modern age interjected between the older and more genuine realms of the public or political on one side and the private on the other" (Arendt 1990: 122). Whereas publicness promotes freedom in politics, the idea of civil society protects citizens from politics and thus promotes political freedom as a nonpolitical phenomenon, or, "freedom from politics", as Arendt argued.
4. In many cases, new "jurisdictions" have been developed because of the failure of the traditional "general-purpose jurisdictions" to offer new ways of problem solving. In that empirical sense, the term "global governance" implies new actors or networks that could overcome the "democratic deficit". "Interdependence, flexibility, and complementarity" seem to be "the three most important features of networks...that facilitate the transfer and use of knowledge and other resources of various actors in the global public policy-making process" (Benner *et al.* 2004: 196-197).
5. <http://www.g20.org/Documents/final-communique.pdf>

References

- Allport, F. (1937) "Toward a Science of Public Opinion", *Public Opinion Quarterly* 1(1): 7–23.
- Arendt, H. (1990) *On Revolution*, New York: Penguin.
- Bauer, H. (1965) *Die Presse und die öffentliche Meinung*, München: Günter Olzog.
- Benner, Thorsten, Wolfgang H. Reinicke & Jan Martin Witte (2004) "Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability", *Government and Opposition* 39, 2: 191–210.
- Bentham, J. ([1787]1995) *The Panopticon Writings*, London: Verso.
- Bentham, J. ([1791]1994) "Of Publicity", *Public Culture* 6(3): 581–595.
- Bentham, J. (1820) *On the Liberty of the Press and Public Discussion*. <http://www.la.utexas.edu/research/poltheory/bentham/bsp/index.html>. Accessed 5 September 2009.

- Bentham, J. ([1822]1990) *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece*, Oxford: Clarendon Press.
- Bentham, J. ([1830]1983) *Constitutional Code, Vol.1*, Oxford: Clarendon Press.
- Bernays, E. ([1923]1961) *Crystallizing Public Opinion*, New York: Liveright.
- Blumer, H. ([1946]1966) "The Mass, The Public, and Public Opinion", in B. Berelson, M. Janowitz (eds.), *Reader in Public Opinion and Mass Communication*, New York: The Free Press, pp. 43–50.
- Bücher, K. ([1893]1901) *Industrial Revolution*, New York: Henry Holt.
- Calhoun, C. (1993) "Civil Society and the *Public Sphere*", *Public Culture* 5(2): 267–280.
- Childs, H. (1965) *Public Opinion: Nature, Formation, and Role*, Princeton: van Nostrand.
- Dean, J. (2001) "Cybersalons and Civil Society: Rethinking the Public Sphere in Transnational Technoculture", *Public Culture* 13(2): 243–265.
- Dewey, J. ([1916]2003) *Democracy and Education: An Introduction to the Philosophy of Education*. Chapter 1: Education as a Necessity of Life. New York: Macmillan, <http://xroads.virginia.edu/~HYPER2/Dewey/ch01.html>. Accessed 8 September 2009.
- Dewey, J. ([1927]1991) *The Public and Its Problems*, Athens: Swallow.
- Fraser, N. (1992) "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", in C. Calhoun (ed.) *Habermas and the Public Sphere*, Cambridge: MIT Press, pp.109–142.
- Garnham, N. (2001) "Public Sphere and the Media", in N. Smelser & P. Baltes (eds.), *International Encyclopedia of Social & Behavioral Sciences*, Elsevier, Pergamon, pp. 12585–12590.
- Habermas, J. ([1962]1989) *The Structural Transformation of the Public Sphere*, Cambridge: MIT Press.
- Habermas, J. (1992) "Further Reflections on the Public Sphere", in C. Calhoun (ed.) *Habermas and the Public Sphere*, Cambridge: MIT Press, pp. 421–461.
- Habermas, J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity Press.
- Habermas, J. (2006) "Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension?" *Communication Theory* 16: 411–426.
- Hooghe, L. & G. Marks (2003) "Unraveling the Central State, but How? Types of Multi-level Governance", *American Political Science Review* 97(2): 233–243.
- Ozouf, Mona. 1988. "Public Opinion" at the End of the Old Regime", *Journal of Modern History* 60 Suppl., S1–S21.
- Park, R. ([1904]1972) *The Crowd and the Public*, Chicago: University of Chicago Press.
- Ross, E. ([1901]1969) *Social Control*, Cleveland: The Press of Case Western Reserve University.
- Splichal, S. (2002) *Principles of Publicity and Press Freedom*, Lanham: Rowman and Littlefield.
- Splichal, S. (2008) 'Från opinionsstyrd demokrati till globala styrelseformer utan opinion', in O. Peterson (ed.) *Medierna: folkets röst?* (Demokratirådets rapport), Stockholm: SNS Förlag, 29–50.
- Tarde, G. (1969) *On Communication and Social Influence*, Chicago: University of Chicago Press.
- Tocqueville, A. ([1856]1955) *The Old Regime and the French Revolution*, New York: Anchor Books.
- Tönnies, F. (1922) *Kritik der öffentlichen Meinung*, Berlin: Julius Springer.
- Wilson, F. (1962) *A Theory of Public Opinion*, Chicago: Henry Regnery.

II. Changes

Chapter 2

Global Copyright Regulation and the Prospects of European Public Sphere *The Case of TVkaista*

Hannu Nieminen

In the early summer of 2006 a small Finnish company called TVkaista¹ started a service that enabled anybody to have an access to all Finnish free-to-air (FTA) television channels via an Internet broadband connection. As the service is based on recorded broadcasts, the access to programmes is delayed until after the original transmission has finished. The service claims to avoid the copyright breach by maintaining that they offer only a digital recorder to its customers who, by using sophisticated software, also offered by TVkaista, make the actual act of recording.

Because of complaints by major Finnish television companies, the service was off-line between late 2006 and summer 2007. Since autumn 2007, however, it has been running without interference. The threat of further legal actions is still looming (see HeSa 2008).² In the following, I will discuss the TVkaista service from three different standpoints:

1. From the legal point of view. TVkaista seems clearly to challenge the present copyright regime, and this might cause further legal consequences.
2. From a viewpoint of cultural democracy. The TVkaista offers unique digital archive services and in this sense it can be assessed as producing public services. Additionally, it gives open access to Finnish television to all Finnish ex-patriots around the globe who otherwise would not have such services.
3. From the perspective of European public sphere. It might be argued that, as the service promotes transnational distribution of linguistically- and culturally-restricted content, it effectively supports cultural and social fragmentation. But an opposite argument is also possible: by challenging nationally-restricted copyright regimes in Europe, the TVkaista-type of service is opening the way to a truly transnational socio-cultural public space.

Description: the Finnish case

From summer 2006 *TVkaista* has offered a global service which allows anybody from anywhere in the world to have access to all Finnish FTA television broadcasts for a relatively small monthly fee. The only difference from watching live television is a single programme-long delay in provision – that is, the time that it takes to record the programme before having access to the copy. As the company puts it:

Through TVkaista you can save all TV programmes (YLE TV1, TV2, FST, Teema, MTV3, Sub, Nelonen, Jim, Urheilukanava, and The Voice) and watch them any time through the net. You can store all domestic channels for two weeks for your own use. Watch what you want, whenever you want – at last, television shows good programmes at your request. (TVKaista nd-1)

Technically the service operates in the following way: according to TVkaista, it offers customers a digital TV-recorder that has sufficient capacity to copy all Finnish FTA channels – ten in all³ – and store them for two weeks. As part of the contract, the service includes storage room and power for the recorder plus access to both the information network and the signal (antenna service) (TVkaista nd-2). The recorder is equipped with sophisticated software⁴ with the help of which, according to the service provider, the customer makes the recordings. The customer can also download the programmes to their own hardware, that is, re-copy the copy from the digital recorder to their own digital memory, which can be a computer's hard disc or an external hard disc.

The digital recorders are physically located at TVkaista's premises. This has raised suspicions that, contrary to TVkaista's claims, instead of a great number of individual recorders the company is equipped with only one or a few high-capacity hard discs which they use for recording and re-delivering the television broadcasts according to the customers' requests. As this would be openly in breach of the Finnish copyright law,⁵ the service must be based on individual recorders which are not controlled by TVkaista but by the customers themselves. To allay the suspicions, it was announced that, from autumn 2008 on, the customers can also have their recorder in their home (TVkaista nd-3). For the basic service the customer pays 20 euro per months. The programmes are available in different formats (iTunes, MPEG4, VLC) and in different bandwidths (from 300 kbps to 8 Mbps).

In the autumn of 2006 the major Finnish television companies challenged TVkaista for breaching their copyright and the company had to close down for a while. The argument was that, in effect, TVkaista was nothing but commercially-motivated re-transmission of the TV-companies' copyright-protected programmes and, as such, it was plainly illegal (see Afterdawn 2006). After fine-tuning both their arguments and the way their services were managed, TVkaista re-opened in summer 2007 with more sophisticated software. Against the TV-companies' claim, TVkaista's argument was that they only sell their

customers a digital recorder which they can use to download on-line their own selection of Finnish TV programmes (Tietokone 2008a).

The leadership of the TVkaista appears to be acutely aware of the legal controversies about its activities and publicizes its own stand effectively, using, especially, virtual platforms and blog-chats. For example, against the suspicion of the illegality of TVkaista by some users, on 17 February 2009 they posted an answer to a blog-inquiry stating that:

The understanding of the TVkaista is that the copyright holders do not consider the use of the TVkaista and the activities of the users illegal. TVkaista has negotiated and continues to negotiate with the copyright holders. TVkaista is not in the process of closing down the aforementioned services despite the pressure from the copyright holders. (TVkaista 2009)

An example that shows that the copyright issue is not so simple and straight forward as TVkaista claims is the fate of their services in Sweden. Displaying their initial success in Finland, in November 2008 TVkaista opened their services for Swedish free-to-air channels (MarMai 2008). However, after only a few weeks, the Swedish service was disconnected; a notice by TVkaista stated that the Swedish service had been cancelled because of a contractual dispute between TVkaista and the Finnish collecting societies Kopiosto and Teosto.⁶ Soon after this the Finnish TV companies and collecting societies announced publicly that they were preparing to sue TVkaista. Pekka Karhuvaara, CEO of MTV3, the major commercial channel, stated on 23 February 2009:

Tomorrow we will send a joint letter to TVkaista. We demand that they stop their illegal activity. They are making money out of our programmes. We cannot allow this. We are even prepared to go to the court to defend our rights. (Digitoday 2009)

In the following, I will first briefly consider the legal arguments. I will then discuss whether a TVkaista-type of service could enhance cultural democracy. Finally I will consider the case from the viewpoint of the European public sphere.

Issues concerning copyright

As is the case with most media industries, and despite the expansion of satellite and other forms of transnational transmission, television as an industry functions typically in and for national markets. From this it follows that television regulation is still mainly national in character. And although it is today technically possible to transmit TV programmes globally through the Internet, much of the control – including copyright governance – is still based on national regulation.

The expansion of the Internet has, however, changed the rules of the playing field. As long as television broadcasting was mainly dependent on radio

spectrum and cable transmission, the regulator had it relatively easy to control the licence conditions as it was technically possible to restrict transmission territorially. Problems started to arise with the introduction of satellite transmission as satellite broadcasting made it possible to develop truly transnational television services because the satellite footprint does not respect state boundaries. The early answer was the establishment of a flexible European regulatory regime, based on the “country of origin” principle, in the form of the Television Without Frontiers Directive (TVWF 1989). The regime was still, however, firmly based on the sovereignty of national legislation and national regulators. By the mid-2000s the advent of Internet has fundamentally challenged these rules.

There are several legal issues that need consideration in TVkaista’s case. The first concerns licence conditions. In Finnish legislation, broadcasting licences are divided into two categories: the licence for programming and the technical licence.⁷ The former does only apply, however, to terrestrial broadcasting; the service providers using other broadcasting technologies are only obliged to make an official announcement to the regulator when starting their services. The latter applies to all broadcasters, that is, to those who use broadcasting technology – be it for terrestrial, cable or satellite transmission. The Internet is not included in this definition as it is regulated on the basis of telecommunication legislation. According to the Finnish act on the Information Society Services, TVkaista might be classified as a network service provider.⁸ Both in principle and in practice, from the legal point of view, TVkaista is not a broadcaster.

Secondly, we can ask how the copyright law applies to TVkaista. There are two undisputed issues that form the basis of the claims by the TV companies: that the companies own the copyright both to their programmes and their transmission signals; and that they are customers to other copyright holders (such as US film and TV companies) who have licensed their programmes to be shown exclusively on Finnish channels – i.e. their reception must be territorially restricted. In the former case, the claimants are the Finnish companies; in the latter case, the primary claimants are the original international copyright holders. However, if the US companies find the Finnish TV-channels unable to control how their rights are respected, it could affect further negotiations between the parties on new programmes.⁹

According to TVkaista, their service is based on the internationally-recognized right to make a copy for private use from any freely-available audiovisual product for anybody’s private use.¹⁰ Firstly, all the material that they offer for copying is FTA, that is, freely available to anybody watching television in Finland. There is no question of piracy, even by the widest possible use of the term.¹¹ Secondly, they are not re-sending the transmissions, either online or off-line, which would be a violation against the copyright to the signal. Thirdly, all decisions concerning recording as well as the concrete act of recording are made by the customer; TVkaista only offers the digital recorder for the personal use of the customer. What a customer downloads and how they then decide to use the recording is not in the power of TVkaista, and thus is not really their concern.

There are, however, some critical issues that may still challenge TVkaista's case. The first concerns the access to the original TV signal that has to be retrieved and transformed into the Internet Protocol to be able to watch the programmes through the Internet. If this is done by the customer who has access both to antenna services and to suitable software – that is, software that can transform all free-to-air television broadcast signals to the IP-format and copy them simultaneously – it would not amount to a breach of a TV company's copyright as the produced copy would be for private use only. But if this is done by TVkaista on behalf of its customers, it would be a copyright infringement. This leads, then, to a more critical question: even if the digital recorder with the software is the property of the customer, according to their conditions of supply¹² TVkaista appears still to be the sole provider of the broadcasting signal. In all cases, it seems, what we have here is a violation of the signal copyright.

Cultural democracy

Another issue is whether a TVkaista-type of service can be defended from the point of view of promoting cultural democracy. By this, we mean that in offering access to the full breadth of FTA broadcasts with a relatively low cost to anybody anywhere, TVkaista represents a genuine public service that no other institution, at least not at the moment, can provide. YLE (the Finnish National Broadcasting Corporation) offers an online digital archive with selected programmes where, however, most of copyright-protected contents of foreign origin are missing.¹³ The situation is the same with other Finnish television companies: commercial broadcasters offer some free material, but they are more interested in developing their commercial online pay-services.¹⁴ This picture may change, though, as at least one telecom operator, DNA, is planning to open its own broadband-television service which appears rather similar to TVkaista services. Although the company has already published detailed information of its product, the service is "for the time being not for sale."¹⁵

The Finnish national audiovisual archive only started its activities in 2008 and, due to copyright, the openness of its services to the greater public is naturally restricted.¹⁶

From these points of view, TVkaista represents a unique initiative. According to its own PR-material: "You never have to decide beforehand what you want to watch. All TV programmes will start when it best suits you and there is on offer just what you, at that moment, want to see." The TVkaista boasts: "The digital recorders are placed in Finland, but you have an access to them from wherever Internet functions. TVkaista has satisfied customers all over the globe – in the US, Canada, Iceland, UK, Spain, Belgium, the Netherlands, Denmark, Sweden, Germany, Italy, Poland, Russia, Japan, Thailand... There is room for more!" (TVkaista nd-4) According to a more general claim, the service expands the national public sphere across the borders, so that Finnish

ex-patriots can have extended access to the cultural and social life of their home country – compared to a much more restricted and one-way form of access that the satellite channels can offer even at their best. This is difficult to verify, though, as TVkaista is not willing to publicize any figures of its users (Tietokone 2008b).

In order to get an initial picture of the TVkaista's potential for cultural democracy we decided to try to look how the service was received by the actual users. For this purpose we looked for the online discussion forums where TVkaista figured as a topic. A sample of the forums was collected in mid-October 2008 by web-search using the key word "TVkaista". Altogether 58 web-sites and 528 messages were selected for analysis.¹⁷ Most of the web-sites were located in Finland and except for two the language of the messages was Finnish. However, 17 websites were either located outside Finland or they were used mostly by ex-patriots.

The first reading of the whole body of messages revealed that most of the online discussion was concerned with technical issues. That is partly explained by the fact that TVkaista launched new services just before the material was collected, including the possibility of using TVkaista in a mobile-telephony environment (Tietokone 2008b). Following the primary analysis the messages were then classified into four categories:

- Those discussing mostly *financial and technological aspects* of the service
- Those discussing the service in relation to *general TV contents*
- Those referring to the issues concerning the *cultural and social dimensions* of the service
- Those concerned on the service's *copyright issues*

The distribution of the issues to these categories is shown in the first column of Table 1.

At the second stage, the messages of ex-patriots were analysed separately. The hypothesis was that there might be a difference between how TVkaista is valued by those living in Finland and having a full online access to all FTA channels, and those living abroad and not having such access.¹⁸ The number of ex-patriots' messages was 80 (from the total). The distribution of their messages is shown in the second column of Table 1.

Table 1. The distribution of issues in online discussion forums on TVkaista¹⁹

	All messages (n=528)	Ex-patriots (n=80)
Financial and technological issues	315 (60 %)	66 (82 %)
TV-contents	40 (8 %)	14 (18 %)
Cultural and social dimensions	29 (5 %)	18 (23 %)
Copyright	80 (15 %)	10 (12 %)

The analysis led to some interesting observations. Firstly, technological issues were much discussed.²⁰ However, there are some factors that invite closer scrutiny. It emerged that a significant factor in this category were the PR-messages of TVkaista itself, who heavily promoted its services through several online discussion boards.²¹ There was also a clear difference between those customers who used the service in Finland and the ex-patriots: the Finnish users were often technology-enthusiasts, discussing different technical solutions; the ex-patriots were more ordinary TV-users who often lacked the basic skills to “tune in” their computers for TVkaista’s service.

Secondly, the TV content – mostly individual programmes or parts of popular TV serials – were usually referred to in a very casual way. Mostly these messages were just expressions of satisfaction that one was now able to watch one’s favourite programme whenever one wanted – or expressions of despair stating that they had found out about TVkaista too late to be able to do so. The contents were then more a question of immediate personal preferences. Here we can find a slight difference between the Finnish consumers and ex-patriots: the latter discuss the contents more often than the former.

Thirdly, most comments on cultural and social dimensions were made by the ex-patriots. There is a clear difference in emphasis between the Finnish and ex-patriot users, as the numbers show. For those users living outside Finland, TVkaista offers an opportunity to have access to, and the means to participate in, the cultural and social life of their home country in a way that has not been possible by other means. For most ex-patriots, TVkaista is technically easy and financially feasible. Here is an example from a Finnish ex-patriot from Milan, Italy:

Sundays are definitely saved by TVkaista. You can find whatever you want, and despite the fact that there is a charge, it is really worth it! A list of Finnish television channels from which you can choose what you like, you can record them and watch afterwards, and what is best – the boys can hear both Finnish and English. And mama can hear all the beautiful dialects of the world!... Almost like a short visit to Finland. And that feels sooo good!²²

Television is so dear and irreplaceable, I couldn’t be without...it has become almost like a member of the family. And now also the old familiar programmes . I can almost smell the real rye bread, it was just a must to watch a part of “Salkkarit” [a Finnish soap opera] Best wishes!!!²³

Finally, in reference to copyright issues, there is widely-felt scepticism and mistrust of media and communication regulation among the online discussants. Their comments show a high level of knowledge about copyright regulation but also deeply-felt resentment about the competence of the public authority to serve the public interest:

This service [TVkaista] has got no other problem than conservative copyright people who have old fashioned ways of thinking, and the same goes with the directors of television companies.²⁴

On a more theoretical level, we can employ here the distinction by Yves Evrard (1997) who differentiates between “democratization of culture” and “cultural democracy”:

Government cultural policies... are mainly steered toward the democratization of culture. They aim to disseminate major cultural works to an audience that does not have ready access to them, for lack of financial means or knowledge derived from education. (Evrard 1997)

By contrast,

a model of ‘cultural democracy’ may be defined as one founded on free individual choice, in which the role of a cultural policy is not to interfere with the preferences expressed by citizen-consumers but to support the choices made by individuals or social groups through a regulatory policy applied to the distribution of information or the structures of supply, as happens in other types of markets. (ibid)

Using Evrard’s terms, we can use TVkaista as an interesting case illuminating the major problems with the global copyright governance. From the point of view of the “democratization of culture”, the public authority has negotiated several exemptions from copyrights that make it possible to use copyrighted works in the public interest: for private use, for educational and institutional uses, etc. Still, they are only exemptions from the main principle, or accepted “market failures” for social and cultural purposes. From the “cultural democracy” point of view, on the other hand, copyright creates an obstacle to the citizens’ full participation in social and cultural life as – to use Evrard’s words – it interferes “with the preferences expressed by citizen-consumers.”

What TVkaista offers is actually a new mode of digital audiovisual archive which differs radically from the model of nationally-planned and executed archives, reflecting the preferences of cultural elites. Instead of an officially-defined, heavily-structured and centralized collection, TVkaista is an example of an archive that is implemented by the users themselves: they choose and select the contents according to their preferences, wishes and desires.

Could the example of TVkaista be repeated in other countries? Within the limits of this chapter it is not possible to discuss and assess similar initiatives in other countries but, according to TVkaista itself, the service is still internationally unique.²⁵ To put it briefly: from the viewpoint of cultural democracy, it might be hoped that the legal disputes between TVkaista and TV companies can be quickly settled and that its example could be repeated in other European countries.

European public sphere

Academic interest in the European public sphere has been on the increase, and a number of research projects have been scrutinizing the issue, some also making policy proposals to enhance its emergence (excellent recent sources are, e.g., Fossum & Schlesinger 2007; Wessler et al. 2008). On an empirical level, much research has concentrated on the role of the newspapers (see, e.g., Trenz 2007). There has been less emphasis on what would be the part of television in promoting the European public sphere. One recent exception is by Jostein Gripsrud, who argues that television may have the same kind of identity-forming effect on the European level as it has had on the national level. He proposes to think of the EU

as a political project that gradually, over time, will add a “European” layer to the identities of Europeans – not least due to the sort of everyday cultural community that television has contributed to since the early 1950s. (Gripsrud 2007)

We can use the case of TVkaista to test theoretical claims concerning the European public sphere. There are two types of claims: one seeing transnational television as promoting European cosmopolitanism; and the other that sees transnational television endorsing cultural segmentation. According to the first argument, TVkaista is an example of the kind of transnational media that open the way for a more cosmopolitan European public sphere. Transnational media create an opportunity for different socio-cultural publics to intersect and to promote the emergence of a borderless Europe. With the means of transnational media, the ex-patriots in different parts of Europe can develop their cultural identities more fully, allowing them to participate in, and to enrich the social and cultural life of, their adopted societies (see Gripsrud 2007; Chalaby 2005).

We can find some supportive evidence for this argument from the online discussion forums discussed above. Some of the forums were multi-lingual and they included interaction between Finnish speakers and the users of other languages.²⁶ Some ex-patriots’ forums, although using the Finnish language, referred to the culture and events in the surrounding non-Finnish societies. One of the forums was in English, but the writer referred to TVkaista from the viewpoint of its cultural political potential. First the writer laments the YLE’s attitude towards the service, and then he or she continues:

The Finnish national broadcasting company YLE has stated that the service violates its rights. Probably not a surprise to anyone, but TVkaista.fi thinks totally the opposite. Nevertheless, I think it is a warmly welcomed service for expats like me. This service may bring some help for those who miss the 8:30 pm news in their native language or their favourite series while abroad.²⁷

However, it must be said that, taken generally, the analysis of the discussion forums showed that not only TVkaista but the whole way of thinking behind it

appears to be still so underdeveloped that there are not yet sufficient grounds to make any generalizations.

What the TVkaista case and the online discussion forums show is that there appears to be growing disenchantment towards the current territorially-defined global copyright regime. The regime is experienced as being blatantly old-fashioned, unable to serve the basic cultural and social needs of global audiences. A new balance between the needs of citizens and the rights of copyright holders is obviously needed (see EFF 2009). The recent news of planned reforms does not, however, promise any radical change.

The second claim concerns the fear that transnational television might endorse cultural segmentation. It is based on the concern that, as the TVkaista-types of services promote transnational distribution of linguistically-limited and culturally-restricted content, they effectively support the fragmentation of European transnational public spheres. The basic argument, familiar from the earlier studies of the social and cultural effects of satellite television, is that expatriots' extended exposure to broadcasts from their home countries hampers their absorption into their newly-adopted society and restricts their functional identity-formation. In this way, their identity stands "half-way": they don't feel like members of their new cultural and social surroundings but at the same time they don't have full access to the culture and society that they feel they belong to. The threat is that, in the end, transnational television might end by facilitating the establishment of closed "sphericules", cultural and social ghettos which, at their worst, match with the new class-divided Europe that can be seen emerging as a result of the EU's expansion (see Cammaerts 2007).

The main counter-argument against the sphericulization thesis is that there is mounting evidence that the ex-patriots' use of media is a creative mix of the local media and the media from their home countries, and that they are able to manage their identity-formation much more pragmatically than has been understood earlier (Moreno 2008). If this can be generalized to apply to immigrant communities in general, it might gain wider endorsement.

Towards conclusions

On the basis of this brief overview it is not possible to be able to draw generalized conclusions. We are, however, able to put forward some further questions:

- TVkaista as a service-format is an exciting example of the hardships that today's global copyright governance faces. There is an urgent need to study similar experimentations and their reception in other countries. Does the prevailing copyright regime offer any real solution to TVkaista's challenge?
- The case of TVkaista brings out interesting topics concerning cultural democracy in the digital era, especially regarding both the creation of

comprehensive and publicly accessible national audiovisual archives and the competencies of the ex-patriots to actively participate in the social and cultural life of their home countries. However, is this participatory potential real or is it just wishful thinking? If it is real, what more is needed in order to make it stronger?

From the viewpoint of the European public sphere, the case of TVkaista includes promising prospects: these kinds of services can be seen to both represent and promote a new kind of European cosmopolitanism. Again, the question is if this cosmopolitan promise is just our optimistic projection or do we have some concrete evidence of the democratizing effects of such services?

Notes

1. TVkaista in English means "TVband".
2. All the news stories referred to in this article are originally in Finnish. The headlines are translated by the writer.
3. Situation as in June 2009. Four of the channels are run by YLE, the Finnish public service broadcaster; three are run by MTV3, the biggest commercial broadcaster, owned by the Nordic Broadcasting Company (Bonnier, Sweden); one is run by Sanoma Entertainment, owned by the Sanoma Group; the remaining two channels are a sports channel and a music channel.
4. Software was developed by a small Finnish company Hibox Systems. See <http://www.hibox.fi> (accessed 11 June 2009).
5. Although it is legal to make a copy of an audiovisual product for your own private use, it is not permitted to have another person make the copying on your behalf. Finnish Copyright Act, Art. 12. See also Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> (accessed 11 June 2009).
6. For Teosto, see http://www.teosto.fi/en/index_en.html. For Kopiosto, see http://www.kopiosto.fi/kopiosto/en_GB/ (accessed 20 June, 2009).
7. See more in Finnish Communications Regulatory Authority (FICORA) web-pages: <http://www.ficora.fi/en/index.html>; <http://www.ficora.fi/index/luvat/tvjaradiotoiminta.html> (read June 11, 2009).
8. Act on the Provision of Information Society Services (<http://www.finlex.fi/en/laki/kaannokset/2002/en20020458.pdf>; accessed 11 June 2009).
9. According to the television companies, this has already been the case. They have been asked by content providers for clarification of their actions in relation to TVkaista and related infringements.
10. See EU Directive on Copyright in the Information society (Europa 2008); <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> (accessed 11 June 2009).
11. Cf. For example the EC report on the implementation of the directive of conditional access (COM(2008)593 final; http://ec.europa.eu/internal_market/media/docs/elecpay/593_en.pdf (accessed 13 October 2008).
12. See the note 7 above.

The writer wants to thank Dr. Jorma Miettinen, former director of the MTV3 television company, and LL.M. Herkko Hietanen, from Turre Legal Technology Law Firm. They both gave valuable insight to the complexities of the case. However, the responsibility of the content of this paper lies solely with the writer.

13. See YLE Elävä arkisto ("Living archive"): <http://www.yle.fi/elavaarkisto/> which offers a selection of old YLE programmes (see also <http://www.yle.fi/elavaarkisto/?s=t&n=archive>). Another service is YLE Areena (<http://areena.yle.fi/>) which offers a wider selection of the latest programmes. (Accessed 12 June 2009.)
14. See MTV3 Anytime: <http://nettiv.mtv3.fi/mtv3/#> (accessed 13 October 2008); Nelonen nettiv: <http://www.nelonen.fi/nettivy/> (accessed 3 November 2008).
15. "Broadband and television in the same package": <http://www.dna.fi/Yksityisille/TV/Laajakai-staTV/Sivut/Default.aspx> (accessed 20 June 2009).
16. See National Audiovisual Archive: <http://www.kava.fi/> (accessed 12 June 2009).
17. The web-search was conducted on 18 October 2008 by Google by using "TVkaista" as a search term. From the whole body of search hits those web-sites were selected that included at least two comments on TVkaista service by different writers. The first 30 screen pages from the Google search were then analysed.
18. There is a satellite channel called TV Finland operated by YLE (the Finnish public service broadcasting company), offering a limited selection of Finnish television programmes from both YLE and the commercial MTV3 channels. TV Finland is directed especially to ex-patriots living in southern parts of Europe. See <http://yle.fi/tvfinland/english.htm>. Accessed 4 September 2009.
19. The total number of issues is bigger than the number of messages as some messages included several issues.
20. It should be emphasized that the method used here is biased towards technical issues as these problems often require a long string of questions and answers, and thus increases the mere mathematical number of messages. This must be corrected in further analyses.
21. For TVkaista's self promotion, see e.g. <http://jaiku.com/channel/TVkaista>; <http://forum.ufs.fi/showthread.php?t=5854>. Accessed 4 September 2009.
22. Karkki, 5 October 2008: <http://macapiso.blogspot.com/2008/10/domenica-dolce-domenica.html> (accessed 12 June 2009).
23. Karkki, 7 October 2008 (see above).
24. Jani, 25 September 2006. <http://blogit.tietokone.fi/tietojakoneesta/2006/09/ensimakua-tulevaisuuden-tvsta/> (accessed 16 June 2009).
25. In Finland, at least one competing service has started (SaunaVisio in the winter 2008) but has since closed down at least temporarily (see <http://www.saunavisio.fi/tila.html>; accessed 17 June 2009). Some earlier trials have been conducted in Germany and the US, but I presently have not enough information of them to make any comparisons.
26. See Maurelita, www.maurelita.com (accessed 12 June 2009).
27. Enduragement; <http://enduragement.wordpress.com/page/2/> (accessed 12 June 2009).

References

- Aferdawn (2006) *TV Companies are Shooting Down the TVkaista Service*, 25 Sept 2006, <http://fin.afterdawn.com/uutiset/arkisto/7964.cfm>. Accessed 11 June 2009.
- Cammaerts, B. (2007) Jamming the Political: Beyond Counter-hegemonic Practices, *Continuum: Journal of Media & Cultural Studies*, 21 (1): 71–90.
- Chalaby, Jean K. (2005) "Deconstructing the Transnational: A Typology of Cross-border Television Channels in Europe", *New Media & Society*, Vol 7(2): 155–175.
- Digitoday (2009) *The Details of the Letter in Darkness: The Collecting Societies Clam Up of the TVkaista letter*, 21 February 2009. <http://m.digitoday.fi/?page=showSingleNews&newsID=20092038>. Accessed 20 June 2009.
- EFF (Electronic Frontier Foundation) (2009) *Broadcasting Treaty*, http://www.eff.org/issues/wipo_broadcast_treaty. Accessed 17 June 2009.
- Europa (2008) *Intellectual Property: Commission adopts forward-looking package*, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156&format=HTML&aged=0&language=EN&guiLanguage=en>. Accessed 17 June 2009.

- Evrard, Y. (1997) "Democratizing Culture or Cultural Democracy?" *Journal of Arts Management, Law & Society*, Vol. 27(1997) 3: 167–176.
- Fossum, J. E. & Schlesinger, P. (eds.) (2007) *The European Union and the Public Sphere: A communicative space in the making*, Milton Park: Routledge.
- Gripsrud, J. (2007) "Television and the European Public Sphere", *European Journal of Communication*, Vol 22(4): 479–492.
- HeSa (2008) *YLE claims internet-TV service illegal*, 10 October 2008, <http://www.hs.fi/kulttuuri/artikkeli/Yle+syytt%C3%A4%C3%A4+nettity-palvelua+laittomaksi/1135234095670>. Accessed 11 June 2009.
- MarMai (2008) *TV Kaista Corners to Sweden*, Markkinointi & Mainonta, 11 November 2008, http://www.marmai.fi/uutiset/article154368.ece?s=r&wtm=Markkinointi_Mainonta/-11112008. Accessed 20 June 2009.
- Moreno, Gabriel (2008) "Viewing Globalization in Transnational, Mexican-American Spaces: Focus on the Micro or Macro" in Nico Carpentier et al. (eds.) *Democracy, Journalism and Technology: New Developments in an Enlarged Europe*, The Researching and Teaching Communication Series, Tartu: Tartu University Press, pp. 267–279.
- Tietokone (2008a) *TVkaista Considers the Claims of its Illegality*, Tietokone, February 18, 2008 http://www.tietokone.fi/uutta/uutinen.asp?news_id=32837&tyyppi=1. Accessed 11 June 2009.
- Tietokone (2008b) *TVkaista Emerges on iPhone and S60-telephones*, Tietokone, September 30, 2008: http://www.tietokone.fi/uutta/uutinen.asp?news_id=35097. Accessed 12 June 2009.
- Trenz, Hans-Jörg (2007) "Quo vadis Europe? Quality Newspapers Struggling for European Unity", in John Erik Fossum & Philip Schlesinger (eds.) *The European Union and the Public Sphere: A Communicative Space in the Making?* Milton Park: Routledge.
- TVkaista (nd-1) *Welcome to the TVkaista service*; <http://www.tvkaista.fi/netpvr/Recordings.jsessionid=A9D5DEF7185807703D71095CEDC68FCE>. Accessed 11 June 2009.
- TVkaista (nd-2) *The TVkaista Services' General Conditions of Supply to Consumer-clients*, Paragraphs 1.2.3 and 1.2.4, <http://www.tvkaista.fi/netpvr/kayttoehdot.pdf>. Accessed 11 June 2009.
- TVkaista (nd-3) *Get a TVkaista digi box, Enjoy tv Programmes in Your Own Time!* <http://www.tvkaista.fi/digiboksi/>. Accessed 11 June 2009.
- TVkaista (nd-4) *Welcome to the TVkaista Services!* <http://www.tvkaista.fi/netpvr/Login.jsessionid=A141412DEB7E3F28AB8436651942B32F>. Accessed 15 June 2009.
- TVkaista (2009) *TVkaista – Fredrik Husberg*, <http://tvkaista.jaiku.com/>, Sunday, February 15. Accessed 12 June 2009.
- TVWF (2008) *Television Without Frontiers Directive* (1989) see http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm. Accessed 11 June 2009.
- Wessler, Hartmut; Peters, Bernhard; Brüggeman, Michael; Kleinen-v. Königsłow, Katharina & Sifft, Stefanie (2008) *Transnationalization of Public Spheres*, Basingstoke: Palgrave Macmillan.

Chapter 3

Providing Cultural Resources

On Turning Audiovisual Archives into a Public Domain

Karl Knapskog

In 1895, Paul Otlet from Belgium set out to create a master bibliography of all the world's published knowledge. The ambition was to collect data on every book ever published, along with a huge collection of ephemeral objects that libraries usually ignored – newspaper clippings, magazine and journal articles, photos, posters, and pamphlets. Using index cards, Otlet and his staff created a database which, in the 1920s, consisted of 12 million individual entries, and a research service where anyone in the world could submit a query (Rayward 1994).

The sheer quantity of paper forced Otlet to search for alternative technologies for information-storage and, in 1934, he put forward the idea of a “mechanical, collective brain” that could contain all the world's information. In a book published the same year, Otlet envisioned a global network of “electric telescopes” that would allow people to search through millions of interlinked documents, images, audio and video files (Otlet 1934). He called his invention a “réseau”, or network, and described how people could send messages to one another, share files and engage in online communication. Otlet's grand plan was never realized. The Belgian government, who initially had supported the establishment of the paper database financially, showed little interest in Otlet's new project. And then came World War II.

The fate of this long-forgotten pioneer in the history of technology may teach us a lesson or two about lost opportunities, and about the conditions for establishing institutions that can serve the public interest. With the technological means now in our hands for creating a digital online-database with global reach, there has been a revival of the idea of the universal, all-encompassing, archive where the question of access and the conditions for access and use pretty much define a new cultural battleground.

We want it now

The ongoing digitization of all kinds of cultural artefacts has increasingly been understood in terms of making these artefacts culturally productive here and

now. The credo is that public archives should be made available to citizens for enlightenment and educational purposes, and grand plans of digitization of “The Cultural Heritage” are made in most countries. Considering the slow cultural recognition of the broadcast media, and what was counted as ephemeral audiovisual artefacts, it is quite an irony that audiovisual material from public service broadcasters (PSBs) and other sources is now reckoned to constitute “the nation’s cultural memory”.

The point of view that “what’s produced by licence fee money also belongs to the licence holders” has been put forward as an argument for free access to, and free use of, content from the PSBs’ archives. In societies increasingly marked by a permanent recycling of cultural artefacts and material, where access potentially means sharing and more-or-less creative re-usage, this may well have evoked expectations of a radical rights-free regime in the management of these archives. And although access to audiovisual archives may well be said to constitute a legitimate cultural right for citizens to explore and reflect on a common cultural memory, the idea of an accessible archive of free material is bound to stand in opposition to the interests of rights holders, revenue for the creators, and commercial exploitation of archive resources.

The main challenge facing public service broadcasting in a multimedia, digitized environment has been described as making a transition to public service media (PSM), i.e. to extend public service obligations to new digital platforms and services (Lowe & Bardoel 2007; Lowe & Jauert 2005; Lowe & Hujanen 2003). This transition from PSB to PSM is said to require “demand-oriented approaches to service and content production rather than the supply-orientation of the past” (Bardoel & Lowe 2007: 9). A recent study of PSBs’ Internet services shows that although this expansion of services is conducted within well-established frameworks and political settings, the actual outcome is characterized by ad hoc solutions (Moe 2009). One central issue is how commercially- and publicly-funded services are to be combined or separated to secure core public service ideals (Moe 2007). A study of BBC Worldwide – established by the BBC to promote their productions in the international marketplace – indicates that strict institutional separation of commercial and public service activities is no guarantee against commercial priorities to permeate and have influence on public service activities (Steemers 2005).

This tension between commercial and public service activities may productively be studied in how public service broadcasters manage and utilize their archives. The political reluctance in many countries against increasing the licence fee in order to enable the PSBs to also live up to their public service obligations on new digital platforms put pressure on them to capitalize on their archival assets. The battleground – the conflict between public and commercial interests – is fairly situated within institutions whose primary goals are to serve the public interest, and this may affect the core values and traditional ethos that distinguish PSB from the market.

Ambitious plans

Many European public broadcasters have ambitious plans for the digitization of their archives, and for making them accessible to the general public for non-commercial uses. There are several economic, legal, practical, and political obstacles to the realization of such plans. The sheer digitization of archive material of various technical standards requires vast economic resources and specialized skills. The importance of precise metadata and contextual information about archive items tend to be undervalued, both in the PSBs and in official calculations of the costs of digitization. Poor metadata results in poor and inaccurate information-retrieval, a problem that will be more visible once the archives get more publicly accessible.

Furthermore, the concept of accessibility is quite ambiguous. Does access mean that citizens themselves may search in the archives, view, and even download the search result? Or, should the PSBs function more as curators of rather overwhelming archive material, presenting selected parts – thematically or otherwise organized? Or both? And if public access also means the right to download and even manipulate and use archive footage, at least the PSBs' own material, on what terms?

In the BBC's Creative Archive project (2005–2006) use of selected archive material was allowed for non-commercial purposes (BBC 2004b). Surrounded by an ethos of fostering new talents in the Digital Age, individuals were allowed to use archive material in their own productions. If, however, they should want to commercialize their productions or present them for a broader public, rights have to be cleared. On a practical level, this was managed by initially not offering archive material in broadcast quality and by using a watermark technology. The BBC plans to make it easy to clear rights and make agreements on financial terms, after which high-resolution versions of the footage are to be quickly provided.

It is currently unclear if these terms will also apply for educational use, i.e. whether education should be defined as a “commercial” purpose. Even an apparently-simple question like this becomes easily complicated in this terrain. One can imagine educators and their students engaged in a historical or contemporary subject, doing information searches in all kind of archives and libraries, and then presenting the results and their work as an audiovisual production. Such an endeavour could hardly be said to be commercial, either in purpose or actual use. But there is a market for educational material of all kinds, audiovisual artefacts included, and free use of archive-footage can be disputed on the grounds of “unfair competition”, or for the simple reason that it is undermining the PSBs' own opportunity to make revenue by producing educational material.

Under copyright law this is solely a question for the PSBs to decide – if, for example, some sort of Creative Commons licence should be applied or not – but this is principally also a question of the nature and content of the PSBs' public service mission and obligations, i.e. an arena for legitimate political interven-

tion. A related area for political engagement would be in the legal framework, nationally and internationally, that defines the room of manoeuvre for different actors, for example the possibility of collective clearance of rights, or the legal limits of “fair use” of copyright material: a question that is especially relevant for the educational sector.

As can be seen from these examples, an array of difficult problems and contested questions follow in the wake of the digitization of the PSBs’ archives. This is very much an area of policy-in-the-making. Although the ethos of serving the public interest is solidly institutionalized in most PSBs, there is not necessarily a consensus on how to utilize archival resources. The same goes for cultural policy in general: although there is a strong support for public funding of PSBs, libraries and museums, and for upholding central national cultural institutions, there is a considerable pressure on these institutions to generate more of their own income. A commercialization of areas and activities within public service institutions has the potential of changing corporate and production cultures in directions that are at odds with the overall institutional objectives, and which may threaten the cultural and political legitimacy of these institutions.

The PSBs’ management of archive material is thus an important area where institutional changes may be studied and examined. This is an arena where ideal, political, and commercial interests have to be balanced. It is an arena where intervening on behalf of the public interest should be rather apt, as the PSBs can be held accountable according to public service ideals, and also where broader cultural policy issues may be raised. But it is also an arena, as we shall see, where there are no obvious answers to the question of which solutions will best serve the public interest.

The Creative Archive

The archives belong to the citizens (licence-fee payers), and should be made accessible to them. Such programmatic declarations can easily be found in speeches from broadcasting officials in many countries, fuelled by the technological possibility of making digitized audiovisual archives accessible to the general public. The vision that informs such plans represents a seemingly-new approach to public-access rights to archive material, best illustrated by the BBC Creative Archive project: During the pilot period (2005–2006), the BBC released clips from factual programmes, audio tracks and images. The content was released under a Creative Archive Licence, allowing people to download clips, keep them, manipulate and share them with others. The Creative Archive Licence (CAL) works in a similar way to Creative Commons licences and other “open content” licences but is more restricted in that it allowed only non-profit, educational, and personal use, limited these rights to within the UK, and forbade use for promotional or campaign objectives.

The Creative Archive was a much-applauded initiative that inspired similar projects in other European countries, and it was clearly in line with the BBC’s

goal “to turn the BBC into an open cultural and creative resource for the nation” (BBC 2004a). The initiative led to a discussion about how a fully-realized BBC Creative Archive could best serve the public interest. The initiative’s public service ambitions were clearly underlined by the project leader for the Creative Archive, Paul Gerhardt, who emphasized both access and creative use and cooperation with other public service institutions:

We want to work in partnership with other broadcasters and public sector organisations to create a public and legal domain of audiovisual material for the benefit of everyone in the UK. We hope that the BBC Creative Archive can establish a model for others to follow, providing material for the new generation of digital creatives and stimulating the growth of the creative culture in the UK. (BBC 2004b)

A digital commons

In these ambitions and plans to “democratize” an otherwise inaccessible part of the cultural heritage, one can see the contours of what Graham Murdock has termed a “digital commons” on the Internet (Murdock 2005) – a non-commercial virtual arena for information, education, and entertainment: the three classical tasks of public service broadcasting. Such a “digital commons” would function as a portal for accessing television programmes and related audiovisual material from public service broadcasters, museums, educational institutions and also from private archives. The idea of a “digital commons” was clearly an inspiration for the Creative Archive project, as Paul Gerhardt explained:

The ambition is to think about creating a single portal where people can search and see what stuff is out there under the same licence terms, from a range of different suppliers. The idea is that if we can create something compelling like that, we will attract other archives in the UK to contribute their material, so we’d be aggregating quite a large quantity. (BBC 2004b)

So, what are the conditions and obstacles for a realization of a “digital commons”? In the wake of the BBC’s Creative Archive initiative there was great enthusiasm, and great expectations. The so-called Friends of the Creative Domain (FCD), supported by the Union for the Public Domain, sent a letter to the BBC and the Department of Culture that spelled out these expectations (FCD 2004). Signed by “artists, filmmakers, educators, students, researchers and archivists”, the letter argued that “the creation of a real, useful, relevant Creative Archive” depended on the following elements:

The archive must draw from all areas of the BBC’s broadcasting from factual to light entertainment, from drama to sport, and “everything in between”. The files must be made available in open standard formats without digital rights management or other technology locks. Furthermore, the files must be free, i.e.

licensed under conditions that do not restrict any licence-payer from “accessing, storing, modifying or sharing archive material from non-commercial use.” The BBC should also take steps to clear the rights to independently produced material in its archive. All this should be done as soon as possible, “to prove that the sky won’t fall if you relax your copyright stance” (FCD 2004).

No free lunch

So, what has happened? The main value of the Creative Archive project may be that it initiated public discussion on central issues concerning public accessible archives: issues that are still under discussion. One of the main issues is, of course, on what terms (part of) the BBC’s archive should be made publicly available. The Creative Archive Licence was an experiment – “a draft”, in Paul Gerhardt’s words, and it remains to decide on the exact terms of access and use. There is a great variety of Creative Commons-inspired open content licences, and one can imagine different licences for different purposes. However, the chosen “licence regimes” have to be “sustainable”, i.e. predictable over time for both users and right holders alike. Summing up the experiences with the Creative Archive, Paul Gerhardt indicates a differentiation of the terms in which the archive will be made available in the future:

We will make all our archive available, under different terms, over the next five to ten years, at a pace to be determined. There would be three modes in which people access it – some of the content would only be available commercially, for the first five year or so after broadcast, say. The second route is through a “view again” strategy where you can view the programmes, but they’d be DRM-restricted. And the third mode is the Creative Archive. Over time, programmes would move from one mode to another, with some programmes going straight to the Creative Archive after broadcast. (Wikinews 2006)

This is a pragmatic solution, trying to balance the different interests involved, including the BBC’s own economic interests in making revenue out of commercial re-use of parts of its archive and running programme production. Such a licence-differentiation also addresses a reported worry among independent, commercial producers that the BBC “giving away archive material for free” would threaten the market for their own productions. The suggested tripartite solution will hardly satisfy everybody, but it clearly reflects how the digitization of television and its relation to the Internet may affect the financing, production, and reception of audiovisual material, and the changed internal relation between these stages of content-production. Needless to say, this will continue to be “a field of struggle”, where interventions on behalf of the public interest still will be of decisive importance.

The introduction of Creative Commons licences has provided more options for both right holders and licensees. It would, however, be a great mistake to

think of Creative Commons licences as something other than alternative licences based on copyright. Creative Commons licences are just one of several options for copyright owners to consider; whether they are used or not, will depend on the nature of exposure that the creator(s) or right holder(s) want in any particular case (see creativecommons.org).

Creative Commons licences are a perfectly valid option for PSBs who want to make their own material available for re-use for non-commercial purposes, and in varying degrees Creative Commons-licensing may be worked into the commissioning process for new programmes. Creative Commons licences will secure citizens the right to view the actual material, use the footage for their own private purposes, but also oblige them to clear the rights and pay the necessary royalties if they “go public” with their productions. When external rights-holders are involved, as in co-productions, or in productions with hired writers, actors, musicians, or producers, use of Creative Commons licences requires consent. This also applies for old material.

In any case, this sort of rights management seems to secure better public access to “the cultural heritage”, stimulates creative experimentation, and spreads knowledge about what is actually in the archives to potential producers and film-makers. In fact, making archive material accessible on these terms constitutes a marketing device that can be effectively combined with rights-clearing and accounting systems. Furthermore, it does not hinder the PSBs themselves in actively curating archive material, using it in new programme formats and on new technological platforms. It seems like cutting a Gordian knot, serving the public interest in a commercially-viable manner.

It remains to be seen to what extent the BBC will be following this line of reasoning in its future policy. The actual outcome will surely be a result of company policy including considerations of the commercial potential of the archive material, and of the actual obligations to the public that emanate from a reformulated public-service mission. A key question will still be how audiovisual material financed by licence fees, a nation’s ‘common cultural heritage’, can be put under a copyright regime that secure accessibility and public use.

Diminishing cultural reservoirs

It seems like a paradox that digitization of audiovisual material should imply limited access to these cultural resources, but it is well documented that increasing copyright costs and limitations on the use of archival material represent a serious problem for independent filmmakers (Aufderheide & Jaszi 2004; Larsen & Uberg Nærland 2009). The strengthening of copyright law in many countries in order to handle digital copying, file-sharing and so called piracy, and an undermining of *fair use* by making it a ‘lawyer zone’ (Lessig 2004), has resulted in a diminishing reservoir of cultural artefacts for cultural production (Boyle 2008). It is well established that the current copyright regime creates a “culture of clearance”, which to some degree restricts documentary filmmak-

ers' choice of subject matter, way of storytelling, and material (Aufderheide & Jaszi 2004).

This development represents a serious threat to the freedom of expression and information, and a potential obstacle to growth in cultural production. Documentary is an important genre, and has played an important role in informing and educating citizens, not at least through the PSBs. The terms on which citizens – including amateur and professional filmmakers – are given access to public archives, directly affect the conditions of knowledge and cultural production in a society. The way in which PSBs manage their archives on behalf of the wider community is obviously a matter of great cultural importance. This is not just a question of making archive material a vital cultural production force, in fact, it is also a question of making this material more accessible by way of contextualization, new perspectives and innovative storytelling.

We will return to these matters, and the cultural political issues they raise, after looking into the situation of two Nordic PSBs with far fewer resources than the BBC: Danmarks Radio (DR) in Denmark, and Norsk Rikskringkasting (NRK) in Norway.

Sometimes a great notion

One should not underestimate the mobilizing force of “great” ideas and visions, as the Creative Archive project clearly has demonstrated. Both in Denmark and Norway the digitization of the PSBs’ audiovisual archives is part of vast national projects of “digitizing the cultural heritage” to make it accessible to the citizens. In Denmark the government has provided special funding of DR’s Cultural Heritage project to secure the archives through “digitization and use”. DR has reached an agreement with the collecting society Copy-Dan on the terms on which the archive footage should be made accessible, used and paid for. This agreement is the first of its kind and has solved most copyright problems, including the status of so-called “orphan works”. In the words of the Danish minister of culture, Brian Mikkelsen, the Danish are now given access to “the great cultural treasures” of DR’s archives (Mikkelsen 2007). With the aid of special public funding, DR has also been able to involve research institutions both in technical problems of preservation and on questions concerning metadata and efficient information retrieval. The Cultural Heritage project is still in its initial phases, and the Danish government has asked DR to provide several services that may demonstrate the value of a digitized archive. The total cost of digitization is estimated to approximately 220 million euro.

In Norway the situation is somewhat different. The NRK has been told by the Norwegian government to conduct the digitization of its archives within its own budget. This was confirmed in a recent White paper addressing the digitization of public archives, marked by emphasizing storage and preservation rather than public accessibility and cultural production (MCCA 2009). This has resulted in a rather slow pace in the digitization of NRK’s archives, and

is done primarily with its function as a vehicle for programme production in mind. The NRK has expressed only vague ideas about how this programme archive should be combined or extended with a public accessible database, serving both the general public and professional users.

In the meantime, the NRK's archival resources have been put on the market. Through the independent, NRK-owned company Aktivum, archive material is sold on rather hard commercial terms (Larsen & Uberg Nærland 2009), old television series are re-fashioned for the DVD-market, and commercial by-products from series and programmes flourish. Aktivum's imperative to make a profit of the NRK's archival assets resembles very much the mission given to BBC Worldwide, but without a clear separation of commercially- and publicly-funded activities. The lack of an explicit and consistent policy on the use of these resources, and what public service obligations are implied, is indeed an example of the confusion that the digitization of cultural artefacts may produce. This is further illustrated by the lack of an agreement between the NRK and the equivalent of Copy-Dan in Norway, Norwaco: If the main purpose of Aktivum is to make a profit out of NRK's archival material, there are few incentives for the company to engage in clearing the rights to secure public access to external material.

The extended collective licences (ECL) as applied in the Nordic countries, solve the problem with 'orphan works' (van Gompel & Hugenholtz 2008), and the Nordic system now has the status of a legitimate rights-management arrangement through the EU directive on copyright and related rights (the Infosoc Directive). This is done in Preamble 18, which states that: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences." From 2002 to 2006 the Nordic countries implemented the Infosoc Directive within their national laws and new ECL provisions were introduced to cover activities in libraries, museums and archives. Extended collective licences presuppose a certain degree of organization of the field in question, i.e. organizations that represent a substantial number of rights-owners in the field concerned. In most countries this is not a problem, and the extended collective licence is thus an appropriate way of solving the difficulties in obtaining copyright clearance of material that would otherwise not be used. This is a legal solution that should satisfy rights-owners, users and the society at large.

The PSBs can obviously play an important role in obtaining copyright clearance of orphan works and other material where the clearance of rights is troublesome, as the historical unique agreement in Denmark has shown. DR's Cultural Heritage project, and the partial state funding of this project, has created a different pace in the digitization of archival material in Denmark compared to Norway, as well as expectations of public accessibility to the archives. But unlike the BBC's Creative Archive project, DR defines "access" solely as the right to *view*. Citizens may search in (parts of) the digitized archive, and view what they want, but this right is not explicitly coupled to creative re-use of the selected material.

This question may well soon be put on the political agenda, as both the terms on which DR's own material is made publicly accessible, and the way DR use its bargaining position in contracting extended collective licences, is certainly a matter of how to best service the public interest. The great notion of a "digital commons" where the audiovisual cultural heritage is made universally accessible, and free for everybody to use and re-use, in elaborations and interpretations of "what the situation is and what is to be done", should indeed be inspiring and define the terms on which debates and policymaking in this important area are conducted in the future.

The PSBs and National Archives

The European PSBs constitute an institutional framework and a political device in the management of society's cultural resources. The technological possibility of digitizing cultural artefacts has started a range of uneven processes where overall political concerns are difficult to maintain. In most countries the PSBs' archives are mentioned in national plans for the digitization and interlinking of public archives, and on how libraries and other public service institutions should cooperate. The actual work of digitization and providing the audiovisual material with contextual information that can serve information retrieval and research purposes is left to the PSBs to decide. In a situation where digitization and accessibility is very much on the agenda, long-term consideration of sustainable retrieval systems seems to be downgraded. The system of compulsory deliverance of audiovisual material from public and commercial broadcasters to national archives does little to remedy this. Mostly, such national archives are engaged in preservation and not in actively securing and documenting audiovisual archive material in order to make it publicly accessible.

There is at least one exception to this rule: the French National Audiovisual Institute (INA). INA is the world's largest audiovisual source, and contains programmes broadcast by the French public television channels since 1949. Established in 1974, INA has since been an invaluable service for researchers and students and was, in 1991, made the legal deposit of copyright works in France. INA's database now contains more than 300,000 hours of digitized footage and, since 2006, approximately 10,000 hours of this material have been made available online to the general public. Depending on the actual use – viewing or downloading, INA claims a fee, which is to cover running expenses and royalties to rights-holders. INA does engage in rights clearance, but a lot of the material still requires legal analysis and clearance of the rights involved. And despite an ambitious plan to conserve and digitize the French audiovisual heritage, which was launched in 1991 with a total budget of 200 million euro over 15 years, almost 800,000 hours of recordings are in danger of deterioration and chemical decay, according to the INA.

This rather brief sketch of the situation in France should illustrate that even the most ambitious national audiovisual archive in Europe faces great challenges. In

most countries, the rather recent cultural recognition of audiovisual material has far from provided the national archives with the necessary resources to secure and document, not to mention make easily accessible to either researchers or to the general public, the material they are entrusted with. The system of compulsive deliverance of audiovisual material from the PSBs and other television channels to national archives is a necessary device to secure the great variety of programmes that are produced in contemporary societies. But although the situation is somewhat different within the European countries, legal deposit requirement and technical preservation of material in national archives are not necessarily followed by obligations to make these cultural resources available to the general public. Even researchers experience that access to archival material in the national archives is awkward and troublesome.

National archives safeguard societies from losing important material due to accidental procedures and practices of archiving by the PSBs and by other producers. The question of access to and use of these resources has been put on the public agenda pretty much as a result of digitization: the fact that a technology of storage and preservation also implies the possibility of access and re-use. It remains to be seen how this radically new situation in diffusion and use of cultural artefacts will be turned into political re-definitions of the role of national archives. A more active role as clearing agencies of copyrights, and in making audiovisual material more accessible, can easily be imagined. Responsibility for the more long-term problems of information retrieval, i.e. what standards of documentation and contextual information should be implemented, is also an issue of great cultural importance that should be considered more prioritized a task for the national archives to fulfil. The Standing Committee of European National Audiovisual Archives (SCEENAA) has acknowledged most of these problems, and has emphasized the need to clarify the public accountability for the preservation of audiovisual archives.

In relation to national archives, the PSBs have legal status as right-holders to their own material. As seen from the different policies and priorities of the BBC, the DR, and the NRK, this may represent different kinds of problems in the relations between the PSBs and the national archives. The overall political task will of course be to balance potential conflicts of interests that may arise from established institutional logics and the traditional public obligations with which these public institutions are entrusted. This may not be accomplished in any straightforward way, as many of the challenges that these institutions are encountering, are historically new and without precedence when it comes to practical and legal solutions. Cultural policy objectives that may be defined on a rather general level through the formulation of programmatic aims and purposes of the national audiovisual archives may easily come in conflict with the PSBs' immediate economic interest in making a profit of their archival resources. In a recent study it is documented that, for example, the NRK in some cases has claimed more in royalties for using documentary footage than it is prepared to pay for screening the production in question (Larsen & Uberg Nærland, 2009). Any European PSB is in a situation with intense competition

from other broadcasters, but the understandable inclination to use unique historical material as a competitive advantage must of course be balanced against broader public interests.

An emergent political culture

Both national archives and public service broadcasters have the powers to engage in legal negotiations on what terms cultural artefacts should be made publicly accessible. The option of extended collective licences is both a viable option to secure mass use of what may be defined as common audiovisual memory, and an opportunity for the PSBs and other public institutions to make an impact on legislation and the ongoing creation of legal precedents in the management of intellectual property. The extent to which this is done with the public interest primarily in mind is, of course, also a question of what public obligations are placed upon these institutions, i.e. a question of how an elaborated view of the public service mission under new technological conditions is spelled out.

What emerges from these reflections is a need to mobilize public service ideals and values in a radical new historical situation. The pressure from strong commercial interests to impose a digital rights management regime that restricts common access to and creative use of society's audiovisual resources makes it imperative to put these questions under more intensive public discussion and scrutiny. The slogan: "Open the Archives", which made former administrative archives in the service of authoritarian political regimes accessible as "social memory" and sources of historical reflection during the nineteenth century has, in the twenty-first century, transformed all kinds of audiovisual material and what has earlier been considered as ephemeral cultural artefacts, into objects and sources of "cultural memory".

In a situation where technology can make cultural artefacts accessible in a hitherto unprecedented degree and pace, both the PSBs and the national archives are left in a situation where a lack of a consistent public policy defines the terms of action. This new historical situation may have resulted in a cultural climate where immediate accessibility and profitable use of historical material has become the driving force in both in the policy of the PBS and other national culture institutions. This could well be defined as a situation of "an emergent political culture", where the interventions of political parties, commercial interests, and the academic society, and the terms on which public discussions of these pressing matters are conducted, will have an impact on future politics in this area.

Preparing interventions in this situation, one could do worse than to bear in mind Wolfgang Ernst's words on what is at stake: "The ultimate goal of working with archives is not only to make an enormous database speak, and to give a voice to a hidden reality, but also to transform *the thing* from an inherited world to a world that remains to be created" (Ernst 2002). To cre-

ate the conditions so that the best cultural resources are available for such an endeavour is still the task.

References

- Aufderheide, P. & Jaszi, P. (2004) *Untold Stories: Creative Consequences of the Right Clearance Culture for Documentary Filmmakers*, Washington D.C.: Center for Social Media. (Report available at www.centerforsocialmedia.org/rock/index.htm. Accessed 5 September 2009.
- Bardoel, J. & Lowe, G. F. (2007) "From Public Service Broadcasting to Public Service Media: The Core Challenge", in G. F. Lowe & J. Bardoel (eds.) *From Public Service Broadcasting to Public Service Media*, Göteborg: Nordicom.
- BBC (2004a) *Building Public Value: Renewing the BBC for a Digital World*. London: BBC.
- BBC (2004b) *BBC Creative Archive Pioneers New Approach to Public Access Right in Digital Age*. Press Releases May 2005.
- Boyle, J. (2008) *The Public Domain: Enclosing the Commons of the Mind*, New Haven & London: Yale University Press.
- Ernst, W. (2002) *Das Rumoren der Archive: Ordnung aus Unordnung*, Berlin: Merve Verlag.
- FCD (2004) *Friends of the Creative Domain Call for a True Creative Archive*. Letter submitted to the BBC and the Department of Culture, June 17 available at <http://www.public-domain.org/?q=node/36>. Accessed 5 September 2009.
- Larsen, L. O. & Uberg Nærland, T. (2009) *Documentary in a Culture of Clearance: A Study of Knowledge of and Attitudes Towards Copyright and Fair Use among Norwegian Documentary Makers*. Paper presented at the Nordmedia09 conference in Karlstad, Sweden.
- Lessig, L. (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York: Penguin Press.
- Lowe, G. F. & Bardoel, J. (eds.) (2007) *From Public Service Broadcasting to Public Service Media*, Göteborg: Nordicom.
- Lowe, G. F. & Jauert, P. (eds.) (2005) *Cultural Dilemmas in Public Service Broadcasting*, Göteborg: Nordicom.
- Lowe, G. F. & Hujanen, T. (2003) *Broadcasting and Convergence: New Articulations of the Public Service Remit*, Göteborg: Nordicom.
- Mikkelsen, B. (2007) *Det talte ord gælder* [The spoken word counts], Speech by the Danish minister of culture, Brian Mikkelsen, on a press meeting, May 29.
- Ministry of Culture and Church Affairs (MCCA) (2009) *St. meld. Nr. 24: Nasjonal strategi for digital bevaring og formidling av kulturarv* [White paper on national strategies for digital preservation and dissemination of cultural heritage].
- Moe, H. (2009) *Public Broadcasters, the Internet, and Democracy. Comparing Policy and Exploring Public Service Media Online*. PhD Dissertation, University of Bergen, Norway.
- Moe, H. (2007) "Commercial Services, Enclosure and Legitimacy. Comparing Contexts and Strategies for PSM Funding and Development", in G.F. Lowe & J. Bardoel (eds.) *From Public Service Broadcasting to Public Service Media*, Göteborg: Nordicom.
- Murdock, G. (2005) Building the Digital Commons. Public Broadcasting in the Age of the Internet, in Lowe, G. F. and P. Jauert (eds.) *Cultural Dilemmas in Public Service Broadcasting*, Göteborg: Nordicom.
- Otlet, P. (1934) *Traité de Documentation. Le Livre sur le livre: Théorie et Pratique*. Bruxelles: Éditeurs-Imprimeurs D. van Keerberghen & Fils (reprinted in 1989 by Centre de Lecture publique de la Communauté Française in Liège, original available at <http://lib.ugent.be/fulltxt/handle/1854/5612/>. Accessed 5 September 2009.
- Rayward, W. B. (1994) "Visions of Xanadu: Paul Otlet (1868-1944) and Hypertext", *Journal of the American Society for Information Science*, Volume 45, number 4: 235-250.
- Steemers, J. (2005) "Balancing Culture and Commerce on the Global Stage. BBC Worldwide", in G.F. Lowe & P. Jauert (eds.) *Cultural Dilemmas in Public Service Broadcasting*, Göteborg: Nordicom.

- Van Gompel, S. & Hugenholtz, B. (2008) *The Orphan Works Problem. The Copyright Conundrum of Digitizing Large-scale Audiovisual Archives and How to Solve it*. Paper presented at the Digicult Symposium, Paris.
- Wikinews (2006) *Interview with BBC Creative Archive Project Leader*. Interview with Paul Gerhardt, June 22. http://en.wikinews.org/wiki/Interview_with_BBC_Creative_Archive_project_leader. Accessed 5 September 2009.

Chapter 4

News Corporation's MySpace.com and the Digital Challenges to Audiovisual Regulations

Ole J. Mjøs

Traditional major media players have long been – and continue to be – uncertain of how they can profitably expand into the new media and communications landscape – and particularly the Internet and online environment. For News Corp., the Internet-based MySpace has been central in the media conglomerate's attempts to extend its traditional media power into the online environment and exploit the long-perceived commercial potential of the Internet. The multimedia online platform MySpace has attracted millions of users across the world, and facilitates communication and the distribution of user-generated media content within the network and between these users. At the same time, MySpace attempts to operate as a synergy device introducing News Corp.-owned traditional television programming and film content online.

The chapter shows how the nature of MySpace and the logics of the new digital and online environment challenge audiovisual regulatory frameworks. This, again, questions the ability of regulatory measures to address the multifaceted digital entities and services such as MySpace increasingly populating the global media and communications landscape.

A transforming media and communications landscape

The media and communications landscape, not just in Europe – but also throughout the world, was very different when the European Commission introduced the *Television Without Frontiers Directive* in 1989. In the mid-1980s, the European Commission was particularly concerned with the major presence of American films and television programmes in Europe. The US-originated programming was creating “a certain uniformity” on European television screens (European Commission 1984: 47). This development, together with the steady rise of satellite and cable television channels operating across Europe, led to a major regulatory response. The European Commission aimed to facilitate, through the *Television Without Frontiers Directive*, a free flow of audiovisual productions across the EU and EEC regions (Brants & Bens 2000;

Chalaby 2002). The objective was to create a European audiovisual sphere. The majority of television programming, according to the Directive, should be “European works” – audiovisual productions of European origin. This was to be achieved through quota regulations requiring broadcasters and satellite television channels to transmit mainly European programming “where practicable”. The Directive also attempted to regulate the amount of advertising on European television, as well as protect minors through various measures (European Commission, 1989). However, since 1989, the European and national media regulatory bodies have been faced with a radically-changing European and global media and communications sector.

The traditional separate media and communication sectors are gradually becoming part of an integrated global industry landscape. Digitization has revolutionized the possibility and capacity for the production and distribution of media content across platforms. Although US film and television continue to have a major presence on television in Europe, digital satellite distribution has led to a dramatic rise in the number of local, national and regional television channels and operators targeting the culturally and linguistically diverse European region. In the European Union and candidate countries there are now over 6,500 television channels. At the same time, new regional centres for film and television production around the world, and news and entertainment satellite television channels originating outside the Western world, create media contra-flows. ICT such as broadband, mobile telephony and the Internet have – in addition to unprecedented communications opportunities – given rise to numerous new audiovisual distribution possibilities through video-on-demand, online video streaming and downloading of professional as well as user-generated media content (Arnault & Castells 2008; Castells 2004, 2009; Goggin 2006; Mavise 2009; Thussu 2006; 2007).

Out of these transformations, new forms of media and communications entities and services have rapidly emerged – particularly within the online environment. The powerful global Internet search engines Yahoo! and Google, the video Web site YouTube, as well as the Internet-based social networks and multimedia entities, such as MySpace and Facebook, have in just a few years become part of everyday life for Internet-users worldwide. Several of these Internet-based enterprises have also rapidly become extremely valuable – strengthening the belief in the enormous financial potential of the online environment. As this chapter shows, the specific case of MySpace also reflects the more general tendencies and trends: the general strong preoccupation among corporate and political stakeholders, as well as the media and press, with the possibilities for economic rewards and growth generated within the online sphere. This motive, together with technological factors such as digitization and the process of media globalization, pose challenges for media regulation.

The rise of MySpace in a transforming media and communications landscape

Launched in 2003 as a small Internet-based start-up in California, MySpace developed into News Corporation's most ambitious operation on the Internet. In 2005, the media conglomerate acquired the social Internet network for between \$580 and \$700 million. While MySpace increasingly distributes traditional audiovisual content, it is the users' media content contributions and the communication between them that have created the network. The rise of MySpace is due to the remarkably rapid take-up and activity of millions of users.

In 2004, American teenagers started to use MySpace "*en masse*" (Boyd & Ellison 2007). By 2007, MySpace was the most visited website in the US, and in early 2009, the service has 125 million user profiles worldwide (Angwin 2009; Arrington 2009; BBC News, 2005). However, MySpace is experiencing tough competition from both cross-national and national social Internet networks. Facebook became the most popular social Internet network site in the US in May 2009, and attracts far more users internationally than MySpace. MySpace has also experienced major reductions in its operations and work force outside the US. Despite this development, MySpace is still a large cross-national social Internet network, and continues to appeal to millions of Internet-users in the US and internationally. Both MySpace and Facebook are significant enterprises within a global digital media and communications environment in which two-thirds of the world's Internet population visit social networking or blogging sites – an activity that accounts for 10 per cent of all Internet time (Arrington 2009; eMarketers 2009; Nielsen Online 2009; Pfanner 2009).

Although MySpace and traditional global television and media networks such as CNN, MTV, and Discovery share worldwide commercial ambitions, the peculiar logic of MySpace sets it apart in significant ways. The traditional global television and media entities have strong gate-keeping functions in their media content and services, and distribute similar media products and service offerings globally, all in line with a defined global brand (Chalaby 2002; Mjos 2010; Urry 2003). MySpace differs radically. The network's existence relies on the extensive involvement of the users. The users do not pay any fees to join MySpace and create a profile, and they are free to start using it and stop using it at any time. There are numerous competing social online networks, and, the examples of networks that experience a rapid increase in the number of users but then lose their popularity signal a certain vulnerability among these networks – within the "fluid" online environment (Urry 2003; 2007). Furthermore, in contrast to traditional global media entities, MySpace facilitates significant possibilities for the individual user's influence on the output of the network. The user can, for example, include their own videos on MySpace's video player, or embed YouTube videos, include photos and express themselves through their personal blog or by posting messages on other users' profiles.

News Corp.'s costly acquisition of MySpace reflects the general strong belief in the Internet's financial potential in the mid-2000s. However, most of the larger media companies had previously taken part in the "dotcom boom" era, investing billions of dollars on various Internet ventures and companies at the end of the 1990s and the early 2000s. News Corp. reportedly invested \$1.3 billion between 1999 and 2001 (BBC News 2001; Blevins 2004; Milmo 2001). At the turn of the millennium, however, most of these investments proved to be far less lucrative than initially thought. The dotcom bubble burst, as the unrealistically high value of the Internet-based enterprises plummeted. Still, by the mid-2000s, new and expanding Internet companies had once again become increasingly visible. Traditional media companies were cautious but many, including News Corp., were once again enticed to invest enormous sums in Internet entities – afraid of losing out on the strategic and financial potential of the Internet.

MySpace was one of these very promising and sought-after Internet properties. The service quickly became popular, especially among young people. In contrast to Friendster and other existing social Internet networks, MySpace welcomed teenagers, facilitated extensive personalization of the user-profiles, and grew rapidly outside the attention of mainstream press throughout 2004 (Boyd & Ellison 2007). By 2005, MySpace had in total about 27 million members. At the time, these users spent on average over three times as much time on MySpace as users of the social Internet network Facebook, and five times more than users of Friendster. MySpace's young users, many between 16 and 24-years-old, were extremely attractive to advertisers but difficult to reach through newspapers and television. In addition, it did not cost anything to create a profile and use the MySpace network (Angwin, 2009; Cohn 2005; La Monica 2009; Naughton 2006; Siklos 2005). MySpace's increasing popularity among young people, and potential as a vehicle for advertising, caught News Corp.'s attention.

However, News Corp.'s and other traditional media companies' resurging optimism and interest in Internet companies in the mid-2000s are ascribed, amongst other things, to the rise of the Internet-based phenomenon Google. Some point out how Google's idea of selling advertising linked to online searches was key to legitimizing the Internet as a medium for attracting advertising on a large scale (Kafka 2007; La Monica 2009). Google's advertising revenue skyrocketed in a very short time – from around \$70 million in 2001 to around \$1,4 billion in 2003 (Google 2009). The global Internet search engine went public in August 2004 and, only a few months after the public launch, the market value of Google surpassed News Corp.'s. Around a year later, the Internet search enterprise was considered more valuable than the traditional media conglomerates Walt Disney and Time Warner (La Monica, 2009). Although the rapid escalation of the value of Internet entities mirrored the late 1990s, their seemingly viable advertising business model and large number of existing users could now more easily justify the valuation of these companies (Croteau & Hoynes 2006; Schifferes 2006).

Regulating a transforming media and communications landscape

The dramatic changes in the media and communications sector, and the increasing role of the Internet as also a site for distribution of audiovisual media content, meant that that such online activity could come to be included in the European Commission's new audiovisual Directive of 2007. However, Member State and industry representatives, as well as parts of the press, strongly emphasized the potential for economic growth in the online environment. Some of these stakeholders, therefore, argued fiercely against any regulation that they feared could slow down or hinder economic development within, particularly, the Internet sector. In the mid-2000s, at the time of the public debate leading up to the new audiovisual Directive, MySpace had been launched in the US and was also growing rapidly overseas.

In Europe, MySpace was receiving increased attention. This was partly due to the massive news coverage in 2005 of News Corps acquisition of the – for most – unfamiliar social Internet network entity (Boyd & Ellison 2007). However, at the same time, the UK mainstream press in particular reported about music bands and artists suddenly becoming popular and reaching the top of the official national music charts through the use of MySpace. MySpace was portrayed as a motor for growth and promotion within the music sector, as bands and fans flocked to the network. Stories of the “magic” of MySpace spread rapidly throughout media. In the UK, MySpace was presented as key to the continuing success of major artists such as Madonna and also, more importantly, the rapid rise in popularity of unknown British music artists and bands (Buskirk 2007; Cieslak 2006). Such news stories supported the notion of MySpace as one of the Internet-based entities that had a major financial and business potential.

The debate prior to the finalization of the European Commission's new audiovisual Directive took place around the same time. As part of the process to develop the new Directive, both European commercial and public media and communications stakeholders were invited to submit written observations and to express their views on the ‘Television Without Frontiers Directive Issues Papers’ to the European Commission. The US-originated search engine giant Yahoo!, one of the world's major Internet-based companies, was among the companies commenting on parts of these Papers in 2005. Yahoo! Europe argued fiercely against regulating audiovisual content on the Internet: “We are not convinced of the need for an extension of the current TVWF Directive to cover any element of the online sector.” Yahoo! Europe pointed to how the major changes within the European audiovisual sector had given rise to a plethora of television channels, and thereby increased the choice for viewers:

In the 1980s barriers to entry into the AV broadcast market were extremely high. This resulted in only a handful of channels in each Member State enjoying very high, passive, audiences and arguably having an impact on

citizens' thinking. The environment today bears no resemblance to that of the 1980s, with a multitude of satellite, cable, analogue, and digital terrestrial channels. The control the consumer exerts, like his/her sophistication in the consumption of AV content, has increased just as the impact of any particular programme or channel has decreased. The trend is continuing apace. (Yahoo! Europe, 2005)

Within the online environment the "choice" for "consumers" is even greater, according to Yahoo!:

The online environment is still more fragmented, with literally millions of content-based websites and applications, from numerous countries, to choose from. There is no concern over spectrum and barriers to entry are extremely low. The consumer uses numerous tools and services to control what s/he views (and often interacts with) online. The 1980s broadcasting regulation simply does not fit this new and very different environment. (Yahoo! Europe, 2005)

In today's media and communications landscape, Yahoo continued: "deregulation, not increased sector-specific regulation, is the way to ensure the economic health of the EU AV industry, while ensuring an adequate level of protection for citizens" (Yahoo! Europe, 2005). Also within the political environment the possible consequences of the new European regulations were debated. Similar to Yahoo, UK media authorities, representing perhaps the most influential Member State (in terms of facilitating commercial pan-European media activity for more than two decades) also pointed out the importance of fostering and harnessing the financial potential of the online environment.

The European Commission's Directives provide a minimum of media regulation, and Member States can choose to implement stricter regulation. While the UK has traditionally interpreted the Directive liberally, other countries such as France have taken a more strict approach (Brown 1998: Chalaby 2002). The former British media authority, ITC, granted permission to transmit from the UK for a symbolic fee of £250 and practised a liberal approach to the regulation of programming, sponsorship and advertising on satellite television channels operating throughout the European Union (Chalaby 2002). The wish to strengthen London's position in the European media market is seen as one explanation for the loose regulation of satellite television channels transmitting non-European programming (Syvertsen 2001). This has contributed to making the UK, and in particular London, a bridgehead for expanding US-originating media companies and, in particular, American pan-European cable and satellite television operators transmitting from the UK.

Most pan-European television channels transmit from the UK and a key reason "is the relaxed regulatory (and commercial) regime" (Tunstall & Machin 1999: 72). The majority of programming transmitted by such pan-European

television channels should be “European works” – audiovisual productions of European origin, according to the *Television Without Frontiers Directive*. However, the Directive allowed for flexibility, by including the words “where practicable”. The UK has practised this flexibility liberally, taking a lax position in regards to the quota requirements – to the benefit of, amongst others, American-originated, pan-European television channels with major non-European programme archives (Tunstall & Machin 1999).

In line with the historically British pro-market position, Shaun Woodward, the British Broadcast Minister, argued against any further EU regulation of audiovisual content in the online environment – and particularly not content on sites such as MySpace:

It's common sense. If it looks like a TV programme and sounds like one then it probably is. A programme transmitted by a broadcaster over the net could be covered by extending existing legislation. But video clips uploaded by someone is not television. YouTube and MySpace should not be regulated. (Woodward, quoted in Sherwin 2006)

Woodward emphasized that British national law already protects minors in relation to media, and his main concern was possible new regulations hampering the commercial potential of the Internet: “The real risk is we drive out the next MySpace because of the cost of complying with unnecessary regulations”, Woodward pointed out; “These businesses can easily operate outside the EU” (Woodward, quoted in Sherwin 2006).

The European Commission's *Audiovisual Media Services Directive* (AMSD) “entered into force” 19 December 2007, and replaced the *Television Without Frontiers Directive*. The AMSD aims to address the “new media realities”. It covers traditional television broadcasting, but also includes on-demand services such as on-demand films and news. Traditional television is categorized as a “linear” service because the broadcaster decides when programming is scheduled and transmitted. On-demand is referred to as a “non-linear” service as the users or viewers chooses when to watch the programming offered:

For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest. (European Commission 2007)

Services that are not primarily distributors of audiovisual content, such as private email communication and electronic versions of newspapers and magazines, are not covered by the Directive: “Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service” (European Commission 2007). The European Commission’s new audiovisual Directive thereby distinguishes between “non-linear” and “linear” audiovisual services, but these two categories do not include private communication or user-generated media content online. However, since the Directive of 2007, News Corp. has stepped up its efforts to develop MySpace into an even more advanced media and communications service. The service is now offering both “non-linear” and “linear” audiovisual content, as well as user-generated media content and communication.

MySpace: As multimedia synergy device

MySpace attracts millions of users, and facilitates communication and the distribution of user-generated media content. At the same time, MySpace has introduced traditional News Corp.-owned media content. The aim is to expand MySpace into a commercial global multimedia giant and synergy device. This development, so far mainly taking place in the US, signals what the European media and communications landscape might expect. This raises the question further of how the multifaceted entity MySpace should be regulated, and complicates the categorizations that the European Commission’s new Audiovisual Media Services Directive attempts to address.

Synergy has become a common strategy for all large media enterprises as they attempt to use the Internet to harness the possible benefits of cross-platform distribution of their various operations (Thussu 2006). The (former) MySpace CEO and co-founder, Chris Wolfe, also emphasized the potential for synergy between News Corp.’s media content and MySpace: “I really thought that we would fit well with a media company. We’d have access to content, we’d have access to unlimited capital, and we’d have access to international markets” (DeWolfe, quoted in Maney 2009). Furthermore, DeWolf claimed: “So they [News Corp] allowed us to stay in our own silo and grow and find synergy – or whatever word you want to use – within the other groups in News Corp” (ibid.). And, also “There is a fair amount of synergy. When people think of News Corp. they may think of Fox channel and Fox News first” said DeWolfe. ‘So there is a lot of crossover and potential for interesting promotions’ (De Wolfe, quoted in La Monica, 2009). While such proclamations might be considered as public relations messages, MySpace has been central in News Corp.’s attempts to distribute media content online.

MySpace’s early forays into legal online distribution of television content started soon after News Corp. took control over the entity. The offering included online downloads of episodes of the television series *24* – produced by the

News Corp.-owned Fox Entertainment (Becker 2006). Also episodes of other Fox-produced television shows such as *Prison Break* and *Bones* were made available on MySpace and the websites of News Corp.-owned local television stations in the US – after they had aired on traditional television. Similar to the MySpace management, Ross Levinsohn, president of Fox Interactive Media, the News Corp. arm that controls MySpace, claimed that: “Leveraging this unique opportunity with our sister company FOX enables us to experiment and innovate and deliver some of the most compelling video experiences online to consumers” (USA Today 2006). A number of changes were made to facilitate the distribution of audiovisual content. In 2007, MySpace re-launched its video-sharing service and called it MySpaceTV (Stone 2007). MySpaceTV was later renamed MySpace Video – an umbrella for MySpace’s video offerings.

While YouTube has been embroiled in copyright issues over its distribution of unlicensed film and television programming, MySpace claims to take a different approach: “Video could have been that big win, we could have been YouTube. But since we were owned by News Corp. that has a great respect for intellectual property, we couldn’t have been YouTube” (Anderson, Co-founder of MySpace, quoted in Gibson 2008). The media conglomerate Viacom, owner of the cable and satellite television channels MTV and Comedy Central, sued YouTube for making video segments of the television series *South Park* and other television programmes available without permission. Viacom argued that 160,000 programme segments had been viewed 1.5 billion times, and demanded \$1 billion dollars in compensation from YouTube (Ahrens 2007). As part of the ongoing dispute between the two media giants, the owner of YouTube, Google, was in 2008 ordered to give Viacom the records that list which users who have watched which videos on YouTube. According to *The New York Times*, Viacom could then use this information to help decide to what extent YouTube’s popularity has been achieved through the distribution and use of “copyrighted clips” (Helft, 2008). Despite News Corp.’s and MySpace’s stance against copyright infringement, it is common for users of MySpace to also incorporate – or embed – music videos and other video clips on their user-profiles from YouTube. YouTube made it easy to embed its videos on other Web sites, such as MySpace, and this helped increase the use of YouTube videos, which in turn helped raise the financial value of the video service – eventually bought by Google in 2005 for \$1.65 billion (Stone 2007; Stross 2008: 116).

Only a year after Google purchased the YouTube video operation, News Corp. and the media enterprise NBC Universal launched an Internet video-distribution network in the US. The advertising-supported portal claimed to offer “thousands of hours” of streamed television programming and movies, as well as content from the television programming libraries of the two companies. The joint-venture online portal was named Hulu.com, and News Corp. has a 45 per cent equity interest in the company. The initial distribution partners were AOL, MSN, Yahoo! and MySpace, and the media content was made available for free, but with advertising (News Corp. 2007; 2009: 23).

MySpace also has a central role in the distribution of video content from Hulu. The same year as Hulu was launched, content from the site was being showcased in the new portal MySpace PrimeTime within MySpaceTV (Nicole 2007). The relationship between Hulu and MySpace was developed further. Users can now view Hulu content either on their own MySpace profiles or the separate MySpace PrimeTime site – part of the MySpace Video initiative. This means that MySpace users can search and watch the whole Hulu video database as well as MySpace's own video content without leaving the MySpace service (Albanesius 2008). The media content is available either from a MySpace Video Player, or in the form of embedded online video services such as YouTube.

Hulu has expanded rapidly in the US. When Hulu started, NBC and Fox were the main providers of video content with only around 90 show titles. By 2009, the site has 130 providers contributing over 11,000 titles to Internet users in the US. The major media company ABC/Disney has also joined the venture (Errol 2009). Similarly, large traditional media companies, such as CBS and ABC, that own or control television and film programming, have also distributed their media content on dedicated online outlets. CBS's Internet video sites CBS Innertube and TV.com offer CBS television programming with embedded ads, and ABC.com distributes ABC television programming (Pomerantz 2008). Although YouTube dominates the online viewing of video, News Corp. has a growing presence, either through Hulu or its wholly-owned Fox Interactive Media outlets – such as MySpace. Together these entities make News Corp. the second most popular online provider of video content and traditional television programming and films (see Table 1).

Table 1. Top U.S. online video properties* by videos viewed February 2009

Property	Videos (000)	Share (per cent) of Videos
Google Sites	5,348.579	40.9
Fox Interactive Media	462.620	3.5
Yahoo! Sites	353.489	2.7
Hulu	332.504	2.5
Microsoft Sites	259.002	2.0
Viacom Digital	248.103	1.9
Turner Network	169.486	1.3
AOL LLC	117.119	0.9
Disney Online	116.104	0.9
CBS Interactive	111.762	0.9
Total Internet	13,072.164	100.0
Total U.S. – Home/Work/University Locations		

*Rankings based on video content sites; excludes video server networks. Online video includes both streaming and progressive download video.

Source: comScore Video Metrix, 2009.

Hulu is currently only available legally in the US. Outside the US, various online services offer Hulu unofficially and illegally. However, just like the American cable and satellite television channels throughout the 1980s and 1990s and MySpace in 2006, Hulu is reportedly planning to expand outside the American market – and the UK is also seen as the natural first market (Barnett 2009). MySpace first established itself outside the US in London and then expanded into the rest of Europe (Sweeney 2006). However, launching Hulu in the UK is complicated due to copyright issues on programming, and raises regulatory issues. Would an online European Hulu service be regulated as “non-linear” on-demand? The British newspaper *The Telegraph* reported that Hulu considered launching in the UK with 3,000 hours of American-originated programming content, as well as content from the British national broadcasters BBC, ITV and Channel 4 (Barnett 2009). If the UK version of Hulu is distributed from the UK and across Europe, will the British media authorities also, in the case of Hulu, allow for flexibility – favouring an American-originated, online, ‘non-linear’, on-demand service perhaps lacking European media content? Furthermore, while MySpace is not regulated by the European Commission’s new audiovisual Directive, how will a European Hulu service embedded in MySpace be regulated?

Conclusion

Transformations in the media and communications landscape challenge media regulation. The European Commission has attempted to address changes in this sector through its audiovisual Directives. The *Television Without Frontiers Directive* of 1989 was implemented to regulate the dominance of American television import and the satellite and cable television channels. Since then, digitization, the emergence of ICT, strong commercial motives and media globalization has led to rapid and continuous changes across the media and communications industries. The modernized European audiovisual Directive of 2007 – the *Audiovisual Media Services Directive* (AVMSD) attempts to address these most recent transformations. News Corp., as well as other major traditional media and communications players, is expanding aggressively to establish itself in this new digital and online environment. MySpace is a key entity for News Corp. in this process, and the recent emergence of global on-line multimedia entities such as MySpace exemplifies the challenges that media regulations are faced with.

References

- Ahrens, F. (2007) “Viacom Sues YouTube Over Copyright”, *Washington Post*, 14 March. <http://www.washingtonpost.com/wpdyn/content/article/2007/03/13/AR2007031300595.html>. Accessed 2 October 2008.

- Albanesius, C. (2008) *MySpace Goes 'Primetime' With Embedded Hulu Video*. 12 November. <http://www.pcmag.com/article2/0,2817,2334598,00.asp>. Accessed 8 April 2009.
- Angwin, J. (2009) *Stealing Myspace*, New York: Random House.
- Arnault, & Castells, M. (2008) "The Structure and Dynamics of Global Multi-Media Business Networks", *International Journal of Communication*. 2: 707–48. <http://ijoc.org/ojs/index.php/ijoc/article/view/298/189>. Accessed 11 July 2009.
- Arrington, M. (2009) *Facebook Now Nearly Twice The Size of MySpace Worldwide*, 22 January. <http://www.techcrunch.com/2009/01/22/facebook-now-nearly-twice-the-size-of-myspace-worldwide/>. Accessed 22 January 2009.
- Barnett, E. (2009) *Hulu set for September UK launch*, 20 May. www.telegraph.co.uk/scienceand-technology/technology/5356527/Hulu-set-for-September-UK-launch.html. Accessed 4 June 2009.
- BBC News (2001) *Murdoch's brief love affair with the web*, 5 January. <http://news.bbc.co.uk/2/hi/business/1102560.stm>. Accessed 11 July 2009.
- BBC News (2005) *News Corp in \$580m internet buy*, 19 July. <http://news.bbc.co.uk/2/hi/business/4695495.stm>. Accessed 11 July 2009.
- Becker, A. (2006) *24 Finds a Space on MySpace*, 15 May. http://www.broadcastingcable.com/article/104183-24_Finds_a_Space_on_MySpace.php. Accessed 8 April 2009.
- Boyd, D. M. and Ellison, N. B. (2007) Social Network Sites: Definition, History, and Scholarship, *Journal of Computer-Mediated Communication*, 13(1) <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>. Accessed 3 April 2009.
- Brants, K. & Bens, E. De (2000) 'The Status of TV Broadcasting in Europe', in J. Wieten, G. Murdock, & P. Dahlgren (eds.) *Television Across Europe – A Comparative Introduction*, London: Sage.
- Brown, D. (1998) *Revenue Trends and Projections in European Pay-TV*, London: FT Media and Telecoms.
- Buskirk, E. van (2007) *Arctic Monkey Frontman Collaborates with Final Fantasy on Side project*, October 22. <http://blog.wired.com/music/2007/10/arctic-monkey-f.html>. Accessed 10 April 2009.
- Castells, M. (2004) "Informationalism Models of the Network Society: A Theoretical Blueprint", in M. Castells (ed.) *The Network Society: A Cross-cultural perspective*, Cheltenham: Edward Elgar
- Castells, M. (2009) *Communication Power*, Oxford: Oxford University Press.
- Castells, M., Fernandez-Ardevol, M., Qui, J. L. & Sey, A. (2007) *Mobile Communication: A Global Perspective*, Cambridge, MA: MIT Press.
- Chalaby, J. K. (2009) *Transnational Television in Europe: Reconfiguring Global Communications Networks*, London: I. B. Tauris.
- Chalaby, J. K (2002) "Transnational Television in Europe. The Role of Pan-European Channels", *European Journal of Communication*, vol. 17, no. 2, pp. 183–203.
- Cohn, D. (2005) Bands Embrace Social Networking. *Wired*. 18 May. <http://www.wired.com/culture/lifestyle/news/2005/05/67545>. Accessed 2 October 2008.
- Cieslak, M. (2006) *Rise of the web's social network*, BBC News, 30 September. http://news.bbc.co.uk/go/pr/fr/-/2/hi/programmes/click_online/5391258.stm. Accessed 13 April 2009.
- ComScore (2009) *Number of Hulu Video Viewers Increases 42 percent in February, according to comScore Video Metrix*, 24 March. <http://www.comscore.com/press/release.asp?press=2756>. Accessed 8 April 2009.
- Croteau, D. & Hoynes, W. (2006) *The Business of Media: Corporate media and the Public Interest*, Second Edition, Thousand Oaks: Pine Forge Press.
- eMarketers (2009) *Facebook Overtakes MySpace*, 18 June, <http://www.emarketer.com/Article.aspx?R=1007145>. Accessed 7 July 2009.
- Errol, P. L. (2009) *Hulu*, Review. <http://www.pcmag.com/article2/0,2817,2344265,00.asp>. Accessed 8 April 2009.
- European Commission (1984) *Television without Frontiers*. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable. COM (84) 300, 14 June 1984. Introduction; Parts One, Two and Three, 47. http://aei.pitt.edu/archive/00001151/01/TV_frontiers_gp_pt_1_3.pdf. Accessed 5 May 2005.

- European Commission (1989) *Council Directive 89/552/EEC of 3, October 1989* Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC) THE COUNCIL OF THE EUROPEAN COMMUNITIES, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CEL_EXnumdoc&lg=EN&numdoc=31989L0552&model=guichett. Accessed 4 April 2006.
- European Commission (2007) *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* Text with EEA relevance, Official Journal L 332, 18/12/2007 P. 0027 –0045 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:01:EN:HTML>. Accessed 4 June 2009.
- Gibson, O. (2008) *200 million friends and counting* 23 June. www.guardian.co.uk/media/2008/jun/23/myspace.tomanderson/print. Accessed 23 June 2008.
- Goggin, G. (2006) *Cell Phone Culture: Mobile Technology in Everyday Life* London: Routledge.
- Google (2009) *Investor Relations*, http://investor.google.com/fin_data2003.html. Accessed 5 April 2009.
- Helft, M. (2008) Google Told to Turn Over User Data Of YouTube. 4 July, <http://www.nytimes.com/2008/07/04/technology/04youtube.html>
- Kafka, P. (2007) Murdoch 2.0, *Forbes*, 24 January, http://www.forbes.com/2007/01/24/murdoch-myspace-tribune-tech-media-cz_pk_0126murdoch_print.html. Accessed 21 September 2008.
- La Monica, P. R. (2009) *Inside Rupert's Brain*, London: Penguin.
- Maney, K. (2009) His Space. *Portfolio*. April. <http://www.portfolio.com/executives/2009/03/18/MySpace-CEO-DeWolfe-Q-and-A>. Accessed 12 July 2009.
- Mavise (2009) *Mavise: Database for TV companies and TV channels in the European Union and candidate countries*. <http://mavise.obs.coe.int>. Accessed 11 July 2009.
- Milmo, D. (2001) *News Corp axes more internet jobs* 16 January. <http://www.guardian.co.uk/media/2001/jan/16/citynews.newmedia>. Accessed 3 April 2009.
- Mjos, O. J. (2010) *Media Globalization and Discovery Channel Networks*, New York: Routledge.
- Naughton, J. (2006) *Myspace or his space? Does Rupert get the problem?* 17 September. <http://www.guardian.co.uk/technology/2006/sep/17/comment.media>. Accessed 8 April 2009.
- News Corp. (2007) *NBC Universal And News Corp. Announce Deal With Internet Leaders AOL, MSN, Myspace And Yahoo! To Create A Premium Online Video Site With Unprecedented Reach*. http://www.newscorp.com/news/news_329.html. Accessed 8 April 2009.
- News Corp. (2009) *Corporate Profile*, Investor Relations. <http://www.newscorp.com/investor/index.html>. Accessed 2 April 2009.
- Nicole, K. (2007) *Hulu on MySpaceTV PrimeTime*. 19 December. <http://mashable.com/2007/12/19/hulu-myspace-primetime/>. Accessed 12 April 2009.
- Nielsen Online (2009) *Global Faces and Networked Places: A Nielsen Report on Social Networking's New Global Footprint*. March. The Nielsen Company. http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf. Accessed 11 July 2009.
- NYT (2009) *Ex-Chief of AOL to Run MySpace*. 1 April. http://www.nytimes.com/2009/04/02/business/media/02digital.html?_r=1&scp=5&sq=myspace%20china&st=cse. Accessed 9 April 2009.
- Pfanner, E. (2009) *MySpace to Cut Two-Thirds of Staff Outside U.S.* 23 June, <http://www.nytimes.com/2009/06/24/technology/companies/24myspace.html> Accessed 8 July 2009.
- Pomerantz, D. (2008) *In Pictures: Web Strategies Of The Big Studios*. 30 March. http://www.forbes.com/2008/04/30/hollywood-internet-studios-biz-cz_dp_0430studios_slide_6.html?thisSpeed=20000. Accessed 28 March 2009.
- Schiffes, S. (2006) *Has the Dotcom Boom Returned?* 10 October. <http://news.bbc.co.uk/1/hi/business/6036337.stm>. Accessed 2 April 2009.
- Sherwin, A. (2006) *Amateur 'video bloggers' under threat from EU broadcast rules*. 17 October. <http://www.timesonline.co.uk/tol/news/world/europe/article603123.ece>. Accessed 4 June 2009.

- Siklos, R. (2005) *News Corp. to Acquire Owner of MySpace.com*. 18 July. <http://www.nytimes.com/2005/07/18/business/18cnd-newscorp.html>. Accessed 2 April 2009.
- Stone, B. (2007) *MySpace, Chasing YouTube, Upgrades Its Offerings*. 26 June. <http://www.nytimes.com/2007/06/27/technology/27video.html>. Accessed 26 June 2009.
- Stross, R. (2008) *Planet Google: One Company's Audacious Plan to Organize Everything We Know*, New York: Free Press.
- Sweney, M. (2006) MySpace targets European expansion. *The Guardian*. 20 June. <http://www.guardian.co.uk/technology/2006/jun/20/news.citynews1>
- Syvetsen, T. (2001) *Kommersialisering, globalisering og konvergens: Utfordringer for mediepolitikk og medieregulering*. Makt- og demokratiutredningens rapportserie, Rapport 31, July, <http://www.sv.uio.no/mutr/publikasjoner/rapp2001/Rapport31.html>. Accessed 29 October 2007.
- Thussu, D. K. (2006) *International Communication: Continuity and Change*, Second edition, London: Arnold.
- Thussu, D. K. (2007) "Mapping global media flow and contra-flow", in D. K. Thussu, *Media on the Move: Global Flow and Contra-flow*, London: Routledge.
- Tunstall, J. & Machin, D. (1999) *The Anglo-American Media Connection*, Oxford: Oxford University Press.
- Urry, J. (2003) *Global Complexities*, Cambridge: Polity Press.
- Urry, J. (2007) *Mobilities*, Cambridge: Polity.
- USA Today (2006) *Fox Offers Shows on MySpace, Fox TV Station Sites*. 3 October. http://www.usatoday.com/tech/news/2006-10-03-fox-myspace_x.htm?POE=TECISVA. Accessed 8 April 2009.
- Yahoo! Europe (2005) Response to the Commission's Issues Papers for the Liverpool Audiovisual Conference http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1-yahoo.pdf. Accessed 4 June 2009.

Chapter 5

Television in Cyberspace

The Net Neutrality Tussle in Norway

Tanja Storsul

Television has entered cyberspace. Increasingly, we stream or download television programmes to our computers, and we share videos on the net. We can watch television shows whenever we want, and we can download movies wherever we are. This development on the Internet resembles visions presented in the 1990s of broadcast television being replaced by personalized multimedia terminals (Gates 1995; Gilder 1992; Negroponte 1995). Although there is little evidence that the broadcasting model is vanishing (Fagerjord et al. 2008), the Internet enables a new television model that exists side by side with the broadcasting model.

Paradoxically, the uses of Internet for video and television services may challenge the Internet model itself. Video and audio streaming raise questions about the capacity and quality of the Internet. For such reasons, a debate has developed about whether or not network operators should differentiate quality and capacity between different kinds of Internet services and service providers. This debate has led to tussles between interests and actors in the media and telecom markets, between concerns and ideas about how the Internet market should be structured.

The debate about net neutrality started in the US, and there it has developed into a big and quite polarized debate, engaging strong political and economic interests. In Europe, net neutrality became an issue some years later and the debate does not seem as heated as it does in the US. Yet, a European net-neutrality debate is currently developing and many of the same issues arise. This chapter presents a case study of the debate on net neutrality in one European country, namely Norway. *What are the conflicting interests, and the issues at stake in the Norwegian net neutrality tussle?*

A tussle

David E. Clark et al. (2005) use the term *tussle* to describe the ongoing disputes over net neutrality. A tussle describes tensions and disputes between conflicting interests, trying to promote solutions that may be to their advantage:

Different parties adapt a mix of mechanisms to try to achieve their conflicting goals, and others respond by adapting the mechanisms to push back. The Internet, like society in the large, is shaped by controlled tussle, regulated not just by technical mechanism but by mechanisms such as laws, judges, societal opinion, shared values, and the like. There is no “final outcome” of these interactions, no stable point, and no acquiescence to a static architectural model. Today, the Internet is more and more defined by these tussles. (Clark et al. 2005: 462)

Typically, they argue, tussles take place when technological systems are designed, redesigned and configured (ibid: 463). There have been many tussles with such characteristics in the media and telecommunications sectors in the last decades. In the 1980s the development of satellite technology became an important argument in Europe for economic and political interests who had long wanted to liberalize television markets (Skogerbø 1996; Syvertsen 1997). Likewise, digitalization and development of enhanced communication services was used to justify liberalization of telecommunications in the 1990s (Storsul 2002). And, digitalization of television has been important for proponents of deregulating television (Storsul & Syvertsen 2007). In all these examples, technological design or redesign moments (i.e. digitalization) were used to challenge existing policies and market structures. Economic and political stakeholders had long-lasting interests in the market and used moments of technological change to promote these interests. Thus, in the market place, tussles often have the character of a battle over market power.

What is distinct about the Internet is that the tussle continues. The tussle does not end when the design process is concluded, simply because there is no end to the design process. Design, redesign and configuration are ongoing processes (Clark et al. 2005: 463). The main reason for this is the open architecture of the Internet. Employing actor network theory, Clark et al. argue that:

the open architecture of the Internet allows the continuous entry of new players into the actor network. The entrance of new actors, with fresh perspectives and values, creates continuous churn in the actor network. These actors can be individual users, or new applications and their creators, or (most potent as actors) players that come to the Internet already embedded in an actor network of their own, perhaps a very solidified one. (Clark et al. 2005: 465)

The open architecture allows not only new applications and capabilities to the network, new applications bring new actors to the network (ibid: 466). This permits change and in times of change, tussle often occurs.

The debate over net neutrality may be understood in such terms. There has been a long-lasting battle over market power on the Internet. At the same time, the Internet has developed significantly over the past decades. New applications, such as video, and new actors, such as media and broadcasting

institutions, have entered the network. This may change the balance of power and challenge the existing structure, e.g. that of net neutrality.

Net neutrality

Basically, the term *net neutrality* refers to networks being neutral towards the kind of services and applications the network is used for. Tim Wu compares this to the electric grid:

A useful way to understand this principle is to look at other networks, like the electric grid, which are implicitly built on a neutrality theory. The general purpose and neutral nature of the electric grid is one of the things that make it extremely useful. The electric grid does not care if you plug in a toaster, an iron, or a computer. Consequently it has survived and supported giant waves of innovation in the appliance market. The electric grid worked for the radios of the 1930s works for the flat screen TVs of the 2000s. For that reason the electric grid is a model of a neutral, innovation-driving network. (Wu, not dated)

Similar to the electric grid, the concept net neutrality refers to the objective that the network itself should be neutral and not specialized for any specific applications or platforms. It should treat all kinds of information, content and sites equally. The network connects the end users, or *the ends* of the network, and is neutral to what is communicated between these ends. This is called the end-to-end principle and the Internet Protocol was designed to follow this principle (Wu 2003: 146). It was designed so that any computer could send a packet to any other computer, and the network did not look inside packets to discriminate between different kinds of information or applications (Berners-Lee 2006). This has been essential to innovation on the Internet. Tim Berners-Lee, the designer of the World Wide Web, blogs that:

When, seventeen years ago, I designed the Web, I did not have to ask anyone's permission... Anyone can build a new application on the Web, without asking me, or Vint Cerf, or their ISP, or their cable company, or their operating system provider, or their government, or their hardware vendor.

It is of utmost importance that, if I connect to the Internet, and you connect to the Internet, that we can then run any Internet application we want, without discrimination as to who we are or what we are doing. We pay for connection to the Net as though it were a cloud which magically delivers our packets. (Berners-Lee 2006)

Thus, net neutrality concerns the basic architecture of the Internet. The end-to-end principle has enabled the Internet we see and use today.

In the first decades of Internet communication, the end-to-end principle was not much challenged. Not even when the web was launched and the Internet became a mass-phenomenon was this principle questioned. In the 1990s most services were low-bandwidth services that did not challenge network capacity. Content providers invested with little return, whereas network providers profited from people upgrading the bandwidth of their network access. The network providers' main challenge was to get their customers online and interested in paying for more bandwidth. A study of the emerging web market in the mid 1990s showed that the network providers were concerned that they needed more content services to increase traffic in the networks (Storsul 1999). Thus, the network providers welcomed any content service that would drive traffic, and content from any source was accessible regardless of network provider.

Towards the end of the 1990s, the situation changed slightly. In the US, vertically-integrated cable companies started to question the end-to-end principle (Berners-Lee 2006; Lemley & Lessig 2000). The debate about net neutrality developed into a political issue – it became a tussle. There were at least two driving forces behind this. First of all, the content providers started to earn money. Content became an interesting market and the network providers feared that they were stuck with the non-expanding part of the market if they remained focused on network provision only. Secondly, the use of audiovisual and live services grew rapidly and network providers faced capacity and quality challenges. In Tim Wu's words:

As the universe of applications has grown, the original conception of IP neutrality has dated: for IP was only neutral among *data* application. Internet networks tend to favor, as a class, applications insensitive to latency (delay) or jitter (signal distortion). Consider that it doesn't matter whether an email arrives now or a few milliseconds later. But it certainly matters for applications that want to carry voice or video. In a universe of applications, that includes both latency-sensitive and insensitive applications, it is difficult to regard the IP suite as truly neutral as among applications. (Wu 2003: 149)

The end-to-end principle works well for the kinds of data the Internet was designed to carry: regular data files. It does not matter whether text services or accessing a website are slightly delayed. For video, voice and live-streaming this is not the case. Any delay would reduce quality of video or voice and make it difficult to watch or make sense of what is said.

Thus, the seemingly-straightforward principles of end-to-end and net neutrality were not so straightforward after all. The IP network was neutral between different packets of data but not among applications, as it favoured those that could handle delays. When the Internet was increasingly used for services that were sensitive to delay and signal distortion, the question became how this should be handled. Should priority be given to certain kinds of applications? Should network providers be allowed to prioritize certain applications or content providers? Or should the neutrality be guarded and restored? But

what should neutral mean? And what would be the best measures to ensure neutrality? These are examples of questions that have become central issues in the debates about future Internet policy.

The debate and conflict that has developed about this issue can best be described as a *tussle* (Clark et al. 2005). Net neutrality is challenged as new applications and actors are entering the Internet. In the US, this tussle has been a polar one. On the one side, network providers argue that they should be able to differentiate between services in order to meet the capacity problem. By making content providers pay for increased capacity and quality, network development would be stimulated. Regulation, they argue, would stifle innovation.¹ On the other side, content providers and civic organizations claim that differentiation would destroy the Internet and cripple innovation that depends on the open architecture of the Internet. Regulatory intervention is necessary to protect net neutrality, these actors argue.²

In Europe, the debate about net neutrality is seemingly not so heated and not so polarized. In the following, I will explore the net neutrality tussle in Norway. First, the most important cases where net neutrality has been challenged will be reviewed. Then, I will identify and discuss the conflicting interests in the debate and consider the joint guidelines adopted by the industry in 2009. The study is informed by qualitative interviews with informants from the telecom and media industry, and reviews of press coverage of conflicts relevant to the net neutrality issue.³

Challenges to net neutrality in Norway

In 2006 two broadband providers started to differentiate network capacity for certain services. This was the starting point for the net neutrality debate in Norway. The first broadband provider that challenged net neutrality was NextGenTel. NextGenTel wanted payment from content providers in order to guarantee them quality of service. The public broadcaster NRK refused this and in June 2006 the capacity on NRK's services was reduced on NextGenTel's network. Morten Ågnes, market director of NextGenTel explained the company's position in a newspaper interview:

The reason is that we cannot increase capacity on our lines to comply with the free services of NRK. Concerning Tippeligaen [the football league], this is a pay service, and for this we get paid to transmit the service to our customers. That covers our investments. When a media company, like NRK, makes content available for free, we do not have the same motivation to make such investments. (*Aftenposten* 2006, my translation)

Audiovisual services like web-TV services provided by NRK and in the football league demanded high capacity networks. NextGenTel therefore wanted to get paid by the content providers for making services available to the customers.

For pay-services like the football league, NextGenTel got such payment, and they prioritized this content. NRK provided free services and did not want to pay for extra capacity through their broadband subscription. NRK argued that the users were already paying for capacity. But NextGenTel insisted, and in response to this, NRK reduced quality on its services to NextGenTel, posting information on the reason why on its website. Many users reacted and as a result of customer pressure, NextGenTel changed its policy back and the quality of NRK's services was restored.

Later the same year, the Telenor-owned cable company Canal Digital reduced speed for peer-to-peer traffic during rush-hour. Canal Digital argued that file-sharing accounted for about 80 per cent of traffic in the network and that this reduced capacity for the great majority of customers not sharing files. Canal Digital therefore prioritized web services, web-TV and IP-telephony before file sharing between 17.00 and 23.00. For the rest of the day and night, there was no such differentiation (*IT-avisen* 2006). In contrast to the NextGenTel case, this did not cause much uproar among Canal Digital's customers. This was probably because the large majority of customers silently accepted that Canal Digital reduced capacity for file sharing in order to avoid what Canal Digital claimed was 0.2 per cent of the customers using 80 per cent of the capacity. An additional explanation may be that file sharers did not have a well-networked actor like the NRK to voice their interests.

With these two cases, the debate about net neutrality had started in Norway. The largest network provider in Norway, Telenor, also engaged in the debate. Berit Svendsen, then technical director of Telenor, wrote an article where she argued that net neutrality could hinder investments in network development:

Net neutrality is a challenge. Today's business model with fixed price on broadband does not encourage the telecom operators to invest heavily in increased network capacity, because increased capacity does not increase income. The solution may be to divide network capacity into different quality-categories to differentiated price. The customer may then choose quality-level and price and know what is paid for. The question about net neutrality is in the end a question about financing and forms of payment for necessary development of network capacity. (Svendsen 2006, my translation)

Without being able to differentiate between quality-categories, there would be little incentives for the telecom operators to invest in network, she argued. A year later, in 2007, Telenor withdrew from the Norwegian Internet Exchange (NIX). The NIX is the national point for interconnection between all Internet service providers (ISPs) and some other service providers. It connects the networks of the different providers to the bigger Internet and ensures that they all communicate.

The background for Telenor leaving the NIX was that the company disagreed with Norway's largest media corporation Schibsted being directly linked up to the NIX. Telenor argued that the NIX should be for ISPs only and that

content providers should not get a free ride to the Internet. Telenor leaving the NIX would, however, not harm the Internet. Berit Svendsen, former CTO of Telenor, argued:

We wanted to show that we did not want to accept this any longer. We did, however, not want to exclude anyone from the Internet, but we had an alternative to the NIX with traffic in both directions. All actors in the NIX had such direct communications, except Schibsted and a few small actors. These would be able to buy commercial contracts with the larger actors without any problems. Therefore, there was an alternative and Telenor left the NIX. (Interview with Berit Svendsen, CEO Conax, former CTO Telenor, 2 October 2008)

Telenor had enabled communication between all major ISP operators independently of the NIX. People would therefore experience the Internet as they used to, Telenor argued. What was important for Telenor was that content providers should access the Internet by leasing lines through commercial agreements with the network operators.

The content providers were, however, not satisfied with this. Even if Internet communication was possible without Telenor in the NIX, if the NIX was abolished all providers would have to establish commercial agreements with several companies. This could be particularly costly for small actors. Telenor, therefore, met with much criticism. From content providers, the criticism was specifically directed at the consequences for the Internet market. In the political domain, and among the general public, such criticism merged with the general scepticism towards Telenor's overall power in the media markets.

After some months, Telenor re-entered the NIX, arguing that the NIX had been sufficiently changed. Interconnection between participants of the NIX had been made voluntary and Telenor could choose with whom they wanted interconnection within the NIX. This was regarded as a substantial change by Telenor but not necessarily by other participants in the NIX, who saw it as a formality that did not change the market situation much. Nevertheless, with Telenor back in the NIX, the situation was restored.

A pragmatic tussle

The NextGenTel/NRK-case and the Telenor/NIX-case are the two cases in the Norwegian net-neutrality tussle that caused the most controversy. Both are cases where the network providers argued they wanted content providers to contribute to paying for network development. But in both cases, the network providers were met with criticism from users and content providers. And in both cases, the network providers ultimately returned to their original practices, even if they were still discontented with the situation.

As we have seen in the cases discussed above, network providers have been concerned with the fact that large investments in networks would be necessary

in order to cope with service development such as the rapid diffusion of video services on the Internet. As stated by Berit Svendsen of Telenor:

For several years, traffic over the Internet has increased by 100% a year. Now, video services are doubling many times each year. What we experience is that the mean income per customer decreases while the customer wants more and more. The question is who is to pay for increased network capacity? (Interview with Berit Svendsen, CEO Conax, former CTO Telenor, 2 October 2008)

In order to finance network development, network providers like NextGenTel and Telenor argued that content providers should contribute. Increased demand for network capacity was driven by video-services, and content providers who wanted to distribute such content should pay part of the bill, they argued. In their view, it was not fair that network providers should be the only ones who paid for developing the networks.

Content providers on the other side turned the argument around and argued that operators needed content in order to attract customers to their networks. If there was no attractive content and no new applications that drove traffic, the network market would stagnate. This concern was expressed by Myklebust, head of NRK's online division:

Users buy network access because they want to use services from content providers. Network providers are marketing that customers can access multimedia services. They use our product to sell their product. Therefore, we do not want to pay extra for that. (Interview with Bjarne André Myklebust, director of new media, NRK, 18 November 2008)

According to content providers like NRK, it was their services that drove the market for network providers. Users paid their network provider for access. Content providers, therefore, found it unfair that network providers wanted them to pay once more for the same access.

In addition, content providers argued that it was an important principle that the structure of the Internet should remain a level playing field where all service providers were equal. Even large content providers argued that this was important in order to enable small players. Wigum, speaking for Schibsted, stated that:

[t]his concerns the basic structure of the Internet. I compare it to the following model: Imagine that Schibsted is a large department store. A taxi driver brings customers to the department store. Then, one day, the taxi driver says that if the department store contributes economically, he can buy a larger taxi and bring more customers. This is something the department store could do, but the small flower-shop on the corner would not be able to do this. (Interview with Dag Wigum, CIO Schibsted, 6 November 2008.)

Through such metaphors, content providers warned against the consequences for small players in the market if they had to negotiate with the network providers to ensure distribution of their content.

But, in practice, the content providers have been more pragmatic. In spite of their arguments that payment by content providers is unfair and breaks basic principles of the Internet as a level playing field, they are increasingly open to making agreements with network providers. The main reason is that they find it even more important to ensure the quality of their services. Content providers who publish quality videos want the users to be able to experience these videos in good quality. If capacity and quality problems make live streaming impossible or very poor, users will turn away from the service. Consequently, for media actors who want to provide TV and video, quality of service is pivotal. This is important for media actors that provide services without charge as they need users in order to attract advertising or to legitimize their expenditure, as does the NRK. It is, however, even more important for media actors that charge for their web service. If quality of a pay-service is not good enough, the service will have no users and no income.

The commercial broadcaster TV2's web-TV service is called TV2 Sumo. On TV2 Sumo, some news and weather services are provided for free, but in order to watch sports, series and TV channels online, a subscription is necessary. In order to charge users for these services, quality of service is very important. TV2 have therefore negotiated agreements with the major network providers in Norway on the quality-level that their subscribers should get when accessing these web-TV services. The quality level TV2 pays for is ensured through dedicated servers in the network providers' networks.⁴

Schibsted has, as we have seen above, been a defender of maintaining the Internet as a level playing field. Most of Schibsted's websites are financed through advertising and not payment. For these services, Schibsted maintains the argument that content providers should not pay the network providers. For pay-services, however, Schibsted is willing to negotiate deals with network providers:

We want the Internet to work as it is supposed to. But we are willing to enter agreements for pay-services. (Interview with Dag Wigum, CIO Schibsted, 6 November 2008.)

From 2009, Schibsted obtained the rights to publish Norwegian football on the web through its subsidiaries VG.no and Media Norge. Football is regarded as very attractive content and Schibsted wanted to develop football on web-TV as a pay-service. Quality of service then became a crucial issue, and Schibsted was prepared to pay network providers in order to ensure a guaranteed quality level. But, Schibsted was very concerned about the conditions for such deals with the network providers and warned that Telenor's near-monopoly meant that prices were set too high.

What Telenor wants is to differentiate price and capacity. We accept that Telenor needs to develop networks. We want network usage to be efficient by for example placing caching-servers in the networks. But we cannot have a situation where the network provider has full control of the market. What we see is that Telenor can price its services without competition and that results in high prices. (Interview with Dag Wigum, CIO Schibsted, 6 November 2008.)

NRK is a public broadcaster and does not charge users for accessing its services. Nevertheless, NRK is still concerned about the quality of its web-TV service. NRK's legitimacy rests on provision of quality services on all platforms. But, as we have seen for example in the NextGenTel-case, NRK has been very critical towards paying network providers for this. Nevertheless, even NRK takes a pragmatic position and accepts paying for some of the peaks in traffic they create:

NRK's point of departure is that content providers create a market. The operators depend on content and content providers should not pay for that. At the same time we have said that we may have to contribute when it comes to big happenings like the Olympic Games. In such events we can contribute to paying for network capacity. This means that normal traffic should be provided over the NIX without costs for content providers, but when we create peaks we can contribute to financing these. (Interview with Bjarne André Myklebust, director of new media, NRK, 18 November 2008).

Summing up, the media content providers are hesitant about paying network providers to ensure that their services are of a certain quality. They think that they provide something valuable to the network provider and argue that the Internet should remain a level playing field. But, when it comes to services that are important to them, they take a more pragmatic position. For pay-services or other critical services, they are willing to make agreements with network providers in which they pay for a guaranteed quality of service.

Thus, the Norwegian net neutrality tussle seems like a pragmatic tussle compared to the more polarized debate in the US. The network providers wanted content providers to pay, and although the content providers are critical towards this, large content providers accepted that this may be necessary in order to ensure quality of key services.

Pragmatic guidelines

The pragmatic character of the Norwegian net neutrality tussle was also reflected in the guidelines for net neutrality adopted by the Norwegian Internet industry in 2009 (NPT 2009). Instead of proposing regulatory instruments, the Norwegian Post- and Telecommunications Authority facilitated a process for actors in the

Internet industry to try to agree on joint principles for net neutrality.

In 2009, after a long-lasting process, agreement was reached. Network providers, content- and service providers, consumer protection agencies and the Post- and Telecommunications Authority endorsed joint guidelines for net neutrality based on three principles:

1. Internet users are entitled to an Internet connection with a predefined capacity and quality.
2. Internet users are entitled to an Internet connection that enables them to
 - send and receive content of their choice
 - use services and run applications of their choice
 - connect hardware and use software of their choice that do not harm the network.
3. Internet users are entitled to an Internet connection that is free of discrimination with regard to type of application, service or content or based on sender or receiver address. (NPT 2009: 2)

Together, these principles formalize the pragmatism in the debate about net neutrality. The first principle focus on the basic Internet connection and states that users should have sufficient information about their Internet connection so that the user knows what resource is being provided for Internet communication. The second principle states that the user will have free use of their basic Internet connection. The user will be able to use the Internet for all forms of communication. Together, the first two principles concern maintaining the end-to-end-principle for the basic Internet; i.e. that the Internet can be used for all forms of communication. The third principle concerns non-discrimination and, in the explanations to this principle, a more pragmatic approach is spelled out as it states that this principle is not to preclude traffic management efforts to:

block activities that harm the network, comply with orders from the authorities, ensure the quality of service for specific applications that require this, deal with special situations of temporary network overload or prioritise traffic on an individual user's connection according to the user's wishes. (NPT 2009: 4).

Of special interest in our context is the opportunity for ensuring quality of service for specific applications. The applications mentioned in the guidelines are telephony and video-services. Thus, the guidelines enable allocation of network resources for certain applications and also prioritization of traffic according to the users' own wishes.

Summing up, the guidelines aim to combine the basic character of the Internet as a neutral network, with a pragmatic approach to situations when capacity or quality is challenged. Certain kinds of priorities are permitted, but not to an unlimited degree. The guidelines will, for example, allow for prioritizing

video-services, as long as this does not threaten the first two principles that ensure all access to basic Internet services.

Consequently, the guidelines may be seen as a compromise and a logical outcome of the interests and pragmatism in the Norwegian net-neutrality debate. The endorsement of the guidelines by actors from different parts of the Internet market, both network and content providers, illustrates that the guidelines have a good standing, at least at the moment they were adopted. What becomes interesting to see is to what degree the guidelines will be sufficient to handle future challenges.

Conclusion

This chapter has argued that the increased use of the Internet for video and television services may challenge the Internet model itself. The Internet model is based on net neutrality, i.e. that the network should treat all kinds of information, content and applications equally. This works well for most data services. Video and web-TV services, however, require high capacity and are sensitive to delays and signal distortion. In this situation, questions are raised about to what degree the networks should still be neutral towards such services, or if we should accept that network operators differentiate quality and capacity between different kinds of services and content providers.

In the tussle that has developed around such questions, media and telecom actors are trying to promote their own interests. In Norway as in the US, network providers want content providers to contribute to network development and argue that content providers should pay in order to be prioritized. Content providers, on the other hand, argue that the networks should remain neutral and that the content they make available is valuable to the network providers and that content providers should not pay extra for this.

The Norwegian tussle has, however, been quite pragmatic. Although the arguments from the two sides may seem incompatible, in practice content providers have accepted paying network providers in order to ensure quality of services significant to their business – such as pay-services. This pragmatism was reflected in guidelines for net neutrality adopted by the Norwegian Internet industry. These guidelines combine ambition to maintain the basic model of the Internet as a neutral network, with possibilities to prioritize services when capacity of quality is challenged.

This pragmatism has been possible in a situation in which the diffusion of video- and television services on the Internet was still at an early stage. The question is what will happen if video- and television traffic increases radically on the Internet and thereby becomes a real challenge to capacity. And, what if quality issues become more important? For broadcast television services, quality issues have been very important and networks and terminals have been developed in order to transmit high-definition television. On the web, most television services have a low technical quality compared to broadcast televi-

sion. So far, customers have accepted this. But, as content providers demand that customers pay for video and television services, customers' expectations about high quality services may increase. This may require the allocation of large network resources to television services and this may interfere with the fundamental principle of maintaining a basic Internet service that can be used for all kinds of communications. In such a situation, the general applicability of the guidelines will be tested and the net-neutrality tussle may be reactivated with a stronger conflict between network providers and content providers about their position in the market.

Thus, the industrial compromise reached in the guidelines for net neutrality may be a temporary one, and the Internet model may face new challenges as the quality and diffusion of television and video services develop on the Internet.

Notes

1. See for example the campaign blog: <http://handsoff.org/blog/>. Accessed 1 October 2008.
2. See for example the campaign website: <http://www.savetheinternet.com/>. Accessed 1 October 2008.
3. Qualitative interviews were conducted with informants in key positions at USIT (NIX administrator), Schibsted, NRK and Telenor in 2008. Informal interviews were conducted with informants at TV2 and NRK in 2007. In the analysis, quotes from the interviews are used as illustrative examples. The interviews were conducted in Norwegian and the quotes have been translated into English.
4. See TV2 (2009) for an overview of broadband providers TV2 have agreements with.

References

- Aftenposten* (2006) "Lav NRK-kvalitet for NextGenTel-kunder", [Low quality for NextGenTel's customers] published 29 September 2006, <http://forbruker.no/digital/nyheter/data/article1477077.ece>. Accessed 1 October 2008.
- Berners-Lee, T. (2006) "Neutrality of the Net", blogpost 2 May 2006, <http://dig.csail.mit.edu/breadcrumbs/node/132>. Accessed 1 October 2008.
- Clark, D. E., Wroclawski, J., Sollins, K. R. & Braden, R. (2005) "Tussle in Cyberspace: Defining Tomorrow's Internet", *IEEE/ACM Transactions of Networking*, Vol. 13 No. 3.
- Fagerjord, A., Maasø, A., Storsul, T. & Syvertsen, T. (2008) "High Risk, Strong Belief. Images of the Future in the Norwegian Media Industry". Paper to NML's 13th Conference on Media Research 30–31 October 2008, Lillehammer.
- Gates, B., Myrvold, N. & Rinearson, P. (1995) *The Road Ahead*, London: Viking.
- Gilder, G. (1992) *Life after Television: The Coming Transformation of Media and American Life*, New York: WW Norton.
- IT-avisen (2006) "Canal Digital struper fildelingstrafikk" [Canal Digital strangles file-sharing-traffic], Published 22 September 2006, <http://www.itavisen.no/php/art.php?id=340607>. Accessed 1 October 2008.
- Lemley, M.A. & Lessig, L. (2000) "The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era", *UC Berkeley Law & Econ Research Paper No. 2000-19; Stanford Law & Economics Olin Working Paper No. 207; UC Berkeley Public Law Research Paper No. 37*, <http://ssrn.com/abstract=247737>. Accessed 1 October 2008.

- Negroponte, N. (1995) *Being Digital*, New York: Vintage Books.
- NPT (2009) Network Neutrality. Guidelines for Internet Neutrality. Version 1.0, Norwegian Post- and Telecommunication Authority. 24 February 2009.
- Skogerbø, E. (1996) *Privatising the Public Interest. Conflicts and compromises in Norwegian media politics 1980–1993*, IMK-Report no 20, University of Oslo: Department of Media and Communication.
- St.meld.nr 17 (2006–2007) Eit informasjonssamfunn for alle [An information society for all]. Government report to the Storting (parliament).
- Storsul, T. (1999) “Nye medier og ny politikk – om eierskap og mangfold i det nye mediebildet”, [New media and new politics – on ownership and diversity in the new media landscape], *Norsk medietidsskrift* 1/99.
- Storsul, T. (2002) *Transforming Telecommunications. Democratising Potential, Distributive Challenges and Political Change*. Dr polit-thesis. UniPub, Acta Humaniora.
- Storsul, T. & Syvertsen, T. (2007) “The Impact of Convergence on European Television Policy: Pressure for Change – Forces of Stability”, *Convergence. The International Journal of Research into New Media Technologies*, Volume 13 number 3.
- Svendsen, B. (2006) “Når nettene blir trange”, [When networks become narrow], commentary in *Dagens næringsliv*, 28 August 2006.
- Syvertsen, T. (1997) *Den store TV-krigen. Norsk allmennfjernsyn 1988–96*, [The big TV-war. Norwegian public service broadcasting 1988–1996], Bergen: Fagbokforlaget.
- TV2 (2009) “Hvorfor får jeg bare se video i 590 kbps?” [Why can I only watch video in 590 kbps?], http://webtvsupport.tv2.no/index.php?_m=knowledgebase&_a=viewarticle&kbarticleid=36&nav=0. Accessed 24 June 2009.
- Wigum, D. (2007) “Telenors angrep”, [Telenor’s attack], commentary in *Dagens IT*, 11 July 2007, <http://www.dagensit.no/arkiv/article1340218.ece>. Accessed 1 October 2008.
- Wu, T. (2003) “Network Neutrality, Broadband Discrimination”, *Journal of Telecommunication and High Tech. Law*, Vol 2: 141–179.
- Wu, T. (nd) “Network Neutrality FAQ” Tim Wu website, http://www.timwu.org/network_neutrality.html. Accessed 1 October 2008.

III. Fundamentals

Chapter 6

Notions of the Public in Public Service Broadcasting Policy for the Digital Era

Hallvard Moe

Public service broadcasting has always been criticized for failing to be of service to the public. The criticism operates on different levels. On one level, some claim that broadcasting, including the public service version, has never addressed the public but, rather, an audience of individual, private consumers. On another level, critics follow activists fighting for greater participation – ultimately for radio and television as a two-way medium. Only then, the argument goes, will the public truly be served.

The advent of digital technology seemingly assigned the media-user a more prominent position. The growth of such technology is based on an economic rationale. The motive is to increase the profit in existing operations and find new business opportunities. As a result, more attention is given to the user as consumer of radio and television. Furthermore, increased user-control, more choice and extended interactivity are prime aspects of digital media, promising easier and cheaper user-involvement, moving broadcasting towards greater participation. Such trends fuel both levels of the customary critique against public service broadcasting.¹

Public service institutions have tried to tackle this strengthened criticism. They have done so not only by launching new initiatives of user participation in radio and television but also by initiating extensive internet activities, also made up of user-generated content. Though the success of such measures in each specific polity may be questionable, the development at least signals willingness to utilize new potential in serving the public (e.g. Carpentier 2003; Macdonald 2007; Moe 2008; Trappel 2008). However, the outcome depends neither on institutional strategies alone nor the extent to which specific organizations are able to translate ideas into actual programmes and applications. Public service broadcasting is a tool for media policy. If the prominence ascribed to the users is to have lasting consequences, the ideas need to rub off on actual policy. Based on that presumption, this chapter asks what notions there are of the public in public service broadcasting policy for the digital era. To what extent is the public considered as a factor for policy change? And are the users envisioned as participants?

I take the two levels of criticism as points of departure. To illustrate what is at stake, I link these two levels with the two ideal key tasks ascribed to the media by theories of deliberative democracy²: help spread important information to all, and facilitate debate between members of society. The former task is directed from centre to periphery, the latter from periphery to centre. Both tasks involve the public, which is addressed with information, and supported in its participation. For the present discussion, this coupling with democratic theory facilitates a consideration of the meaning of “a public”, and subsequently of public participation in the media.

In what follows, I first work towards a definition of a public, and discuss this concept as pertaining to public service broadcasting. Next, I assess ideas about public participation in broadcasting, again focusing on the domain of public service. On this basis, I undertake an empirical analysis of the notions of the public in public service broadcasting policy. I use Norwegian policy since 2000 as a case. I concentrate my analysis on three media policy documents. These are White Papers which all grant public service broadcasting a key role as a media policy tool facing digitalization. Based on the findings, I argue that the public service broadcasting policy is not grounded in a comprehensive vision of the users as a public. However, the documents do at least make room for such a notion. Rather than depicting a one-way process, increasingly prioritizing audiences before publics, the visions seem to depend more on actual political differences along a traditional left-right continuum. On the other hand, I find the policy to lack any substantial notion of the users as media participants. On that point a clear gap seems to remain between business hype and actual policy.

Media users as a public

In complex societies, the media should disseminate relevant information to the public. Democratic theory defines a public as a body made up of members of a polity. Acting collectively, they control the rule of society. Within media studies, a dichotomy is often made of public and audience. Sonia Livingstone points to a set of associations describing this dichotomy, all favouring the public: public versus audience entails “rational versus emotional, disinterested versus biased, participatory versus withdrawn, shared versus individualised, visible versus hidden” (Livingstone 2005: 18). The audience is the “dark doppelganger” of the public (Dayan 2001: 746). As Livingstone (2005) convincingly argues, a strict division is hard to draw. In reality, the two categories are entangled and linked. Even so, they are useful to keep as analytical types.

Still, the definition often employed in democratic theory, where the public deals only with formal politics, is problematic. To grasp the role of the media in democracy we can neither look exclusively at formally recognized political issues nor limit our interest to rational deliberation, where claims are supported by arguments. We need to also take in how other forms of communication

about other issues facilitate (or hinder) opinion formation and our construction of identities as citizens.

These forms might be found in the cultural component of the public sphere. "Drama as well as documentaries, movies as well as talk shows convey facts and influence the meanings of a particular issue, its relations to central values and historical examples, its emotional character etc" (Gripsrud 2007: 483). Aesthetic-affective modes of communication – incorporating informal conversations, expressions of passion, greetings, and storytelling – make use of an arsenal of rhetorical devices. They are all important for public debate (Dahlberg 2005: 113ff; Brady 2004). Aesthetic-affective modes of communication help build identities and allow for the expression of marginalized voices. They can directly set the stage for rational deliberation. As such, they can "strongly enhance acts of communication aimed at understanding that constitute the public sphere" (Dahlberg 2005: 118). This does not mean that anything goes. We should still shun forms of discourse that do not enhance democratic participation. But, we have to recognize how our needs as citizens are being catered to through mediated communication seemingly far removed from rational deliberation.

This facilitates an argument for media entertainment as a context where citizenship can flourish, as presented for instance by Liesbet van Zoonen (2005).³ Discussing entertainment fan communities, she claims that the relevance of popular culture for politics lies in "the emotional constitution of electorates that involves the development and maintenance of affective bonds between voters, candidates, and parties" (van Zoonen 2005: 66). Furthermore, taking part in deliberation implies willingness to let go of one's own view and adopt another. Each must proceed with fairness when meeting others' claims and opinions. This presupposes empathy. We have to be able to comprehend what it is like to be someone else and understand how they came to feel like they do. By widening or deepening the user's imagination, fiction may contribute to the formation of an individual's moral abilities, including skills vital for empathic feelings (Nussbaum 1997: 99ff; also Murdock 2005). Such insights point to the importance of a cultural public sphere for the "articulation of politics, public and private, as a contested terrain through affective (aesthetic and emotional) modes of communication" (McGuigan 2005: 435).

For the present discussion we need a wide definition of public, which still sets it apart from audience. Building among others on the work of Pierre Sorlin, Daniel Dayan (2001: 746) offers a list of attributes useful in this regard. Taken together, the attributes describe a public as a body of some communality and stability; developed through and committed to internal debate; relating in a reflexive manner to something external; built on some common ideas or shared values; and able to perform in relation to others and represent demands. An audience fails on all these points. In this definition, a public's democratic role does not rely on any specific communicative form or a predefined range of relevant issues.

The question, then, is if broadcasting can attend to such a public. Some argue that television's general mode of address always has prioritized users as indi-

vidual members of an audience in private homes (e.g. Peters 1999: 217ff). More specifically, others problematize the construction of a public for public service broadcasting. In his article entitled “Which Public, Whose Service”, for instance, Stuart Hall (1992) attacked both the idea of a unified national public, and the broadcasters’ capability to address different groups in a satisfactory way.

Clearly, public service broadcasting never corresponded to any ideal model of the public. However, no form of address can eliminate the fact that broadcasting gave listeners and viewers an unprecedented feeling of attachment to their society or each other. It improved “most people’s ability to form their own opinions and make their own choices of actions on the basis of knowledge about culture and society” (Gripsrud 2002: 271). This function did not disappear over time. Setting out in search of the television public, Daniel Dayan returned with a qualified positive finding of what he called “an almost public”, for instance periodical or loosely linked to the media (Dayan 2001: 762). Users of broadcast media do not constitute one common public all the time – and rarely correspond to the whole citizenry of a nation state. But users do, to varying degrees and at different points in time, make up groups that offer commonality, are committed to internal debate, are capable of self-representation, have members loyal to shared values, can express preferences as demands, and act reflexively in relation to external groups.

Even if we maintain that broadcast media are able to address users as members of a public, the critique seems strengthened as media systems develop. Discussing the relationship between public service broadcasters and their users, Trine Syvertsen (2004a) argues that the idea of serving users as citizens has lost relevance over time: “with the impact of competition, the focus on serving the viewers as citizens was seriously challenged within public broadcasting institutions” (Syvertsen 2004a: 368). Now, in a digital media system, “the media appear to be simultaneously expanding the scope of the audience and diminishing the realm of the public” (Livingstone 2005: 19). This is also mirrored in studies of media policy. In general, commerce and consumer considerations have been found to gain grounds on cultural policy over the last decades (e.g. Syvertsen 2004b: 19–20). The increased weight given to competition law is also illustrated in specific analysis, such as Paul Smith’s (2006) study of Ofcom. Smith (2006: 937) finds the interests of commercial media, and New Labour’s commitment to free market principles as two of the main concerns that shaped the construction of the new British cross-media regulator. Such a development is also discussed in recent work on public service broadcasting. Studies of the broadcasters’ roles in the transition to digital television, for instance, have showed the implications on a specific political issue (e.g. Born 2003; Iosifidis 2005; Moe 2003).

If ideas traditionally linked to cultural policy aims are downplayed in public service broadcasting, it could be assumed to have consequences for visions of the users. To what extent are they imagined as members of a public in the wide sense described here? This is a question of how the policy envisions public service broadcasting related to its first democratic key task: to disseminate

relevant information, and cultural and educational content to all. This brings us to the question of the second key task, the one pertaining to participation.

Media users as participants

Besides distributing content to the public, the media should also, according to deliberative democratic theory, facilitate public participation. Participation describes a process both of individual involvement and collective sharing. Here, I am interested in participation in, as opposed to through, the media (Carpentier 2007: 88). That is, I am concerned with how the public is envisioned in actual policy as contributing with content-related or structural participation in the media, not the ways in which broadcasters may facilitate participation outside the media.

The pioneering activists who strove to make it into a participatory medium saw radio as a wireless telegraph; a way to communicate point-to-point over large distances. With a similar intent, TV-amateurs built television sets in the 1930s capable of communicating two ways. In 1932, German poet, playwright and theatre director Bertolt Brecht advocated his much-referred-to vision that radio could be “the finest possible communication apparatus in public life... if it knew how to receive as well as to transmit” (in Silberman 2000: 42). This resonated with ideas of a more egalitarian public sphere, at the time formulated by, among others, John Dewey (1927). Such arguments later inspired much research on local media in the 1970s and 1980s, as well as discussions of the democratic potential of online media from the late 1990s (e.g. Feenberg 2008). Just as with the concept of the public, scholars tend to study participation in the media in the context of factual content, presenting formally-political issues. As I have argued, a too-narrow concept of the public may lead to an impoverished understanding of the democratic functions of the media. This also means that a too-strict definition of politically relevant participation in the media hinders an attempt at grasping the meanings of public involvement.

Some scholars who do recognize the importance of wider forms of media participation are less interested in its democratic aspects. In a large study of participation in television, Gunn Enli, for instance, seeks to distance herself from a strand of research solely concerned with “‘civic participation’ and activities with political and social implications” (Enli 2007: 6). Emphasizing entertainment and play as motivations for participation, she instead opts to include “playful activities with no obvious political purpose”, and call it “audience participation” (Enli 2007: 6). In my view, an acknowledgement of forms of participation in the media without direct political implications in a strict sense does not need to entail a dismissal of the democratic value of participation. Entertainment and different playful forms of participation may very well lack any “obvious political purpose” but still be of relevance for the media’s democratic key tasks.

Talk radio, television game and reality shows and other participatory formats – as well as different mediated forms of communication about them

– clearly matter. We cannot grasp the media’s significance for the formation of identities, feelings of togetherness or alienation, and the construction of autonomous citizens if we exclude large portions of their output. Individuals’ and groups’ self-defining and self-reflexive processes take place not only in the world of politics in a strict sense but to a large extent in the form of social regulation achieved through shared understandings of what is and what is not acceptable social behaviour. Media entertainment – including participatory variants – plays a crucial part when these understandings are debated, affirmed, or rejected.

Media fiction offers “cognitive maps of reality, and furnishes social understandings which have political implications” (Curran 2002: 238). Entertainment also facilitates discussions of disputed issues like race, religion, or sexual minorities’ rights. One example is the emotionally charged ethical lessons taught by melodrama (Gripsrud 1992). Diverse forms of popular culture may provide disempowered groups with an outlet to oppose prevailing social structures and ideologies. When looking for notions of a participating public in public service broadcasting, we need to look beyond news and factual programming and be open to consider the relevance of participation in a wide range of genres (e.g. Livingstone & Lunt 1994; McNair et al. 2003). The minimum criteria must be that it somehow contributes to the construction of publics.

Historically, scholarly criticism of public service broadcasting’s failure to live up to its democratic key tasks can be traced back to the 1970s (Moe & Syvertsen 2009). But, interestingly, such criticism did not initially deal with lack of participation. Nicholas Garnham, to choose one key contributor, stressed the disseminating function of broadcast television in his seminal criticism of the British system (Garnham 1978). When, in the early 1980s, he discussed the potential of interactive television, he did not consider possible implementations within public service institutions (Garnham 1983: 20). By the mid-1980s, however, as Garnham sought support from Habermas’s public sphere theory to defend public service broadcasting, he did list increased participation as one aspect of improvement (Garnham 1986: 53ff).⁴ Still, the highlighted issues remained independence from state and market, and journalistic standards.

This lack of attention to the issue of participation may be ascribed to public service broadcasting being embedded in an elitist paternalistic ethos, too far removed from any egalitarian activist agenda. Or one could link the lack of attention to the theoretical reference introduced by Garnham in 1986: Habermas’s early work did not offer obvious triggers for ideas about public participation in the electronic mass media. Perhaps more importantly, contributions like Garnham’s answered to a combined political and industrial attack on public service broadcasting. In that situation, scholars focused on defending the arrangements rather than expanding them.

Since then, and especially with the advent of digital media, participation was pushed up the agenda for critics as well as broadcasters. By the late-1990s, interactivity was *the* buzzword, especially within the television industry. Interactive television was portrayed as “a new form of television”, giving viewers “the

opportunity to actively and directly participate in a program or its creation” (Jensen & Toscan 1999: 15). Such statements were in danger of neglecting the history of participation in broadcast media, a history as long as the media themselves. And almost a decade later, we can ascertain that the industry buzz has died down without fulfilling its promises. Broadcasting remains a predominantly disseminating practice, safely located within its established industry. As Graham Murdock (2005: 222–223) put it: “viewers are still responding to options orchestrated by programme makers. They may have an increasingly flexible menu to choose from but they are still not allowed in the kitchen.”

Still, new possibilities – for instance provided by digital recording services – do facilitate changed use. And different forms of user participation are significant for television today. A mapping in Norway found that, in 2004, the channels together broadcast over 20 hours daily (rising to 25–35 hours over the weekend) of programming where user-contributions “constitute a substantial element” (Karlsen et al. 2009: 23). In the same study, 44 per cent of respondents stated to have either been on, or contributed to, television (via SMS, phone, email or letter) (see McNair et al. 2003 for a historical overview of UK channels). In this situation, public service broadcasters are urged to engage with participatory formats to fulfil their democratic key task of facilitating public debate (e.g. Bardeel & Lowe 2008; Macdonald 2007).

While we should be careful not to portray the situation as entailing a revolutionary shift, ideas about, and arrangements for, public participation are central to the current development of public service broadcasting. For the present discussion, the question is whether or not this is recognized in media policy. To what extent are notions of users participating in the media expressed in public service broadcasting policy? I now turn to look at an empirical case.

The media user in Norwegian public service broadcasting policy

Norway is a small Northern European country with a long tradition of state involvement in broadcasting (e.g. Hallin & Mancini 2004). Its public service broadcasting policy has not changed radically faced with a digital media system. The licence-fee funded institution NRK still enjoys relatively stable conditions, and remains a dominant media actor, having also expanded onto new media platforms without much political or public debate (Moe 2008). The commercial public service radio and television actors also remain strong, even though changes are pending as the licence agreement for commercial public service channel TV2 is renegotiated in 2010. This means that the country’s media policy represents an interesting case for the present discussion: to what extent are notions of a participating public spelled out in a context where the public service arrangements are comparatively uncontroversial?

My interest here is in using the Norwegian case to explore how visions of media users have been expressed in actual policy since digitalization was put

on the agenda. I do this by looking at three government White Papers. A White Paper is an official set of proposals used as a vehicle for policy change or development into law. The three White Papers studied stem from 2001, 2003 and 2007.⁵ With different mandates, they were all issued by the Ministry of Culture, and they all treat public service broadcasting as a central policy.

Obviously, White Papers are not the only place to look for recent Norwegian public service broadcasting policy. First, a White Paper can more or less directly build on a more general discussion paper (so-called Green Papers). And the policy process that follows a White Paper produces more textual manifestations through consultative statements, parliament discussions, laws and statutes. Second, to get a full grasp of the policy development, we should take a wide range of forces and structural features into account. This means, for instance, paying as much attention to the formal input from industry lobbyists and civil society actors as to informal arenas and public debate. However, I am interested in the visions of the users that are expressed as basis for actual policy. Such visions are neither formulated in laws nor necessarily laid out in detail in parliamentary debates. Rather, it seems reasonable to look for them in these general discussion papers.

I do not strive for any universal answer to the question of how users are considered in public service broadcasting policy. My interest is rather in exploring to what extent and how seemingly widespread ideas of the users' roles in a digital era are taken into account in policy-making. This interest prioritizes the specific over the general. The approach taken here is qualitative in the sense that the analysis is based on non-standardized techniques, with a focus on detail and context.⁶

One linguistic point needs to be kept in mind: in English, "public" is both a noun and an adjective. Norwegian, like for instance German, has different words to describe the two (the noun being *offentlighet* and the adjective *offentlig*). On the other hand, the Norwegian language does not invite a dichotomy similar to public/audience. An audience is called *publikum*, but this term can also informally refer to a public.⁷

White Paper I: The means and aims of media policy

The White Paper grandly titled "In the Service of Freedom of Speech" from September 2001 takes "substantial structural changes in the media market" as its starting point for a "principled review of aims and means" of media policy (Regjeringen 2001: 4).⁸ The text is an ambitious evaluation undertaken by the Labour party government shortly before it left office following the general election. The White Paper's discussion prominently features issues of public service broadcasting.

The introduction presents the specific structural changes triggering the need for policy revision by listing "some keywords" as illustrations. While the text painstakingly stresses the difficulties with predicting developments of media markets and user behaviour, these keyword discussions form the basis for the

policy proposals that follows. Nine in all, the keywords span from generic buzzwords like “digitalization/convergence”, via “ownership concentration”, to specific features like “wireless access”. Seven of them describe technological or economic developments. Only the two remaining include perspectives on the users. First, “globalization” entails a “global market” where “common symbols and codes easily can be interpreted by the audience in different parts of the world” (p. 19). Second, “the role of the editor is democratized since the technological development gives the audience totally new possibilities to construct their own media consumption” (p. 20). Here, the user is envisioned as a globally-oriented consumer, with increased control of her or his media use. Interestingly, despite the reference to the democratizing potential of new technology, the discussion offers no perspectives on the user as a member of a public, or even as a media participant. Instead, the focus is on consumption of traditional broadcast television.

On this basis, the discussions in the White Paper are carried out without any thorough comprehensive vision of the users as a public, or as participants in the media. Still, ideas about the users’ role as members of a public do pop up in the text. When discussing the potentials of digital media, for instance, it is mentioned how interactive possibilities make the internet well-suited as a channel of expression for “most people” [*folk flest*] (p. 18). Furthermore, the White Paper does acknowledge that digital media, especially through the internet, theoretically make available a channel to the public sphere for everyone (p. 25). But, it continues, communication presupposes a sender, a channel and a recipient. Among the multitude of voices online, there is no guarantee that everyone is heard. Therefore, the White Paper reasons, we need the established media actors to filter, frame and interpret the information brought to the public sphere. This task must be undertaken in a way that looks after different groups’ need for correct information, and their need for getting their views communicated to the public sphere (p. 25).

Clearly seeing the users as members of a public, this argument deals with the possibilities and restrictions of greater participation in the media, and grounds the argument with references to the two ideal key functions of the media as laid out by deliberative democratic theory: the spreading of relevant information to all, and the facilitation of public debate. The argument is employed in a discussion of the possible extension of public service arrangements to include not only broadcasting, but all media (p. 25ff). Here, the White Paper refers to the term public service broadcasting, and lists three different meanings of “public service”: as a universal public good; as a service for the public sphere; and as a service for audiences.⁹ The three meanings are, however, not considered or employed at all. It is unclear if all three coexist, or if some are more relevant than others. Instead, the discussion continues with only vague references to the democratic tasks of the media, and without any specific use of any of the three meanings of public service. As Anders Johansen (2008: 38) has argued, White Papers are not supposed to be read continuously like a thesis. Rather, they are made to be checked or skimmed through. This could explain such

lack of coherence. Nevertheless, the listing of the three meanings of public service broadcasting seems somewhat arbitrary.

In sum, the 2001 White Paper does not offer any common vision of the media user as a member of the public, let alone as a participant. Instead, the text seems to dutifully account for ideas of the democratic functions ascribed to the media – as in the example with defining public service – without employing these ideas in actual policy suggestions. To some extent, this might be explained by the somewhat casual presentation of the background for the policy review, as structured around nine keywords. As the basic policy is laid down, however, it would seem that the concept of users as an audience rather than users as a public takes priority, although it is still considered as a factor in more specific discussions. And the ideas of users as participants do not resonate in this 2001 policy document.

White Paper II: digital terrestrial television

The second media policy White Paper produced after the millennium, released by a centre-right coalition government, is of a somewhat different character. Rather than assessing general means and aims of media policy, it deals with one specific policy challenge: the digitalization of television distribution (Regjeringen 2003). The White Paper – entitled “About a Digital Terrestrial Television Network” – is part of a long-winded process starting in the mid-1990s (e.g. Moe 2003; Storsul 2008). When the White Paper was released, in June 2003, a key issue was under what preconditions *Norges Televisjon* – a commercial company jointly owned by the public service broadcasters NRK and TV2 – should be granted a licence to build and run a digital terrestrial network.

At the outset, the White Paper acknowledges the fundamental discussions undertaken in the “In the Service of Freedom of Speech”-paper discussed above. It also refers to the suggestions in a then-recent Green Paper on freedom of speech, specifically the idea that the state is responsible for a communication infrastructure as a public good. Here, we find a clear vision of the media user as a member of a public in the digital age: everyone must have access to as “many open channels for expression as possible” (p. 14). For television, the White Paper continues, this translates as a responsibility to provide “the whole population a basic offer of television channels” (p. 14). In the argument that grounds the White Paper, then, it makes room for users as a public, though not as participants in the media.

References to the democratic functions are also made elsewhere – for instance when warning against the potential consequences of turning off the analogue television signals before all users have access to digital ones. But in the specific discussion of why one should build the new network, “the public” is strikingly missing. Under the heading “Democratization of the information society”, it is argued that the proposed network will help give access for all to the information society. However, the text does not spell out why this is important. Instead, it explains that

The immediate effect is that a greater portion of the population will get access to multichannel television...Looking some years ahead, the television market will presumably be characterized by a wide spectrum of additional services (for instance electronic shopping, interactive advertising, downloadable extra information, internet-on-the-television etc), as a supplement to traditional television channels. In this way, digitalization can contribute to maintain and strengthen the strong position of television in the population's media consumption. This indicates that it is important to provide access for everyone to television after digitalization. (Regjeringen 2003: 15)

Here, the democratizing effect of digital television is its ability to offer users new services, for instance connected to shopping and advertising, and thus making sure television is central to their media consumption. Clearly, this is a line of thought far removed from ascribing the media the two democratic key tasks of spreading information and facilitating public debate. It is also a reasoning that not only neglects the users as a public but also ignores any novel potential for participation in digital media. When the text deals with the consequence of more television channels facilitated by digital technology, it reasons that this will give the audience a greater choice of programmes, advertisers more channels to choose from, and, for programme producers, more potential buyers (p. 18). Again, the business side of television is prioritized, not the cultural or democratic.

Even though it explicitly bases the discussions on previous government papers' situating of the users as a public, such concerns do not surface in this second White Paper's actual proposals or recommendations. While presented as a cultural policy paper, the centre-right government here gives more room to ideas of the users as an audience than as a public. This could seem to strengthen the supposition that, in a digital media system, users are prioritized as members of an audience rather than a public. But interestingly, the "order" is reversed compared to the first White Paper: The 2003-text lays out ideas of the public as its fundament, but leaves these ideas behind in the detailed discussions. The 2001-text does the opposite – inserting concerns about the users as a public sporadically in the discussions, without first having granted such visions any systematic place in the Paper's fundamental rationale.

That being said, the two papers are strikingly similar in their lack of perspectives conceptualizing media users as participants.

White Paper III: broadcasting in a digital future

The latest relevant White Paper was presented in May 2007 by the Labour-led coalition government currently in office (Regjeringen 2007). Although it sports the title "Broadcasting in a Digital Future", the text is clearly concentrated on public service arrangements, specifically the future of the NRK.

In contrast with the two former papers, this has a clearer structure, with less-tentative statements describing the situation at hand. In Chapter 2, the White

Paper outlines the “central driving forces” behind the “processes of change in the television sector” (p. 12). These are portrayed as technological and regulatory “catalysts” (p. 12) about to change “the audience’s everyday media use in a radical way” (p. 17). Discussing these changes, the White Paper concentrates on more channels, new internet-based download-services, greater control over when and where a programme is watched, better quality picture and sound, new forms of payment, and potential internationalization of television content. The causality in this presentation is evident: new technology and regulation entail new situations for the users. As such, the users are not considered a factor for policy change – regardless of their roles as audience members or a public.

Furthermore, when concerning changes in television use, the White Paper deals almost exclusively with the user as a traditional recipient: as a viewer. Much space is used on updated data on viewer market shares. But in discussing new potentials for increased user control, the White Paper is vague, even relapsing to mere truisms: “The most interesting aspect of the PVR technology”, for instance, “is how the audience choose to use it” (p. 24).

Throughout the discussion, the users are consistently placed within a market context. Only once throughout the whole text does the user get the role as a member of the public participating in the media. Under the heading “the audience becomes content producers”, the White Paper claims that a consequence of new technology and new programme formats is that “‘ordinary people’ to a constantly increasing degree participate in programmes” (p. 25). Referring to the amount of participatory programmes on Norwegian television, the White Paper states:

This can be interpreted as an expression of an important change in relation to who gets to express themselves in the public sphere. While it used to be first and foremost members of the society’s elite who could use the mass media as a channel for expression, we see today that the media to a larger extent are available for ordinary people. (Regjeringen 2007: 26)

Here, for once, the users’ participation as members of a public is spelled out. But this spelling-out does not lead into any specific suggestions. Instead, as the text continues with detailed policy statements and proposals, the discussion of changes for users brought on by technological and regulatory developments forms the background. Thus, the vision of the users as participants in the media is easily lost in between the dominating descriptions of them as traditional recipients.

Ideas of the users as members of a public do, however, surface as the White Paper elaborates on the meaning of the public service broadcasting term. With a reference to the 2001 White Paper discussed above, the three meanings – universal, for the public sphere, for the audience – are repeated. And as in the 2001 White Paper, the text offers no further weighting between the three meanings, or any discussion of the internal relationship between them. On the one hand, the White Paper seems to take for granted that all

three meanings are equally valid, and coexist. Yet on the other hand, as the discussion continues, the White Paper ignores the meaning of public service as serving individual audience members. Instead, the two other meanings are emphasized: referring to a statement from The Council of Europe, public service broadcasting is ascribed the task as “a universally available point of reference for all participants in the public sphere”, and as “a forum for a complex public conversation, and a means to promote individuals’ democratic participation” (p. 45). This vision of the media users as participating members of a public is kept throughout the discussion that follows. Here, the White Paper argues for the need to maintain a publicly-funded media institution in the digital age, and simultaneously promote public service content from other actors through different means (pp. 45–63).

Compared to the previous White Papers, this third one stands out with a clearer, more confident presentation of the situation and the issues at hand. In this regard we should keep in mind that the latest text has the advantage precisely because of being the latest. It was harder and more risky to make bold statements about the digital media system in 2001 than six years on. Still, the third text also stands out on a different level. While its general discussion prioritizes ideas of the media users as audience members, the paper does, to a larger extent than the two former, make a case for envisioning the users as constituting a public. The case may not be carried through in a sound manner but it is still substantial to the argument made for the continued use of public service arrangements as a media policy tool. This would run counter to claims that media policy is getting ever more based on consumer concerns and less on cultural or democratic aims.¹⁰ One possible explanation could be political: the 2003 White Paper, which goes the farthest in prioritizing the business side of television, was presented by a centre-right coalition. The 2007 Paper, on the other hand, is offered by a Labour-led left-centre coalition. Thus, their different foci could be at least partly caused by basic political differences along the left-right spectrum.

If so, it is interesting to notice that none of the three White Papers pay much attention to the user as a participant in the media. Despite acknowledging and even praising the impact of digital technology, including the potentials of internet communication and the new interactive services on digital television, no vision of participation is carried on in actual policy proposals or specific statements related to public service broadcasting.

Conclusion

The starting point for this chapter was two levels of criticism against public service broadcasting related to the key tasks normative democratic theory ascribes to the media: the spreading of information and cultural and educational content to the public, and the facilitation of public debate. While stressing their historical roots, I have shown how these two levels of criticism have grown

in importance in the face of a digital era. I have argued that to discuss how the media fulfil their democratic key tasks, we need to operate with a concept of “public” that acknowledges a wide range of communicative forms, also in media genres other than political talk shows or news. This also has implications for the discussion of participation in the media. Participation may very well be seen as important for the workings of the public sphere even though the format or communication is far removed from a deliberative ideal.

With such an understanding, I have looked at how actual public service broadcasting policy envisions the user in a digital media system. Based on the case of Norway, I have argued that no comprehensive vision of the users as members of a public grounds the policy. Still, the documents analysed do, to different degrees, make room for such a notion. The extent to which these notions matter in specific proposals seems to depend on actual political differences along the traditional left-right continuum. That is, the three consecutive White Papers from 2001–2007 do not depict a one-way process increasingly prioritizing audiences before publics. They do, however, all give strikingly little attention to any substantial notion of the users as media participants.

Public service broadcasting is but one tool of any media policy, and must be considered in relation to its whole. Clearly, given the scope and design of the analysis, my conclusions should be seen as tentative. Still, they at least illustrate how considerations of the media’s democratic key tasks are treated unsystematically or inconsistently in actual policy. This might in part be attributed to a necessary time lag between technological innovation and business hype on the one hand, and policy-making on the other. However, in the long term, a failure to tackle significant issues of the legitimacy of media policy tools might have grave implications. Further attention should be given both to the situation in other countries, and to the way in which the (lack of) discussion of these fundamental issues in overarching policy documents trickle down to more specific regulatory devices.

Notes

1. I use the term “broadcasting” to describe the public service arrangements. This is not to ignore the ongoing issues with transferring such arrangements to other media platforms. As I have argued elsewhere (Moe 2008), these are key issues for media policy. Yet, I use “broadcasting” in the present discussion since it is the explicit point of departure for the policy discussions under scrutiny, starting from the late 1990s. Moreover, the criticism directed against the public service institutions that I concentrate on are closely related to characteristics of broadcasting.
2. Since the late 1980s, deliberative democratic theories have grown in prominence within political philosophy and political science (e.g. Bohman 1998 for an instructive discussion). While Jürgen Habermas’ key contribution (Habermas [1992] 1996) remains a central reference – not least within media studies – recent works in the field provide important developments, both concerning normative aspects (e.g. Benhabib 2002), and empirical dimensions (e.g. Wessler 2008). For a useful operationalization of the ideal of deliberation in the public sphere, see Peters (1994).
3. Importantly, van Zoonen distances herself from theories of deliberative democracy, labelling them “the modernist response to the gap between political elites and everyday citizens” (2005: 148).

4. See also Kellner (1990: 185ff) for an example from the US, and Collins (2002: 65ff) for further discussion.
5. In the 1990s, the yearly White Papers dealing with public service broadcasting policy (titled "Broadcasting and the Press etc") were rather brief. They did not include substantial discussions of digital media. The first White Paper that does – one set aside for the issue of digital television distribution in 1999 – does not undertake discussions of the role of the public (Moe 2003). Thus, the three papers selected for the present analysis together make out the most relevant discussion documents of its kind.
6. The reliance on data collected from written sources is a widespread method in broadcasting history and policy studies. Use of such sources stems from historical research. Importantly, although it is sometimes downplayed in methodological discussions (e.g. Scott 1990: 6ff; Østbye et al. 2007: 46ff), using such sources implies textual content analysis. But rather than being interested in the documents' qualities as texts in themselves, the interest lies in using them as sources supposed to document a process. I rely on written sources to provide relevant information about the social phenomena at hand. By gathering, thematically coding, and systematizing material from them in accordance with the research question, I identify chronology, key arguments, and concerns at different stages of the period under scrutiny (Jensen 2002: 245ff).
7. See Meinhof et al. (2005) for further discussion of the audience/public relations across different languages.
8. All translations from Norwegian are my own.
9. These three meanings were first introduced to Norwegian media policy in the Public Service Council's first report in 1997 (Allmennkringkastingsrådet 1997: 6-7). The Public Service Council was set up as an independent advisory unit under the Ministry of Culture to assess the practices of public service broadcasters. It was at the time lead by Jostein Gripsrud, and also counted Trine Syvertsen among its members. Syvertsen had discussed the three meanings of public service in a 1990-article (Syvertsen 1990: 183ff). In her argument, the three meanings could be relegated to different time periods: the public good meaning was important in the early years of broadcasting. It was replaced by the second meaning's ideas about the public sphere, which in turn got increasingly challenged by the third meaning – that of servicing audiences (see Syvertsen 2004a for an updated discussion). Importantly, neither the Public Service Council's report nor the 2001 White Paper refers to the latter shift – from the public to audiences.
10. This resonates with other analyses. In a large study of the public's role in the development of digital terrestrial television in Sweden, for instance, Pernilla Severson (2004: 96ff) found traditional cultural policy tools (like public ownership and content quotas) to have remained central throughout the process, even though the policy had a "consumer orientation".

References

- Allmennkringkastingsrådet (1997) *Allmennkringkastingsrådets rapport 1996*. Oslo: Statens medieforvaltning.
- Bardoel, Jo & Lowe, G. F. (2008) "From Public Service Broadcasting to Public Service Media. The Core Challenge", in G. F. Lowe & J. Bardoel (eds) *From Public Service Broadcasting to Public Service Media. RIPE@2007*, Göteborg: Nordicom, pp. 9–29.
- Benhabib, S. (2002) *The Claims of Culture*, Princeton, Oxford: Princeton University Press.
- Bohman, J. (1998) "Survey Article: The Coming of Age of Deliberative Democracy", *The Journal of Political Philosophy* 6(4): 400–25.
- Born, G. (2003) "Uncertain Futures: Public Service Television and the Transition to Digital – a Comparative Analysis of the Digital Television Strategies of the BBC and Channel 4", *Media@LSE Electronic Working Papers*, issue 3.
- Brady, J. S. (2004) "No Contest? Assessing the Agonistic Critiques of Jürgen Habermas's Theory of the Public Sphere", *Philosophy & Social Criticism* 30(3): 331–354.

- Carpentier, N. (2003) "The BBC's Video Nation as a Participatory Media Practice", *International Journal of Cultural Studies* 6(4): 425–447.
- Carpentier, N. (2007) "Participation and the Media", in B. Cammaerts & N. Carpentier (eds) *Reclaiming the Media: Communication Rights and Democratic Media Roles*. Bristol: Intellect Books, pp. 87–92.
- Collins, R. (2002) *Media and Identity in Contemporary Europe: Consequences of Global Convergence*, Bristol: Intellect Books.
- Curran, J. (2002) *Media and Power*, London, New York: Routledge.
- Dahlberg, L. (2005) "The Habermasian Public Sphere: Taking Difference Seriously?", *Theory and Society* 34(2): 111–36.
- Dayan, D. (2001) "The Peculiar Public of Television", *Media, Culture & Society* 23(6): 743–765.
- Dewey, J. (1927) *The Public and its Problems*, Athens: Swallow Press/Ohio University Press.
- Enli, G. S. (2007) *The Participatory Turn in Broadcast Television. Institutional, Editorial and Textual Challenges and Strategies*, Oslo: University of Oslo.
- Feenberg, A. (2008) "Et demokratisk Internett?" in B. Gentikow & E. G. Skogseth (eds) *Medier og demokrati*. Oslo: Scandinavian Academic Press/Spartacus, pp. 209–29.
- Garnham, N. (1978) *Structures of Television*, London: BFI.
- Garnham, N. (1983) "Public Service versus the Market", *Screen* 24(1): 6–27.
- Garnham, N. (1986) "The Media and the Public Sphere", in P. Golding, G. Murdock & P. Schlesinger (eds) *Communicating Politics: Mass Communication and the Political Process*, Leicester: Leicester University Press, pp. 37–53.
- Gripsrud, J. (1992) "The Aesthetics and Politics of Melodrama", in P. Dahlgren & C. Sparks (eds) *Journalism and Popular Culture*. London, Thousand Oaks, New Delhi: Sage, pp. 84–96.
- Gripsrud, J. (2002) *Understanding Media Culture*, London: Arnold.
- Gripsrud, J. (2007) "Television and the European Public Sphere", *European Journal of Communication* 22(4): 479–492.
- Habermas, J. ([1992] 1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Mass.: The MIT Press.
- Hall, S. (1992) "Which Public, Whose Service?", in W. Stevenson (eds) *All Our Futures. The Changing Role and Purpose of the BBC*, London: British Film Institute, pp. 23–38.
- Hallin, D. C. & Mancini, P. (2004) *Comparing Media Systems: Three Models of Media and Politics*, Cambridge: Cambridge University Press.
- Iosifidis, P. (2005) "Digital Switchover and the Role of the New BBC Services in Digital Television Take-up", *Convergence* 11(3): 57–74.
- Jensen, J. F. & Toscan, C. (1999) "Introduction", in J. F. Jensen & C. Toscan (eds.) *Interactive Television. TV of the Future or the Future of TV?* Aalborg: Aalborg University Press, pp. 11–25.
- Jensen, K. B. (2002) "The Qualitative Research Process", in K. B. Jensen (ed.) *A Handbook of Media and Communication Research: Qualitative and Quantitative Methodologies*, London and New York: Routledge, pp. 235–54.
- Johansen, A. (2008) "Skal stortingsmeldinger leses?", *Prosa* 14(5): 38–41.
- Karlsen, F. et al. (2009) "Non-professional Activity on Television in a Time of Digitalisation. More Fun for the Elite or New Possibilities for Ordinary People?", *Nordicom Review* 30(1): 19–36.
- Kellner, D. (1990) *Television and the Crisis of Democracy*, Boulder, San Fransisco, Oxford: Westview Press.
- Livingstone, S. (2005) "On the Relation between Audiences and Publics", in S. Livingstone (ed.) *Audiences and Publics: When Cultural engagement Matters for the Public Sphere*. Bristol and Portland: Intellect Books, pp. 17–43.
- Livingstone, S. & Lunt, P. (1994) *Talk on Television: Audience Participation and Public Debate*, London, New York: Routledge.
- Macdonald, M. (2007) "Television Debate, 'Interactivity' and Public Opinion: The Case of the BBC's 'Asylum Day'", *Media, Culture & Society* 29(4): 679–689.
- McGuigan, J. (2005) "The Cultural Public Sphere", *European Journal of Cultural Studies* 8(4): 427–443.

- McNair, B., Hibberd, M. & Schlesinger, P. (2003) *Mediated Access: Broadcasting and Democratic Participation*, Luton: University of Luton Press.
- Meinhof, U. H. et al. (2005) "Appendix: Audiences and Publics: Comparing Semantic Fields Across Different Languages", in S. Livingstone (ed.) *Audiences and Publics: When Cultural Engagement Matters for the Public Sphere*. Bristol: Intellect Books, pp. 213–239.
- Moe, H. (2003) *Digitaliseringen av fjernsyn og allmennkringkastingens skjebne*, Bergen: University of Bergen.
- Moe, H. (2008) *Public Broadcasters, the Internet, and Democracy: Comparing Policy and Exploring Public Service Media Online*. PhD-thesis. Bergen: University of Bergen.
- Moe, H. & Syvertsen, T. (2009) "Researching Public Service Broadcasting", in K. Wahl-Jorgensen & T. Hanitzsch (eds) *Handbook of Journalism Studies*. New York, London: Routledge, pp. 398–413.
- Murdock, G. (2005) "Building the Digital Commons", in G. F. Lowe & P. Jauert (eds.) *Cultural Dilemmas in Public Service Broadcasting*, Göteborg: Nordicom, pp. 213–31.
- Nussbaum, M. (1997) *Cultivating Humanity*, Cambridge, Mass.: Harvard University Press.
- Peters, B. (1994) "Der Sinn von Öffentlichkeit", *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Sonderheft 34/1994: 42–77.
- Peters, J. D. (1999) *Speaking into the Air: A History of the Idea of Communication*, Chicago, London: The University of Chicago Press.
- Regjeringen (2001) St.meld. nr. 57 (2000-2001) *I ytringsfrihetens tjeneste. Mål og virkemidler i mediepolitikken*.
- Regjeringen (2003) St.meld. nr. 44 (2002-2003) *Om digitalt bakkenett for fjernsyn*.
- Regjeringen (2007) St.meld. nr. 30 (2006-2007) *Kringkasting i en digital fremtid*.
- Scott, J. (1990) *A Matter of Record: Documentary Sources in Social Research*, Cambridge: Polity Press.
- Severson, P. (2004) *En gökunge i public service-boet? Publikens roll i digitaliseringen av marksänd television*, Uppsala: Uppsala Universitet.
- Silberman, M. (2000) *Brecht on Film and Radio*, London: Methuen.
- Smith, P. (2006) "The Politics of UK Television Policy: The Making of Ofcom", *Media, Culture & Society* 28(6): 929–940.
- Storsul, T. (2008) "Bakkenettet og allmennkringkastinga", *Norsk Medietidsskrift* 15(1): 38–57.
- Syvertsen, T. (1990) "Kringkasting i 1990-åra: Hvem er mest 'public service'?", in U. Carlsson (ed.) *Medier, Människor, Sambälle – 14 artiklar om nordisk masskommunikationsforskning*. Göteborg: Nordicom, pp. 183–195.
- Syvertsen, T. (2004a) "Citizens, Audiences, Customers and Players. A Conceptual Discussion of the Relationship Between Broadcasters and their Publics", *European Journal of Cultural Studies* 7(3): 363–380.
- Syvertsen, T. (2004b) *Mediemangfold – Styling av mediene i et globalisert marked*, Kristiansand: IJ-forlaget.
- Trappel, J. (2008) "Online Media within the Public Service Realm? Reasons to Include Online into the Public Service Mission", *Convergence* 14(3): 313–322.
- Van Zoonen, L. (2005) *Entertaining the Citizen: When Politics and Popular Culture Converge*, Lanham, Boulder, New York, Toronto, Oxford: Rowman & Littlefield.
- Wessler, H. (2008) "Investigating Deliberativeness Comparatively", *Political Communication* 25(1): 1–22.
- Østbye, H. et al. (2007) *Metodebok for mediefag, 3. utgave*, Bergen: Fagbokforlaget.

What if Competition Policy Assists the Transfer from Public Service Broadcasting to Public Service Media?

An Analysis of EU State aid Control and its Relevance for Public Broadcasting

Karen Donders & Caroline Pauwels¹

At the end of the 1980s and the beginning of the 1990s the first private companies' complaints against the funding of public broadcasting organizations were filed with the competition authorities of the European Commission. Several commercial broadcasters – then, brand new players in the market – took matters to 'Brussels' and asked the Directorate-General for Competition to check whether or not subsidy schemes of public broadcasting organizations were in line with the Treaty of the European Communities (EC Treaty). In spite of Member States' approval of the Television without Frontiers Directive in 1989, European involvement in the area of (public service) broadcasting was considered most unwelcome. The Directive came into force after serious disputes and Member States like France, Belgium and Denmark were far from happy with the emphasis the Directive placed on the objective of economic integration rather than cultural exchange (Collins 1994; Michalis 2007). In a similar way, Member States strongly opposed the extension of a market integration rationale to public service broadcasting. They felt that the European Commission had no discretion over public broadcasting organizations and would, moreover, insufficiently take into account the democratic, social and public interest objectives at large, underlying public service broadcasting.

Member States' resistance and the Commission's hesitance to do something with the private sector's complaints did not prevent the State aid rules from becoming increasingly relevant for the development of public service broadcasters. The Court of First Instance confirmed the necessity for Community action in the field of State aid control and public service broadcasting three times in a row at the end of the 1990s. After the rulings of the Court, over 20 Commission decisions concerning the support for public broadcasting have been taken.

Opinions about the application of State aid rules to public broadcasting differ. While the private sector supports Commission intervention, most stakeholders dislike it and even fear that DG Competition might limit the scope of public broadcasting activities. Given the market-oriented policies of DG Internal Market or DG Competition in, for example, the Green Paper on Television without Frontiers (1984), this suspicion is understandable and to some extent justified.

However, after over 15 years of State aid control it might be interesting to look whether the intervention of the European Commission indeed went as far as some wished and others feared. This question is all the more relevant as public broadcasters are expanding activities to new media markets – a trend which is also questioned by the private sector (including private broadcasters, but also the print sector and even other publicly-funded cultural institutions) at the European level – and are once again faced with many (digital) challenges. In addition, now the Commission is updating its 2001 Broadcasting Communication² (this document specifies the principles with which the funding of public broadcasting should comply), an assessment of Commission practice so far is a valuable contribution to the heated (the Netherlands and other Member States strongly oppose the Commission plans) discussions about the revision of the Communication.

In this chapter it is hypothesized, going against mainstream academic and political discourse, that the European Commission's State aid control has not undermined the legitimization of public service broadcasting and, with validity, can be considered to have fostered the ongoing transfer from public service broadcasting to public service media. Public service media is defined from a rather pragmatic perspective as a policy project that goes beyond the traditional radio and television conceptualization of public service broadcasting. Public broadcasters should, from a public service media perspective, develop (and are in fact developing) into multimedia undertakings that use all available platforms to offer services and fulfil their public service remit. This remit is not limited to a particular type of genre (e.g. information) or specific types of services (e.g. programmes). Public broadcasters can, and should, also be active in, for example, the fields of entertainment and new on-demand services. Guiding principles in this respect are those such as quality, universality, pluralism and – not negligible – market-conforming behaviour.

The argument of this chapter is not, however, that the European Commission itself pursues the creation of a holistic public broadcaster. The empirical analysis suggests that the dynamics of the negotiation process (at European level) between the different stakeholders and the dynamics initiated by the commitments that Member States make (at a national level) to alter certain aspects of public broadcasting policy, strengthens the transition from public service broadcasting to public service media.

The chapter consists of three parts. Firstly, the main critiques of State aid control and the principles that are the basis of the Commission's interference with Member States' public broadcasting systems are summarized. Secondly, there is a discussion of the application of the State aid rules to public service broadcasting. This is not a legal analysis per se, but rather aims to pinpoint the guiding principles of Commission policy with regard to the definition of the remit and the way in which they are used – possibly to the benefit of public broadcasting. Finally, the outcome of this analysis is evaluated in light of this chapter's hypothesis and some concluding remarks are made.

A stalemate situation? Euroscepticism meets state aid principles

The rationale underlying euroscepticism

It was no surprise that Member States were not amused, to say the least, with the complaints against their funding of public broadcasting organizations. Public broadcasting organizations were (and are still) well entrenched and established in Western-European societies. For political reasons, or because of the firm belief in its significance for democracy, broadcasting seemed too important to be left to the profit-seeking mechanisms of the free market. In consequence, public broadcasters have been at the core of most Member States' media policy for several decades. Notwithstanding the Member States' own criticism of public broadcasters in the 1980s, and some Member States' support for a more liberal agenda in media policy, a European (and) market-oriented interference with this particular type of policy was considered to be a bridge too far in the EU's integration process. Moreover, the initial resistance of Member States to European Commission interference with public broadcasting should be seen in a broader framework than the State aid rules of the EC Treaty. The 1980s and 1990s were a period in which the European Commission, most notably the DGs Internal Market and Competition, and some Member States pushed a process of liberalization and de-regulation in the media sector (Humphreys 1996: 161ff). By means of the 1992 internal market project, which focused heavily on the services sector, nationally-embedded audiovisual sectors were pushed into the core of European integration and, hence, liberal policy agendas.

European intervention with public broadcasting was, therefore, approached with much caution by Member States, public broadcasters and often also by academics. In several valuable contributions on the subject, the European Commission's role in this debate, that deals essentially with the balance between public and private actors in post-liberalization broadcasting markets, is rather negative. DG Competition is more often than not seen as a threat for public broadcasting (see, for example, Holtz-Bacha 2005; Humphreys 2007; Jakubowicz 2007: 21–22; Katsirea 2008: 323ff; Michalis 2007: 168ff; Papathanasopoulos 2002: 73ff).

Overall, criticism of the Commission' State aid control is threefold. Firstly, it is said that the European Commission does not take into account the specific cultural nature of public broadcasting. For this reason, Bardoeel and Lowe (2007: 12) disapprove of Commission intervention in the field of public broadcasting, wondering "how the European Commission can so blithely treat PSB from a deterministically economic perspective when the entire enterprise isn't about that and is in fact explicitly about the countervailing importance of the socio-cultural dimension." Secondly, critics are of the opinion that the European Commission intervenes in a policy area that falls, following the principle of subsidiarity, within the Member States' competences (Holtz-Bacha 2005: 231–33). A third point of criticism, focused upon in this chapter, relates to the

actual scope of public broadcasters' activities. It is feared that the European Commission, inspired by market failure theories on broadcasting, might want to limit public broadcasters' activities to these services that are not readily available on the commercial market. Entertainment, sports and, more recently, new media services (Donders & Pauwels 2008) would then fall outside the public service remit. In such a scenario, public broadcasters are turned into "niche" (broadcasting) service providers.

The guiding principles in the Commission's actions

The question remains whether or not the virulent criticism of diverse stakeholders is equivalent to the actual development of State aid control on public broadcasting. The guiding principles, on which the Commission grounds its analysis, are defined in a set of guidelines – the so-called Broadcasting Communication (European Commission 2001). There are three main principles: (1) a clear definition of the remit; (2) objective and independent control of public broadcasters' activities; and (3) transparent and proportional funding. It is on the basis of these three principles that the European Commission can ask Member States to change certain aspects of their public broadcasting regimes and require public broadcasters to refund excessive amounts of subsidies to the State. The first principle concerns the definition of the remit. Member States should define the public service remit as precisely as possible. This principle is quite flexible. But in the light of public broadcasters' expansion into new media markets, it can become increasingly important, and unpredictable. Keeping in mind the Amsterdam Protocol, which can be regarded as a political victory for Member States reluctant to face EU intervention and which grants them the right to define the remit, the Commission can only check for "manifest errors". This means that the European Commission can merely challenge the definition of the remit when Member States are funding services that are unquestionably commercial rather than public in nature (Hobbelen et al. 2007: 102). Objective, and therefore independent, control of what public broadcasters are doing is the second principle underlying State aid control in the field of public broadcasting. In response to the private sector's concerns about the lack of control on public broadcasters, the Commission asks Member States to establish agencies that assess whether or not public broadcasters are living up to set, and paid for, objectives. The third principle relates to the transparency and proportionality of funds. Proportionality means that the amount of government support should equal the net cost of public service delivery. In other words, Member States should not give more money than necessary to fulfil the remit. If they do so, this could encourage public broadcasters to cross-subsidize commercial services. In order for the Commission to assess the proportionality of the funds, the financial and organizational structure of public broadcasters should be transparent (European Commission 2001).

The analysis will focus on the way in which the Commission applies the first two criteria as they are most relevant with regard to various public broadcasters'

multichannel strategies and, thus, the assertion that the Commission intends to limit the remit of public service broadcasters in the digital age.

A full frontal attack on multi-platform public broadcasters?

The action points of the European Commission

Over 20 Commission decisions show that State aid policies indeed affect national regulation of public service broadcasting. On the basis of an extensive analysis of Commission decision practice,³ five demands that are recurrent in the Commission's decision practice are defined: (1) a clearly defined remit; (2) *ex ante* control for new services; (3) independent regulators for public broadcasters; (4) 10 per cent reserves; and (5) more transparency. Do these demands harm public broadcasters and result in a marginalization of their remit, or, do they foster the current transfer to public service media? Three Commission demands are the starting point of analysis: firstly, the demand for a better-defined remit; secondly, the importance of independent control; and finally, the idea of an *ex ante* evaluation for new media. The last issue is currently the most contentious, as it implies an *ex ante* evaluation of new services offered by public service broadcasters. Such an *ex ante* evaluation should, in the Commission's opinion, consist of an assessment of the public value of a given service, but also its likely market impact.

Definition of the public service remit

Commission interference with the public service remit is sensitive. In numerous State aid investigations the European Commission has questioned, in light of its competence to check for a manifest error, the public service remit of some public broadcasters under investigation. Hereby, the focus lies on public broadcasters' expansion to new media markets. This is criticized by Member States and public broadcasters who stress that, following the Amsterdam Protocol, it is up to Member States to define the remit. According to them, even if the Protocol indeed also mentions that the funding of public broadcasters cannot be contrary to the common interest, this does not limit the freedom of Member States to define the remit.

The European Commission has tried to tackle the need for a clear definition of public broadcasters' tasks in three different ways:

First, in the 2003 BBC Digital Curriculum case, the European Commission (2003: §36) said that new services – in this case online educational services – had to be “closely associated with the BBC's television and radio services.” In the DG Competition's opinion this was not the case, as the BBC had expanded its activities to an already-developed market wherein it was not previously active. Although the aid was declared compatible in its decision, this statement was fiercely criticized as it intervened with Member States' discretion over the remit. Moreover, it was also unclear why educational services, even if offered online,

did not fit the remit in the Commission's opinion as education is a long-standing part of the BBC's public service obligations. Furthermore, the assumption of a necessary "close association" between ancillary services and "old" television and radio services sheds the Commission's own idea of technology-neutrality – i.e. regulation is not dependent on specific platforms or technologies.⁴

A second approach was put forward in the decision on the licence-fee funding of ARD and ZDF. In 2007 the Commission decided that ARD and ZDF could exploit, due to a vague remit, commercial services under a public banner (Commission 2007: §239–240). Certainly for new media services, there is a need for a more precise definition of the remit that exemplifies most importantly what the added value of new services is in comparison to the already existing offer (Commission 2007: §227). Even though the Commission accepted that "the public service might include certain services that are not 'programmes' in the traditional sense, such as on-line information services" (Commission 2007: §222), this approach can again be criticized. The demand for an 'added public value' is questionable as it assumes a necessary link between "old" and "new" services for a second time. New services should "possess" a public value in addition to television and radio services. Hence, there is a problem of technology-neutrality.

In its 2008 decision on the funding of Flemish public broadcaster VRT, the European Commission tried to overcome these problems by formulating another approach on the issue of definition. In this decision, DG Competition emphasizes the right of Member States to define the remit, while at the same time, it urges Member States to do so effectively. The Commission doubts whether the remit is indeed defined by the Flemish government or by the VRT itself. DG Competition thus fears that the public broadcaster itself defines its scope of activities, and the Flemish government accommodates it afterwards. According to the Commission, the uncertainty about the scope of the remit brings about undesirable and unnecessary uncertainty for other market players (Commission 2008a: §170–174, 178–180). The third approach of the Commission is more in line with its competences to check for a manifest error and is captured in one single question: do Member States genuinely define the public service remit of their public broadcasters and, hence, uphold a hands-on, instead of hands-off, approach?

In short, the Commission's approach towards the issue of definition has evolved over the years. The Commission, at first not always sufficiently aware of the specificity of public broadcasting, tried to ensure a clear definition through a largely technology-dependent approach. While public service broadcasting is (or should be) defined with reference to its aims and functions, DG Competition defined public service broadcasting with reference to specific services and markets. One can legitimately criticize DG Competition for this. Yet, most Member States (in their media laws) stipulate that "PSB company investments in new services should be associated with their core services in traditional broadcasting and not 'cannibalize' on these services" (Leurdijk 2007: 73). As such, it has not been easy for the Commission to avoid the technology-dependent concepts

that are used in national media policy as well. Moreover, competition policy deals with the preservation of competition in the market. In that sense, and given the limited cultural competences of the Commission, a focus on markets is understandable and even unavoidable.

Partly as a consequence of European State aid control, an increasing number of Member States has adapted, or is planning to adapt, its definition of the public service remit. In Germany the concept of 'telemedia' has been introduced in the public service remit, as follows:

public service broadcasting must, by producing and broadcasting radio and television channels, act as a medium and a factor in the process of shaping free individual and public opinion. Along with the channels it may offer printed material and telemedia with programming-related content. (State Media Authorities 2007: Art. 11)

The telemedia concept, i.e. electronic information and communication services (except for telecommunication services) that are "journalistically-editorially" arranged⁵ (Schultz et al. 2008: 10), has even broadened the remit of ARD and ZDF in a more technology-neutral way. Also, in the Netherlands, the definition of the remit has been clarified in the course of a State aid procedure. In April 2008 a new Media Decree was approved by the Dutch Parliament. The Decree makes sure that a variety of electronic offers fits within the remit of the Dutch public broadcasters. Digital services like theme channels, websites and mobile offers are no longer considered to be 'side activities', but are fundamental to the fulfilment of the public service remit. In Portugal, a country that has been involved in three different procedures, a new Public Service Broadcasting Concession Contract extends the remit to non-linear services and distribution platforms other than television and radio. And also in Finland there are ongoing discussions, which are inspired by debates at the European level, about the refinement of the remit.

These evolutions, even if provoked by direct or side-effects of Commission State aid control, should be seen as improvements to previous inconsistencies and can indeed, in the long run, facilitate the evolution from a public service broadcaster to a genuine public service content provider. In other words: European State aid control dynamics do not (necessarily) push public broadcasters into a niche zone of the media market (Ward 2004), but rather enable, or at least assist in, a more explicit legal transition from public service broadcasting to public service media.

Independent control

Another concrete example of Commission State aid control of the funding of public broadcasters is the DG Competition's requirement to establish legally external bodies that monitor public broadcasters' activities and fulfilment of the remit. The Broadcasting Communication (European Commission 2001: §41)

indeed mentions that there is a need for an “appropriate authority” to monitor the fulfilment of the remit. The Commission considers that only legally external bodies can be such an “appropriate authority”. All Member States agree, as is specified by the Prague Resolution on Public Broadcasting (Council of Europe 1994: 10), that “the control and accountability of public service broadcasters, especially as regards the discharge of their missions and use of their resources, must be guaranteed by appropriate means.” Whether this task is best performed by an external or internal agency, however, is a point of discussion.

In Germany the Commission’s demand for external monitoring was particularly difficult to reconcile with the long-established Broadcasting Councils. These consist of members that represent “socially relevant” groups and are internal to the different German public broadcasting corporations. They appoint the Director-General of their public broadcaster, determine the basic rules with which the broadcaster has to comply and go over the budget (Palzer 2007: 44). German private broadcasters questioned the independence of the Councils and argued that most of their members identify with the public broadcasters they have to control. The Commission (2007: §256) also feared that this internal control of public broadcasters’ activities might lead to “an inherent conflict of interests of the operations of the public service broadcaster on the one hand and the regulatory and control function on the other.” Nevertheless, the Commission, at the conclusion of its negotiations with the German Länder, accepted this system of control (probably in exchange for the introduction of an *ex ante* evaluation of new media services). This was not the case in Ireland and Flanders. Both the Irish and Flemish government authorities agreed to establish external agencies for the monitoring of public broadcasters’ activities. The RTE Authority, an integral part of Irish public broadcaster RTE, has been replaced by the Broadcasting Authority Ireland (BAI). In Flanders, the Flemish Regulator for the Media (VRM) has the task of monitoring the VRT (Commission 2008a: §79; 2008b: §151).

Whether external bodies perform this task better than internal organizations like the German Broadcasting Councils might seem likely at first, but it remains to be seen. First, it is too soon to assess how these new external bodies function. Second, in light of the DG Competition’s demand for external control and the creation of external monitoring bodies in other Member States, the Broadcasting Councils in Germany might be more “motivated” to perform their task rigorously. Third, all systems of control, whether internal or external, are embedded in national contexts. In the United Kingdom, the BBC Trust replaced the BBC Governors because it was felt that the latter were not sufficiently independent. In Germany the Broadcasting Councils have been installed within ARD and ZDF in order to prevent government agencies from exercising excessive control over broadcasting programmes. Perception is that these bodies are perhaps more independent and certainly more desirable than control by government authorities. Hence, the question of control relates directly to the independence of public broadcasters and the way in which editorial independence is interpreted and valued in a specific Member State’s context. If government authorities and public broadcasters are not supportive of new agencies, their success

might be rather limited. Keeping the Flemish and Irish commitments in mind, the Commission's decision to accept the German Broadcasting Councils is to some extent arbitrary. But, in light of the German situation, the Commission's acceptance of the Councils could indeed prove to be more productive from an accountability and responsiveness perspective. As everybody is watching the Councils with renewed attention due to the Commission procedure, it is, now more than ever, a must for them to take responsibility.

In this respect, Commission interference has created more awareness about not only the necessity of control but also the need for effective and credible control. Better and more accountable monitoring systems will benefit the legitimacy of public broadcasters expanding their activities to new media markets. This does not mean that Member States should accept each and every demand of the Commission concerning the monitoring of public broadcasters. It does, however, lead us to the conclusion that the European debate on control also fosters urgent national discussions about an appropriate organization of control systems for public broadcasting.

Ex ante control

In its most recent decisions the European Commission has intensified its aim for a clearer remit. The Commission argues that new services that are not covered by any law or contract between government on the one hand and the public broadcaster on the other should be separately entrusted to public broadcasters by the responsible government authorities (Commission 2007: §245). An *ex ante* assessment of new services should precede such a specific entrustment: "Without any prior evaluation and explicit entrustment of the Flemish government, the VRT is not allowed to deliver services or perform activities that are not covered by the Beheersovereenkomst"⁶ (Commission 2008a: §239, translated from Dutch).

The idea of an *ex ante* evaluation is inspired by the BBC's Public Value Test (PVT). The PVT consists of two parts: a Public Value Assessment (PVA) and a Market Impact Assessment (MIA). The BBC Trust is responsible for the PVA and analyses to what extent a new service is living up to the BBC's public purposes. The MIA, provided by Ofcom, analyses the effect of the proposed new service on the market (BBC Trust 2007). The Commission's demand for an *ex ante* evaluation of new media services, although already having spread from the German case⁷ to cases involving Ireland, Flanders, Austria and the Netherlands (the last two cases are not yet closed), is heavily criticized (see, for example, EBU 2008). There are several valid reasons to criticize the Commission for imposing a PVT on EU Member States. Firstly, it is not sure whether the PVT that is embedded in a very specific public broadcasting regime can be exported successfully to countries other than the United Kingdom. The instrument, launched in 2007, goes back to earlier initiatives of the Department for Culture Media and Sport (DCMS) to subject new (licence fee-funded) services to prior approval by the Secretary of State. In 2000, the DCMS decided that

it was necessary to evaluate whether “the value to the public of the service is proportionate to the likely impact on the market” (DCMS 2000: §3.1.2) and designed the first forerunner of the PVT, on the basis of which, for example, BBC3 (a channel for 25- to 34-year old viewers) was approved. By imposing a PVT-like model on other countries, the Commission might overlook the embedded character of the test. Secondly, a PVT could be too burdensome (in terms of staff and money) for public broadcasters with budget constraints. In the United Kingdom a considerable number of people work on public value tests and it must be noted that not all new services are subject to the test. Hence, it does not offer a panacea for all new services that are offered by public broadcasters. In principle the public value test seems a good idea. In a specific broadcasting reality, however, it will need continuous adaptation and improvement. Thirdly, the MIA, which is an essential part of the Commission’s demand, assumes involvement of third parties in the appraisal of new public broadcasting services. It is somewhat problematic that private companies might co-decide on the scope of activities of direct competitors. Finally, and perhaps most crucially, *ex ante* evaluations concern individual services whereas public broadcasting is a holistic project. The judgment of singular services can introduce a pure market-failure logic into public broadcasting regulation and lead to a marginalization of public broadcasters.

Consequently, Member States’ caution with regard to the Commission’s demand for *ex ante* control is certainly understandable and to some extent justified. Yet, as public broadcasters are expanding activities to new markets, it is vital to illustrate the importance of their presence there. Steemers (2003: 133) puts her finger on the spot in saying that “failing to demonstrate both uniqueness and appeal across a broad range of output, the consensus surrounding public funding could conceivably dissolve.” In this regard, Suter stresses that it is vital to treat the test as something more than a necessary evil. Because “PSBs face unprecedented pressure to make, and justify, investment in new means of productions and distribution”, in the end they have to illustrate how new services deliver public value to citizens (Suter 2008: 5). The embeddedness of the test in national contexts is a given. However, the test is also based on a similar public broadcasting ethos. The uniqueness of each national context can, hence, not be validly used to avoid the implementation of some sort of public value test. A PVT can not only strengthen public broadcasters’ legitimate presence in new media markets but has the potential to improve the internal organizational structure of public broadcasters. Following this point of view, the idea of a PVT should be grasped as an opportunity to proactively tackle questions about the position of public broadcasters, especially in new media environments: Should public broadcasters offer on-demand sports content? Are pay-services public services? Are there limits to public broadcasters’ presence online? Is there a justification for an ‘internet licence fee’? And so forth. Such questions arise and might lead to a decline in public as well as political support for public broadcasting, so, in that regard, the PVT could have an inherent value *for*, and not *against*, public broadcasters.

In short, the discussion about an *ex ante* evaluation for the moment largely misses the point. Arino (2004: 125) convincingly argues that “the distribution of competences in the media arena should not be a power struggle between member states to avoid interference by the Community.” Even if the Amsterdam Protocol gives Member States discretion over the organization of their public broadcasters, the question should be whether an *ex ante* evaluation, despite the problems possibly attached to a PVT, can contribute to a stronger public broadcaster. This is a scenario worth exploring.

Evaluation and discussion

So far the analysis does not support a fully negative appraisal of Commission intervention in the field of public broadcasting, nor does it clear DG Competition from all criticism on its policy. In the beginning of this chapter reference was made to three main critiques on the Commission: first, its State aid policy neglects the cultural aspects underlying public service broadcasting; second, the Commission goes against the subsidiarity principle and interferes, contrary to the provisions of the Amsterdam Protocol, with Member States’ quasi-autonomous competences to regulate and finance their public broadcasters; third, DG Competition limits the remit of public broadcasters, especially with regard to the latter’s expansion into new media markets.

Our evaluation of State aid control shows that the European Commission indeed approaches the funding of public broadcasting from a market-integration perspective. This is not surprising as DG Competition applies the State aid rules. On the one hand, it is not desirable to fully subject public broadcasters to market-oriented principles and the principle of market failure. Public broadcasting is a holistic project that starts from the assumption that broadcasting is too important to be left to the market alone. A market-failure approach undermines this fundamental basis and is therefore not suitable for public service broadcasting. On the other hand, there is no convincing evidence that its economic gaze at the funding of public broadcasters has prevented the Commission from taking into account the Amsterdam Protocol and, subsequently, the cultural basis of public service broadcasting. The framework within which the European Commission can take cultural aspects into account in State aid investigations is real but, however, limited.

Subsidiarity is a more complicated matter. There are indeed tensions between the Commission’s discretions under the State aid framework and the Amsterdam Protocol’s emphasis on Member States’ competences in the field of public broadcasting. Harrison and Woods (2007: 101) explain that this is not unique to State aid control of public broadcasting. Overall, however, the Commission tries to walk the thin line of subsidiarity. The acceptance of the Broadcasting Councils in Germany, be it under pressure of the Länder, illustrates that the application of the State aid rules of the Commission is inspired by the Amsterdam Protocol and the competences it assigns to Member States. The

Commission's approach towards definition also illustrates that they have become more reluctant to intervene with the remit while the Amsterdam Protocol states that the definition of the remit lies within the discretion of the Member States. Although the Commission co-defined the remit in the BBC Digital Curriculum case, it has, meanwhile, adapted its approach. In its recent decision on the Flemish VRT, DG Competition encouraged Flanders to take the lead in defining the remit. Furthermore, the 'hard selling' strategy for the PVT (apparent in, for example, the German, Irish and Flemish cases in which negotiation efforts were focused on the introduction of an *ex ante* evaluation of new media services) illustrates that the European Commission, partly out of pragmatism to reduce complaints at the European level, does not wish to take over Member States' role in regulating and controlling their public broadcasters.

With regard to the alleged limitation of the public service remit, one can indeed make a (legal) point against (too) extensive Commission intervention (Katsirea 2008). Member States' and public broadcasters' cautiousness and fear of overly intrusive Commission intervention is, in a sense, justified. However, the analysis also showed that the Commission tries to find a way of combining competition objectives with the Member States' support for public broadcasting. Its evolving approach towards definition issues illustrates that this is a learning process. Leaving aside the issue of subsidiarity, a clear remit is indispensable for the functioning of every public broadcaster. After monopoly, the Reithian rationale – "to inform, to educate, to entertain" – is no longer (if it ever was) self-sufficient. Yet, it is not up to the Commission to define the remit of public broadcasters. It is up to Member States to do so. The recent initiatives of the Commission to encourage Member States to define the remit in a clearer way and its demands to develop a PVT exemplify that the Commission is (made) aware of this. They, moreover, force Member States to take their responsibility to sustain the development of public service broadcasting into public service media and consider the legal and policy levels. The adaptations of media laws, public service contracts, etc., and the introduction of some sort of public value test are examples thereof.

Hence, the assumption of numerous academics and policy makers, that the European Commission wants to limit the remit of public broadcasters, is not supported by the findings discussed in this chapter. The Commission has, indeed, sometimes raised doubts with regard to some services offered by public broadcasters (e.g. chatrooms, dating websites, mobile services) and this has not always been unjustified. In comparing three regulatory regimes (Germany, Norway and the United Kingdom) of public broadcasters' internet activities, Moe (2008: 234) comes to the conclusion that "the history of the cases' approaches to the internet, and the regulations of them, was largely characterized by ad-hoc solutions." Especially in the United Kingdom, he says, some services have been offered by the BBC that can hardly be considered to fit within the core remit of the public broadcaster. Government regulation of public broadcasters' behaviour in new media markets has, in that sense, not been pro-active, but rather reactive. Taking this, and a rising number of complaints from the private

sector concerning the digital expansion of public broadcasters, into account, the increased attention for the issue of new media services is not unsurprising. Moreover, the Commission has rarely formally contested a specific service offered by a particular public broadcaster. Again, its demand for a PVT exemplifies the emphasis the Commission puts on the responsibility of Member States to define the public service remit.

Concluding remarks

The starting point of this chapter was that State aid control can contribute to the necessary transfer from public broadcasting to public service media. The research set-up did not equate “an impact” with an automatic danger for the public service remit. It, rather, looks at the concrete dynamics of Commission investigations, the outcomes of Commission intervention and possible benefits and advantages for public broadcasters and the citizens they serve. While Harrison and Woods (2007: 74) fear that “the interest of the citizen at national level, often protected through a legislative process, may therefore be overridden by commercial interests at the Union level determined by bureaucrats in the Commission, subject to the review of the European Courts”, this chapter nuances this and puts forward the idea that State aid control of public broadcasting is valuable for national public broadcasting policies and citizens alike.

First of all, European State aid control has stimulated difficult and necessary debates about the transfer from public broadcasting to public service media. It creates involvement with Member States and other stakeholders and has, therefore, led to a responsabilization of all actors. This is a positive evolution for Member States’ governments, public broadcasters, the private sector and citizens. Furthermore, the observed process of European State aid interference and responsabilization has left enough margins for subsidiarity. In other words, Member States retain the power to regulate their public broadcasters, while the European Commission follows up on its duty to check for compliance with the State aid rules. It is thus up to Member States to financially, legally and politically support a future-proof public service media project. Claims that the European Commission prevents this transfer from public service broadcasting to public service media gives Member States the opportunity to walk away from their responsibilities in a new and challenging new media environment. Finally, arguing in favour of a holistic project for public broadcasting organizations, the transfer from public service broadcasting to public service media is desirable and, in addition, unavoidable. However, now that other actors like the printed press are confronted with public broadcasters’ expanding activities, considerations about the public service remit will most likely increase. Anticipation thereof, through considerations under State aid control, is not a bad thing for a future-proof fulfillment of the public service remit.

Notes

1. Karen Donders is a researcher at the Institute for European Studies (IES) and the Center for Studies on Media, Information and Telecommunication (IBBT-SMIT) (both Vrije Universiteit Brussel). She is working on a PhD concerning European State aid policy and its impact on Member States' regulation of public service broadcasting. Professor Dr. Caroline Pauwels is Director of IBBT-SMIT and teaches courses on e.g. national and European communications policies. She is member of, a.o., the Board of Directors of the Flemish public broadcaster VRT (at time of writing, June 2009).
2. The European Commission started its revision process of the 2001 Broadcasting Communication in January 2008. At the time of writing (June 2009), this revision process was not yet closed.
3. The analysis is based on desk research, document analysis of all Commission decisions and a wide range of interviews with a variety of experts in the field of State aid and public service broadcasting.
4. Although the "closely associated" principle is not technology-neutral, we stress that public broadcasters should reflect more on cross-mediality of the content they offer. In that sense, a "close association" between content on different platforms can be desirable.
5. For the moment, it remains unclear what "journalistically-editorially arranged" means. The introduction of new media offerings might, as such, clarify the remit in one way, but cloud it in novel respects.
6. The "Beheersovereenkomst" is a contract between the Flemish government and the public broadcaster in which concrete agreements are made between these two actors.
7. In its 2007 Decision on the licence fee funding of ARD and ZDF, the European Commission required Germany to develop an *ex ante* evaluation test for new media services. After criticism of private companies on the – presumably – wild and unrestrained expansion of the German public broadcasters to new markets, the European Commission felt that the introduction of a test assessing both the public value and possible market impact of new services would anticipate the private sector's frustrations and, hence, complaints (at the European level).

References

- Arino, M. (2004) 'Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps' *Communications and Strategies* 5(4): 97–126.
- Bardoel, J. & Lowe, G. F. (2007) 'From Public Service Broadcasting to Public Service Media: the Core Challenge', in G. F. Lowe and J. Bardoel (eds.) *From Public Service Broadcasting to Public Service Media*, Göteborg: Nordicom, pp. 9–28.
- BBC Trust (2007) *Public Value Test (PVT): Guidance on the Conduct of a PVT*, London: BBC Trust.
- Collins, Richard (1994) 'Unity in Diversity? The European Single Market in Broadcasting and the Audiovisual, 1982-92', *Journal of Common Market Studies* 32(1): 89–102.
- Council of Europe (1994) Resolution No.1: The Future of Public Service Broadcasting. Prague: Council of Europe.
- DCMS (2000) *BBC Public Service Approvals*, London: DCMS.
- Donders, K. & Pauwels, C. (2008) 'Does EU Policy Challenge the Digital Future of Public Service Broadcasting?' *Convergence: the International Journal of Research into New Media Technologies* 14(3): 295–311.
- EBU (2008) *EBU Reply to the Commission's Questionnaire*, http://ec.europa.eu/comm/competition/state_aid/reform/comments_broadcasting/index.html. Accessed 25 September 2008.
- European Commission (2001) Communication on the Application of the State Aid Rules to Public Service Broadcasting, *Official Journal* C 320, 15.11.2001.
- European Commission (2003) *State aid: BBC Digital Curriculum*, 1 October N37/2003.
- European Commission (2007) *State aid: Licence Fee Funding of ARD and ZDF*, 24 April, E3/2005.

- European Commission (2008a) *State aid: Public Financing of VRT*, 22 February, E8/2006.
- European Commission (2008b) *State aid: State Financing of RTE*, 22 February, E4/2005.
- Harrison, J. & Woods, L. (2007) *European Broadcasting Law and Policy*, Cambridge: Cambridge University Press.
- Humphreys, P. (1996) *Mass Media and Media Policy in Western Europe*, Manchester: Manchester University Press.
- Humphreys, P. (2007) 'The EU, Communications Liberalization and the Future of Public Service Broadcasting', *European Studies: a Journal of European Culture, History and Politics* 24: 91–112.
- Hobbelen, Hein, Harris, Victoria & Dominguez, Ignacio (2007) 'The Increasing Importance of EC SA Rules in the Communications and Media Sectors', *European Competition Law Review* 28(2): 101–115.
- Holtz-Bacha, C. (2005) 'The EU, the Member States and the Future of Public Broadcasting', *Doxa* 3: 231–237.
- Jakubowicz, K. (2007) *Public Service Broadcasting: a New Beginning, or the Beginning of the End*. London: Knowledge Politics, www.knowledgepolitics.org.uk. Accessed 23 February 2008.
- Katsirea, I. (2008) *Public Broadcasting and European Law: a Comparative Examination of Public Service Obligations in Six Member States*, New York: Wolters Kluwer International.
- Leurdijk, A. (2007) 'Public Service Media Dilemmas and Regulation in a Converging Media Landscape', in G. F. Lowe and J. Bardeol (eds.) *From Public Service Broadcasting to Public Service Media*, Göteborg: Nordicom, pp. 71–86.
- Michalis, M. (2007) *Governing European Communications. From Unification to Coordination*, Lamham: Lexington Books.
- Moe, Halvard (2008) 'Public Service Media Online? Regulating Public Broadcasters' Internet Services: a Comparative Analysis' *Television and New Media* 9(3): 220–239.
- Palzer, C. (2007) 'Germany', in S. Nikoltchev (ed.) *The Public Service Broadcasting Culture*, Strassbourg: the European Audiovisual Observatory, pp. 39–48.
- Papathanassopoulos, S. (2002) *European Television in the Digital Age: Issues, Dynamics and Realities*, Cambridge: Polity Press.
- Schultz, W., Held, T. & Dreyer, S. (2008) 'Regulation of Broadcasting and Internet Services in Germany: a Brief Overview' Working Paper Series Hans-Bredow-Institut (13).
- State Media Authorities (2007) Interstate Treaty on Broadcasting and Telemedia (unofficial translation).
- Steemers, J. (2003) 'Public Service Broadcasting Is Not Dead Yet: Strategies in the 21st Century', in G.F. Lowe and T. Hujanen (eds) *Broadcasting and Convergence: New Articulations of the Public Service remit*, Göteborg: Nordicom, pp. 123–136.
- Suter, T. (2008) 'Setting Public Goals, Defining Public Value, Securing Public Support – the Challenge for European PSBs', Presentation at the French Presidency's Conference on 'Public Service Media in the Digital Age', Strassbourg, 18 July 2008.
- Thomass, B. (2008) 'The Debate about ARD Mediathek and ZDF Mediathek and the Public Value Test', Paper presented at the IAMCR Conference, Stockholm, 20–25 July 2008.
- Ward, D. (2004) *The European Union Democratic Deficit and the Public Sphere: An Evaluation of EU Media Policy*, Amsterdam: IOS Press.

Chapter 8

Tools for Democracy or for Surveillance?

Reflections on the Rule of Law on the Internet

Helge Rønning

Censorship can no longer be 100 per cent effective, but even if it is only 20 per cent effective we should still not stop censoring ... We cannot screen every bit of information that comes down the information highway...

The above quote points to a critical area of challenges to freedom of expression internationally. Freedom of speech implies the liberty to express opinions and ideas without hindrance, and especially without fear of punishment. It is obvious that these principles also must apply to the communication systems of all sorts, and also, therefore, to the Internet. These fundamentals are technology neutral. Despite the constitutional guarantees of free speech in many of the world's legal systems, even the most democratic of societies have never treated freedom of speech as an absolute. The liberal tradition has generally defended freedom of the sort of speech that does not violate others' rights or lead to predictable and avoidable harm, but it has been fierce in that defence because a free interchange of ideas is seen as an essential ingredient of democracy, but there have to be some limits. Incitements to illegality in the form of, for example, sexual abuse of children, sedition, murder, libel and defamation are obvious restrictions.

The Internet community and defenders of the freedom of expression fight to hold onto the freedom of speech on the Net, and to extend its use as a democratic and free medium. They come up against attempts at censorship and control by states, corporate interests, political groups, and other kind of organizations – among others, religious. The Internet contains all forms of content. The objectives of the censorship attempts are to control not only the content but also the possibilities the Net has as a free and democratic area for communication.

These prospects are, to a large degree, due to the fact that the Internet ideally provides, simultaneously, a participatory interface and a two-way flow of information between many different users. It is a medium that creates virtual spaces where communities without borders from around the world can enter into communication with each other. This makes the Net particularly suited to

serve global as well as new, local social movements. Now, I do not think that any technology constitutes a totally independent logic in itself; it is linked to political and social contexts, and its development must be discussed in relation to political choices. So, also, the Net.

On the other hand it has also become clear that the Internet has qualities that make it a very advanced tool for surveillance and must be seen in relation to the increasing number of legal provisions and technical systems of surveillance and interception of communications now being introduced. One example of this is the Swedish law, passed 18 June 2008, on the surveillance of communication, which provides that the Swedish Armed Forces can monitor all electronic communications that pass through Sweden, even when they originate outside the country's borders. Furthermore it seems that the number of countries that apply restrictions on the Net is increasing, and is not limited just to countries that one would usually associate with restricting freedom of expression. Particularly in relation to anti-terrorist laws, morality issues and religious questions, filtering of the Net increases steadily.²

How to censor and resist

There are many ways of censoring and controlling the Net. According to the organization OpenNet Initiative (opennet.net), which is dedicated to revealing and documenting examples of Internet censorship, filtering mainly takes the following forms: technical blocking, which involves techniques that are used to prevent access to specific WebPages, domains, or IP addresses, frequently used where direct jurisdiction or control over websites are beyond the reach of authorities; removing search results where companies that provide Internet search services cooperate with governments to omit what they regard as illegal or undesirable websites from search results; and, particularly sinister, attempts in several countries, including Australia, to force ISPs to prevent the dissemination of offensive content with the help of blocking technologies and to monitor online material. Such efforts do not only stifle freedom of expression, but it also implies that private companies – the IPSs – come to function as censors.³ States may block Internet access to the whole country. State-directed implementation of national content filtering schemes and blocking technologies may be carried out in such a way that it affects Internet access throughout an entire country. This is often carried out at the international gateway. Regimes that want to block access to certain types of content rely on software providers with automated content identification methods.

But, as an article from *The Economist* in 2006 pointed out

... censors have an effective countermeasure. Once they identify a proxy, they can block access to it, just as they block access to other sites. The difficult part is finding the proxies, but the software used by censors, called censorware, is getting better at it. China's censors are leading the way. The

estimated 30,000 government censors behind the world's most elaborate censorship programme – known as the Great Firewall of China by detractors, and as the Golden Shield by the Communist Party – work hard to hunt down proxies and prevent them from relaying data into the country. (*The Economist* 2006)

There is a constant struggle over freedom and censorship on the Internet. One important element in this struggle is the use of so-called “circumventors” which are a form of proxy servers that takes a site that is blocked and “circumvents” it through to an unblocked web site, thus allowing the user to view blocked pages. Such servers contribute to giving people who live under undemocratic regimes access to banned information. This means that no set of Internet censorship is absolutely perfect. Activists seek to break the blocking mechanisms and come up with alternatives all the time. One example is the way that “Yemen Portal” has campaigned to allow free access to information in Yemen by launching “Free Yemen Portal”, which displays the content of all the websites banned in Yemen (Al-Saqaf 2009). This illustrates how it is possible, at least for a time, to find restricted information on uncensored URLs or proxies. When you know what you are doing, it is possible to avoid filtering mechanisms. Most Internet users, however, do not have such skills, and, where the Net is strictly surveyed, particularly in public places such as Internet cafés, many do not dare take the chance. Thus, even inefficient attempts at censorship may work by installing fear and social and political self-control. An example of the problems associated with this configuration is an event that occurred in Finland in February 2008 when a Finnish freedom-of-speech activist was placed on a government blacklist for revealing which Web sites Finnish Internet providers blocked, based on a list compiled by the government (McCullagh 2008).

Those who fight censorship develop new ways and technologies to evade the censor who, in turn, counters their attempts with new forms of censorware. This ongoing battle is however, more than an issue over technology. It has to do with what role the Internet is to play in the future of free communications and, as such, is a replay of the struggle that took place centuries ago, when books were smuggled from liberal countries into absolutist states.

The states that censor and filter the Net for political content in areas such as human rights, freedom of expression and opinion, minority rights and religion are mainly situated in the Middle East, Asia and North Africa; countries like China, Iran and Tunisia, which are heavily censored, and Saudi Arabia, Ethiopia, Libya that have extensive filtering, and states like Russia, India and Arabic states that have some restrictions. The control with social networks and content (sex, drugs, games, etc) is, however, much more widespread and encompasses many so-called democratic countries (Zittrain & Palfrey 2008). While there may be no objection to the blocking of child pornography, issues such as imagery related to Nazism and Holocaust denial is more problematic and, more sensitive, of course, is surveillance of private messages on social networks, and possible interception of all forms of Internet traffic related to antiterrorist measures. It

appears that filtering takes place in an increasing number of countries, and that techniques for doing so become steadily more advanced. While filtering regimes may be understood in relation to the political, legal, religious, and social context from which they originate, that cannot serve as an excuse for accepting them. In some countries intervention in social media implies outright censorship. In February 2008 a Pakistani block on YouTube caused an international outage for the website. Iran blocked all social networks – Facebook, YouTube, Twitter, SMS on cell-phones – in connection with the demonstrations following the presidential elections in 2009.⁴

Who controls what?

One of the greatest problems regarding control of access to the Net is that this is often in the hands of private corporations not subject to the standards of review common in government mandates. When this, as a consequence, means that Internet censorship takes place at institutions such as schools, libraries, Internet cafés, as well as on individual computers within such institutions, it makes it almost impossible to challenge the practice through courts of law because control rests with private companies rather than public bodies. The main problem, however, with all these techniques, from the perspective of the debate about the principle of the freedom of expression, is that they involve direct censorship: they take place *before* the material has been accessed, which is against the principles of freedom of expression in all democratic countries.

The danger to the principle of freedom of expression is greatest when the corporations that produce content-filtering technology work alongside undemocratic regimes in order to set-up nationwide content-filtering schemes. This means that there is no legal means to control and discover in what ways the Net is being censored. Governments of developing nations often rely on other countries and multinational companies to supply them with the necessary technologies of surveillance and control. China cooperates with several African countries, and big multinationals such as Microsoft and Yahoo and Google have cooperated with Chinese and other authoritarian Asian states in their censorship efforts.

The international transfer of surveillance technology is becoming a profitable sideline of ICT activities, in addition to being a *sine qua non* for non-democratic regimes to impose the current levels of control over Internet activity. On the one hand, the multinational corporate censors have the same agendas as the governments whom they service but, on the other hand, they also have agendas of their own. "It is arguable that in the first decade of the 21st century, corporations will rival governments in threatening Internet freedoms."⁵ The reason for the willingness to cooperate with authoritarian regimes and particularly China is obvious. China is already a very important market for online companies, and many predict that it will grow in importance over the next few years,

and the multinationals will also be up against competition from homegrown Chinese companies that do not have to answer to the criticism about serving the interests of an authoritarian system. One such company is Google's main competitor in China, the search machine business Baidu.

The big multinational Internet companies are, of course, aware of the challenges and criticisms with which they are faced, and they have responded. However, their answers are often provided in terms that suit the authoritarian regimes they cooperate with. The basic response is to refer to legal provisions and local laws, regardless of whether these and the way they are practised are in keeping with international standard of human rights and freedom of expression and information. Thus Microsoft, in an online document, "Microsoft on the Topic: Online Freedom of Expression", states:

Microsoft is deeply concerned about issues of individual privacy, personal security, and government control of Internet content. As one example of this concern, Microsoft has adopted an internal policy to guide its responses to government demands that it restrict content published by using our Windows Live™ Spaces blogging software and service. This policy applies worldwide and is intended to promote three principles:

- **Explicit Standards for Protecting Content Access.** Microsoft will remove access to blog content only when it receives a legally binding notice from the government indicating that the material violates local laws, or if the content violates the service's terms of use.
- **Maintaining Global Access.** Microsoft will remove access to content only in the country/region issuing the order. When blog content is blocked due to restrictions based on local laws, the rest of the world will continue to have access. This is a new capability Microsoft is implementing in the Windows Live Spaces infrastructure.
- **Transparent User Notification.** When local laws require the company to block access to certain content, Microsoft will ensure that users know why that content was blocked, by notifying them that access has been limited due to a government restriction.⁶

In short, Microsoft only censors when the authoritarian government asks it to do so.

In January 2010, Google decided to break out of its voluntary self-censorship agreement with the Chinese authorities. This was hailed as a brave stroke for free expression, and it shone a light on the way that Chinese authorities maintain a steady control with all forms of communication. However, it must also be borne in mind that Google reacted only after it was clear that it had been the victim of a very sophisticated hacker's attack, which probably originated with forces close the authorities that otherwise censor the Net in China. At the time of the Google-China crisis the company's business in China was relatively small. Estimates put Google's China revenue in 2009 at about \$300 million, not much compared to the company's \$22 billion in global sales (Helft 2010).

It has also been pointed out that Google's challenge to the Chinese authorities might be regarded as a smart way of gaining credibility in a period where the company was under attack from several sides for its different projects and practices: disregarding the rights of authors in relation to its scanning of books, with the purpose of creating an immense digital library and bookstore; Google Street View, criticized for invasion of privacy; and the way that data related to its Gmail service may have been used for sales purposes.

The particular criticism of Google and other companies for their privacy practices and the way that they use the profiles of its users for marketing purposes indicates a serious problem over privacy. The more you let companies like Facebook, Google, Ebay and Amazon know about you and your preferences the more information about yourself you relinquish to the treasure-chest of the Internet traders: think about the regular suggestions of other books of interest received by those who have bought books on Amazon. While information collected in this manner is potentially very valuable as a business and marketing tool, it is also knowledge that may be used to survey political and social activities of citizens. Thus we are faced with a situation where personal data is being controlled big multinational corporations, which are under no form of democratic control and which, furthermore, might decide to make use of them in a manner that is not in the interest of all the individuals around the world whose profiles they have access to.

The Problem with Blogging

The questions of freedom of expression on the Internet and the issue of libel and defamation come together as an issue about who is responsible for what is published on the Net. In relation to blogging, for instance, it is often difficult to identify who is really the author, editor and publisher of often anonymous and pseudonymous utterances. The question is, however, if this provides a good enough reason to control and censor what is published on blogs and other sites on the web. Here we encounter one of the principle issues in all discussions concerning freedom of expression: the relationship between freedom and responsibility.

All discussions of freedom of expression in some way or other deal with what limits should exist, and where these limits are to be drawn. Now, I am in favour of broad limits, but this presupposes that it is possible to identify those responsible for the publication of the utterances. This is very tricky. On the one hand, bloggers, unlike professional journalists, do not seem to have the right to protect their sources anywhere in the world. On the other hand, blogging can work as a kind of masked ball, where you can utter anything by hiding behind a pseudonym, or by remaining anonymous. You can libel and defame, you can express despicable opinions, racist sentiments, etc. And, at least in the US, those who are offended cannot get back at the bloggers because, by "... an act of Congress, Web site administrators aren't liable for what's written

on their sites. And erasing anything on the Web is almost impossible” (Boxer 2008). This, however, draws attention to the kind of legal uncertainty that exists in cyberspace, which also involves how the development of the Net expands the divide between those who wish to use the web to disseminate information and opinions, even when, strictly speaking, it goes against the law, and those who want to control it – be it governments or lawmakers. This situation leads to a discussion of what it implies to keep the Net as a tool for free expression while its use is maintained within the parameters of a wide interpretation of freedom of expression that does not bring unacceptable and demonstrable harm to others.

One of the trickiest aspects of blogging, and causing harm to others, is the phenomenon of “Internet Shaming”, where people increasingly use the Net to publish details about people they either have reason to resent or they just want to shame and pursue for personal and other reasons. This trend is deeply related to the way that activities on the Net dissolve the boundary between what is private and what is public and thus may imply a serious invasion of privacy, as well as a new form of surveillance. The surveyor or the censor is no longer up there as part of an authoritarian state machinery, or part of a private marketing company or search machinery. He/she is one of us, and can denounce you, keep tags on you through the use of the Net and mobile telephony. What we may see is the development of a new and anonymous Internet-mob that resorts to self-justice and thus constitutes a retreat to a pre-democratic situation and goes against accepted norms of justice (Oehmke 2008). Online democracy is a precarious proposition and must be reconciled with the many misuses of the new medium, including the successes enjoyed by terrorists and hate-groups while operating within the new medium.

The challenge of copyright

One of trickiest and most controversial issues of the development of Internet communication has to do with how to protect the interests of authors and publishers of all kinds: copyright (in the continental European tradition, authors’ rights, in German *Urheberrechte*). There is a balance in relation to copyright between the rights, on the one hand, of the creators and publishers and particularly the authors to protect them against those who would steal the fruits of their efforts and investments and, on the other, the rights of the users to utilize the results that creators have made available in the areas of knowledge and art. It is this precarious balance that is now at stake on the Internet through the widespread culture of free access to all forms of copyright-protected material – both legally, semi-legally and blatantly illegally in the form of Internet piracy. It is interesting that the illegal practice of stealing is now being hailed in many quarters as a form of resisting censorship and protecting freedom of information. Linked to this attitude are less aggressive arguments that copyright law has moved too far in the direction of protecting big cultural industrial complexes.

On the other hand, there are many that argue that, without proper copyright protection, what would really suffer would be the interests of creators and creative industries as well as the public's access to the goods resulting from such creation. To protect copyright is thus seen as a way of fostering development by protecting the interests of authors as well as publishers at the same time as the public benefits. The potential conflict between public interest on the one hand and the interests of the copyright-holders on the other has been intensified by new digital technologies, which have increased the potential gains that either copyright owners or consumers might realize from exercising control over subsequent uses of legally-acquired copyrighted works in digital form. Any attempt to resolve digital copyright conflicts may be caught between the copyright owners' wish to maintain control over their intellectual property and the ethics and expectations of consumers who have become accustomed to making relatively free use of creative works in digital form.

The ease of replication and redistribution of creative works in digital form facilitates the instantaneous, global availability of copyright-infringing works. Consequently, the effectiveness of any nation's efforts to protect the rights of its copyright owners depends increasingly on international coordination of enforcement efforts and the harmonization of copyright law across countries. Copyright infringement and enforcement has thus become an issue both at the individual level and in the international arena. It is necessary to find ways of using the new technology to the benefit of both rights-holders and the public.

Considerations such as these illustrate the complexities involved in analysing the issue of copyright from a social, legal and economic perspective, and why it is important to see it from the perspective of both national and international considerations. National boundaries are too narrow to provide adequate protection for intellectual capital and this is particularly linked to the growth in importance of new global digital communications systems, with the global market for digital knowledge-based products. Copyright safeguards the interest of rights-holders in the global Internet economy and serves as a precondition for the operation of intellectual capital. To protect authors' rights and publishers' rights (i.e. copyright) also implies protecting a free and open public discourse. To undermine 'copyright' implies the undermining of the means for free expression in advanced as well as developing countries.

The net as communicative space regulated by the rule of law

The prohibition of all forms of prior censorship is the basis for all legislation concerning freedom of expression. Citizens have the right to make their own decisions concerning what information and messages they wish to communicate to others. All reactions to possible infringements must come a posteriori, after the expression has been uttered, and only through court procedures, never as administrative measures. The principle of subsequent accountability

is a fundamental one, and must be kept separate from where the boundaries to the right to freedom of expression are to be drawn. The debate over where the boundaries should be drawn must take place in full openness. The declaration that an utterance is unlawful must be made known so that the citizens themselves are informed about the reasons for the declaration and will thus be able to form their opinion about the issue.

However, there are dilemmas when it comes to the development of the Net. As with all forms of communication, there is a need for some sort of regulation. There are limits to the so-called freedom of the net, as to all forms of expression. The question is about how regulation is to be exercised. There must be some sort of order which, for instance, can control clearly-illegal activities such as those associated with child-pornography and direct and concrete incitement to murder. There must be both ethical and legal limits to what it is possible to disseminate through the Internet. The Net cannot develop into a space that is unrelated to any form of legal, regulated and ethical codes. There are laws that have to be obeyed off-line as well as on-line.

On the one hand there are those who resist all forms of control and regard all attempts to establish Net-regulation as an attempt at censorship. At the other extreme are authoritarian forces that fear the Net because it is an opening for information and debate that threaten authoritarian regimes, as well as forces that are eager to control citizens' activities even in democratic countries. There is, however, a middle ground that, on one hand, opposes censorship, but acknowledges that, as in other social contexts, there must be rules and laws that regulate social behaviour and communication through democratically-established measures. Human dignity and the rights of citizens to privacy, the right be protected against attacks both from sinister control-freaks and from mobbing by bloggers who do not respect the right of individuals to be left alone, all must be considered. The challenge is not about establishing the forms of blocking mechanism and barriers to the free flow of information it is how to also create an international system based on rule of law for the Net. According to Lawrence Lessig, quoted by *Der Spiegel*, to leave Cyberspace to itself will not fulfil the promise of freedom.⁷

Notes

1. Statement by the then Singapore Minister of Information as quoted by Frank Fisher in Fisher, Frank (1998) "The Ratings Game" in *Index on Censorship* 2. 1998.
2. For an overview see among others: <http://www.efa.org.au/Issues/Censor/cens3.html> (accessed 05.10.08)
3. See: <http://www.efa.org.au/Issues/Censor/cens1.html> (accessed 05.10.08)
4. "freiheit@unendlich.welt" *Der Spiegel*. No. 33/10.8.09. p.73. And "Blocked YouTube" http://www.economist.com/daily/chartgallery/displaystory.cfm?story_id=E1_TDSVQJRR&source=login_payBarrier (accessed 03.02.10)
5. see: http://www.privacyinternational.org/survey/censorship/_index.html (accessed 8.02.10)
6. <http://search.microsoft.com/results.aspx?mkt=en-US&setlang=en-US&q=Freedom+of+expression> (accessed 05.10.08)
7. "freiheit@unendlich.welt" *Der Spiegel*. Nr.33/10.8.09. p. 72.

References

- Al-Saqaf, W. (2009) "Internet – A Challenge to Arab Regimes' Control of Information", in A. Kierulf & H. Rønning (eds) *Freedom of Speech Abridged. Cultural, Legal and Philosophical Challenges*, Gothenburg: Nordicom.
- Boxer, S. (2008) "Blogs", *New York Review of Books*. Vol. 55. Number 2. February 14. *The Economist* (2006) "Cat and Mouse, on the Web", Nov 30th 2006
- Fisher, F. (1998) "The Ratings Game", *Index on Censorship* 2.
- Helft, M. (2010) "For Google, a Threat to China with Little Revenue at Stake", *New York Times*, 15 January, <http://www.nytimes.com/2010/01/15/world/asia/15google.html?emc=eta1>. Accessed 2 February 2010.
- Kierulf, A. & Rønning, H. (eds) (2009) *Freedom of Speech Abridged. Cultural, Legal and Philosophical Challenges*, Gothenburg: Nordicom.
- McCullagh, Declan (2008) "Finnish Government Blacklists 'Free Speech' Site", February 18, http://news.cnet.com/8301-13578_3-9874155-38.html?part=rss&tag=feed&subj=TheIconoclast, Accessed 7 February 2010
- Oehmke, P. (2008) "Big Brother im Netz", *Der Spiegel* No. 31. 28.07.08
- Zittrain, J. & Palfrey, J. (2008) "Introduction", in R. Deibert, J. Palfrey, R. Rohozinski & Jonathan Zittrain (eds) *Access Denied. The Practice and Policy of Global Internet Filtering*, Cambridge. Mass: MIT Press.

Legal Globalization and the Public Sphere

Sandra Braman

Three types of processes must map onto each other contiguously for a public sphere to effectively come into being: the social processes that constitute a politically effective polity, the legal processes of a jurisdictional entity with efficacy, and public communicative processes that are meaningfully articulated with the other two. Historically, it was assumed that all of these processes were contained within the boundaries of geopolitically recognized states; as thus idealized, television played an important role as a venue for public discourse about shared matters of public concern. These notions were central to ideas about media-democracy relations under modern conditions.

By the 1990s, however, transnationalization of the communication infrastructure and flows of content lead many – including Habermas (2001) himself – to consider the possibilities and limits of a global public sphere. While some commentators who highlight the role of television are enthusiastic about the possibility that global communications among those who seek political and economic change can have an impact (see, e.g., DeLuca & Peeples 2002), others are less sanguine (Hafez 2007; Sparks 1998). Sceptics do not doubt that television has become transnationalized, but do challenge the assumption that globalization of the medium necessarily translates into globalization of actual content about political affairs. Both enthusiasts and critics of the notion of a global public sphere restrict themselves to only two of the three types of pertinent processes, failing to attend to the legal dimensions of such importance to the translation of discourse into political realities. Today the boundaries of the polity, the geography of the law, and the communicative spaces of television as a public sphere are no longer contiguous; rather, their relationships are best described as *interpenetrated globalization* (Braman 1996). The state remains, but the law itself is no longer uniquely tied to individual states. Here the processes of legal globalization are mined for their implications for television and the public sphere and, further, theories of relations between media and power under contemporary conditions.

The interactions, of course, are not one-way. Communication networks have long provoked the development of new forms of transnational governance.

Famously, this includes stimulating the formation of the first international organization (the ITU, to regulate the telegraph, in the 1860s). More recently, it was a communication network that triggered the creation of the first global organization with regulatory-like powers (ICANN, to manage the Internet, in the 1990s). The literature on international and comparative media law and policy¹ is well developed, but the difference between international and global organizations is significant: the first involves geopolitically recognized states, while the second also includes civil society entities such as non-governmental organizations (NGOs) and corporations in decision-making. The effective appearance of non-state actors in law-making and -implementation marks a dramatic turn in relations among states, societies, and legal systems that highlights the need to globalize, as well as internationalize, media law and policy.

Legal globalization includes the formation of global institutions, but goes much further. The modes of policy transfer and coordination through which the legal dimension of globalization is accomplished are referred to as policy convergence (Jordan 2005); harmonization is the outcome of such processes when they result in conformance of the laws of multiple states with each other. Legal globalization reaches the very foundations of jurisprudence, the principles and arguments upon which law-making and -interpretation are based (Twining 2000). As a consequence, the opening of the twenty-first century is considered equivalent in historical importance to the period during which the international system of geopolitically recognized states first formed several hundred years ago (Kirby 2006). Since differences in jurisprudence both manifest and justify differences in the ways that democracy is theorized and implemented (Edelman 2005), these developments provide fundaments of the context of any efforts to create, participate in, or act on the basis of a public sphere.

Unfortunately, those who work with media law and policy have not yet caught up with these developments. This is not for lack of awareness of the importance of the transnational realm. Harms argued as early as 1980 that communication policy should always be thought of in global terms, mainstream authors such as Mowlana (1996) called for a turn from international to global communication by the mid-1990s, and by the close of that decade, doing so had become so common that it could be referred to as a cliché (Cunningham, et al. 1998). However, this insight has not yet widely infiltrated the study of media law and policy beyond the work of those doing research on ICANN (see, notably, Mueller 1999). Credit must go, therefore, to the few existing exemplars, such as research on the use of public diplomacy to align media policies of transition societies with those of other nations (Price & Thompson 2002), policy convergence efforts that appear in government commitments to the use of communication in health campaigns (R. Smith, et al. 2004; Taylor 2004), antitrust law as applied to media and telecommunication oligopolies (Donovan 2006), and treatment of consumer fraud (Rabkin 2007).

The relative paucity of analysis is problematic because globalizing media law and policy is of constitutional significance, for all communication issues

are of constitutional status (Tribe 1985). Uncertainty regarding jurisdiction can leave crucial constitutional values to self-regulation (Dommering 2006). Arguments for shifting the constitutional act to the international level support moving even further away from society-oriented principles (see, e.g., Petersmann 1991). The threat to freedom of expression and related civil liberties is thus of intense concern. Pool (1983) long ago warned that, as diverse legal systems dealing with communication converge in response to technological change, it was likely that the most restrictive of available models would come to dominate. Competition, it turns out – rather than freedom of speech or the public interest – is the most important explanatory variable for legal globalization, whether that competition is economic (Howard 2007; Swank 2006) or political (Murillo & Martinez-Gallardo 2007). If Sassen (2003) is correct that we are currently only in the “incipient” phase of legal globalization, achieving a better understanding of how these processes unfold is critical.

We can examine legal globalization as it appears in the *government* (formal institutions of the law), *governance* (decision-making with structural effect whether it takes place within the public or private sectors, and formally or informally), and *governmentality* (cultural predispositions and practices that enable and sustain governance and government) (Braman 2007). International law and policy is now a subset of global media law and policy, and comparative research is critical for understanding the processes by which globalization of the law takes place. Because research on international and global organizations, regional integration, and multilateral treaties is relatively well represented in the media policy literature, the focus here is on other types of processes by which the law is becoming globalized. Many of these are relatively new, while others simply become more visible when the analytical lens is widened.² We begin by looking at the concept of policy convergence itself.

The processes of policy convergence

Legal theory has historically been bound tightly to specific states (Mattei 1998; Street, 2003), so it should not be surprising that most research on and theorization of globalization has taken place in fields other than the law (Berman 2005b). The notion of an “international plane” of law, however, first appeared in 1911 (Charnovitz 2003), appreciation of the importance of trans-governmental relations through informal and non-governmental processes was evident by the mid-1970s (Keohane & Nye 1977), and by the late 1980s the concept of internationalization had become a “codeword” for modern legal development (Blume 1989: 12). Today it is not possible to fully understand cross-border developments solely within the bounds of international law. Legal scholars are now interested in non-state actors, citizenship, and state actions that take place beyond their geopolitical borders. Through the early years of the twenty-first century, much of this literature has been dominated by thinkers from the US, just as a great deal of harmonization of the legal field also involved its

“Americanization” (Dezalay & Garth 1996), but this situation may change and perceptions that current legal innovations have their origination in American practices aren’t always accurate (Schick 2006).

The linkage between jurisprudence and specific states can be seen as a strength in the sense that new legal theories, practices, and institutions always accompany changes in political form (Mattei 1998). The very phrase “international law” was coined by Jeremy Bentham in 1789 at a time when the “law of nations” had to cope with the appearance of new states, and new types of states. The use of political theory (Charnovitz 2003) and history (Najjar 1998) to analyse globalization of the law significantly enriches analytical opportunities. Previous waves of legal globalization included the spread of Roman law across Europe and the diffusion of European legal models during the colonial era (Kelemen & Sibbitt 2004). Indeed, the purportedly “stable” system of sovereignty and territoriality that globalization is said to challenge may never have actually existed (Berman 2005b).

Many key moments in the history of internationalization and globalization of the law involved the media. Experience with the telegraph convinced European governments that their regulatory interests differed from those of private parties (Pircher 1987). Negotiations over the World War I peace treaty introduced a role for journalists in peace-making and transparency and the free flow of information as international policy principles (Blanchard 1986). World War II brought new transatlantic partnerships in matters involving global communication (Headrick 1990), and that war’s atrocities catalysed development of international human rights laws that include protections for speech-related civil liberties (Dennis 2006). Satellites required global coordination and, by introducing “open skies” as another policy principle, significantly raised the relative salience of information policy issues (Oettinger 1980). Communication-based collaboration within the peace movement across state borders in the 1980s (Faber 1982) launched the current round of growth of international non-governmental organizations (INGOs). The Helsinki Final Act for the Commission on Security and Cooperation in Europe (CSCE) placed human rights and civil liberties on a par with other principles of international law for the first time (Nordenstreng & Kleinwachter 1991). The European Commission has stimulated harmonization processes in a wide range of issue areas that affect the media and/or generate a climate in which communication policy may be “hauled”³ into harmonization, including finance (Warren 1990), culture (A. Smith 1990), research and technological innovation (Petrella 1996), and policing (Occhipinti 2003).

The Internet is of course a premiere generator of both jurisdictional tensions and regulatory experiments (Bellia, Berman & Post 2007; Berman 2005a; Froomkin 1997; Zittrain 2005). The policy convergence effected by the need to cope with the Internet is likely to transform national legal systems more deeply than has ever been accomplished by traditional international or transnational law (Hughes 2003). Evidence of this convergence includes interplay among courts in diverse jurisdictions dealing with copyright (Cho 2007; Okediji 2000;

Proulx 2005) and harmonization of laws dealing with libel (Yanchukova 2003), e-commerce (Gaskin 1999), and cybercrime (Downing 2005).

Trends within specific issues, technological change, the evolution of organizational and political forms, and content-based factors all contribute to legal globalization (Bennett 1991b; Simmons, Dobbin & Garrett, 2006). Numerous typologies of policy convergence processes have been offered. Randeira (2007) offers a fourfold breakdown based on the locus of initiation: the simultaneous operation of multiple international or supranational norms operating only beyond the level of the state; changes in national laws; the impact of alternative “people’s policies” with a national or supranational character; and project law (rules, obligations, and procedures generated by international organizations and donor agencies). Berman (2005b) distinguishes among categories according to the type of actors involved: transnationalization of the legal process itself; involvement of non-traditional legal actors in traditional legal processes and the transnationalization of international norms by classical legal actors such as judges. Busch and Jorgens (2005) offer a typology based on mode of operation, principal motivations of policy-makers, and the degrees of freedom with which national-level policy-makers can influence the content and autonomously decide on the adoption of a policy: cooperative harmonization; coercive imposition; and interdependent but uncoordinated diffusion. Others include domination, elite networking, penetration, and institutional isomorphism in their analyses. Since convergence processes evolve, in most cases separate mechanisms will play roles at different times. Issue-oriented analyses of policy convergence processes unfortunately often confuse different types of regulation and modes of policy diffusion (Dommering 2006).

Even when causal factors are present and there are deliberate efforts to promote harmonization, legal globalization does not always occur (Busch & Jorgens 2005). Ideas travel more easily than do policy tools (Radaelli 2005). Things may look alike on paper but not be so in practice. Types of bureaucracy, government capacity to handle conflict, the nature of policy processes, and actors’ preferences can all have an influence. Dynamic relations among transnational corporations, non-market entities, and the actions of states can yield a range of possibilities for resolving particular global policy issues locally, as research has found both in the developing world (Jasanoff & Martello 2004) and in the more developed societies of the North and West (Piven 2001). And efforts at global governance may simply fail (Van den Bossche & Alexovicova 2005).

Government-based legal globalization

Globalization of media law and policy is a matter of *government* when it takes place through the practices, programmes, institutions, and decision-making procedures of geopolitically recognized entities. This occurs in the course of foreign policy, judicial thinking, and transformations of the form of the state itself.

Foreign policy

Hegemonic states extend their influence through the diffusion (Kelemen & Sibbitt 2004) or imposition (Bartholomew 2006) of elements of their legal systems. Foreign policy-makers are welcoming when they seek to avoid uncertainty (O’Heffernan 1991) or internationalize markets (Dyson 1986). Often governments make decisions and institute programmes that are *de facto* media law and policy in pursuit of foreign policy goals (Blanchard 1986; Winseck & Pike 2007). Arms control treaties, for example, include numerous provisions that affect the media (Braman 1991).

In the face of judicial, legislative, or popular resistance to such activities, this may be accomplished by executive fiat (Biegel 2001). Early twenty-first century struggles over expanding executive power within the United States include a growing literature analysing presidential options regarding extraterritorial applications of US law from this perspective (see, e.g., Effron 2003; Posner & Sunstein 2007). Intergovernmental collaborations among lawmakers can also accomplish this goal. Deliberate efforts of this type are multiplying; the International Network on Cultural Policy, for example, involves ministers of culture from around the world who discuss trade issues that have an impact on culture together to collaboratively develop policy concepts and tools (Magder 2004).

The judiciary

The constitutional status of media policy makes the role of the judiciary as a globalizing force particularly important. US court decisions have been used to justify extraterritorial extensions of the law since at least the close of the nineteenth century (Burnett 2005). Legal foundations for doing so have been located even earlier (Schoen, Falchek, & Hogan 2005; Teitel 2005), going as far back as foundational documents like constitutions (Sepper 2006).

The judiciary contributes to legal globalization through logistical, communicative, evidentiary, and theoretical means. Beginning in the 1980s, face-to-face meetings among those responsible for jurisprudence from different countries have helped develop an epistemic community in support of legal globalization (Berman 2005a). Judges stimulate globalization of the law when they try to reduce tensions between the US and foreign sovereigns (Posner & Sunstein 2007), interpret US statutes so that they apply extraterritorially (Keithley 2005), and resolve conflicts between statutes and international treaties (Effron 2003). Courts increasingly cite foreign court precedents (Baker 2006; Benvenuto 2006) and use evidence from foreign jurisdictions (Bennett 1991a). National courts at times rely upon international customary law to support state-level decisions, and international courts treat national court decisions as evidence of state-level custom and practice (Moremen 2006).

Theoretical responses by the judiciary to globalization involve reconceptualizing the actors and processes that are the subject of litigation (Sachs 2006)

and development of new normative frameworks (Schmitt 1999). The US Alien Torts Act of 1789 has been revived, for example, to analyse human rights cases in which foreign governments are defendants and corporate cases in which the disputed activities took place in countries other than those of the court involved (Schoen, Falchek & Hogan 2005; Teitel, 2005).

State form

There is wide and deep variance in state form, even across democracies of the developed world (Alber 2006; Greenfeld 1992; Michaels & Jansen 2006; Silberman 1993), and the range of types of states is either growing (Hill 1991) or, more plausibly, now being recognized. The result, as with the multiplication of the number of international laws and law-making institutions (Seastrum & Getlan 2001), is exacerbation of venue shopping choices and jurisdictional dilemmas. Existing states can also find their legal systems challenged and ultimately transformed as a result of migration (Taki 2005), expansion of the population in borderlands (Berman 2005a), and/or diffusion of the borderland condition itself (Bauman 2002).

New types of states produce legal innovations that contribute to legal globalization. “Responsible port states” are understood to have mandatory extra-territorial responsibilities (Molennar 2007). The “preventive state,” based on a constitutional model that is paternalistically focused on non-political security threats, creates a detention regime with media dimensions (Sajo 2006). And the “cunning” state deliberately manipulates responses to demands from the international community and models of approaches to the law in order to serve domestic goals (Randeira 2007).

Governance-based legal globalization

Globalization of media law and policy is a matter of *governance* when it takes place through the formal and informal practices, programmes, institutions, and decision-making procedures of both public and private sector entities. Such trends are of rising importance because of shifts in relations among states, the law, international organizations, and civil society. Research in this area focuses on the multiple formations of transnational civil society, private law and legal services, and the architecture of technologies and technological systems.

Transnational civil society

Whether driven by transnational political activity (Turner 1992), the exigencies of the European Union (Cox 1999), claims that the concept of citizenship has been incompletely theorized (Sunstein 1996), or appreciation of the impact of international and global decision-making on individual citizens (Charnovitz 2003), today the notion of citizenship is being reconsidered both theoretically

and pragmatically. The familiar argument that states are “imagined communities”, of course, provides a rationale for taking seriously other relevant communities for political purposes (Berman 2005b). Specialized communities, such as those of organized labour and diasporic movements, provide insight into the unpredictability and diversity of developments taking place in this area.

Though much of the literature treats the involvement of civil society in international and global law and policy as if it is a recent development, here, too, there is a history. During the nineteenth century non-state actors played important roles internationally in issues such as anti-slavery, the peace movement, and Red Cross activities (Berman 2005b). Journalists and other civil society actors were actively involved in negotiations during the Paris 1919 peace talks (Blanchard 1986). During the same period, Jane Addams – an early innovator in development of civil society institutions – argued that citizens and community groups have an important role to play in international organization discussions because official delegates to meetings of such groups are not likely to know much about modern social thought and thus may otherwise have no means of understanding the importance of certain concerns. By the mid-1950s, Article 71 of the UN Charter was understood to justify the involvement of NGOs in international organizations (Charnovitz 2003).

Among those who do research on, or are involved as advocates in, global media policy-making, the focus has been on civil society as represented by issue-oriented NGOs. Twenty-first century meetings of the World Summit on the Information Society (WSIS) process provide examples of both practice and research of this type (see, e.g., Calabrese 2004; Raboy 2004). However, the greatest success in terms of a strengthened legal presence for members of civil society at the global level has been in the very different arena of investors’ rights (Van Harten 2005). For those concerned about media policy, this may be an even more important dimension of civil society activity, given the global nature of media consolidation (McChesney 1999).

Trade unions offer a particularly interesting example of global civil society efforts because of their birth in the belief that international processes of capital accumulation would force workers around the world to join together. International Framework Agreements now adapt and extend representation in a manner that parallels to some extent the strengthening of the global legal strength of the investors whose capital is at stake (Fairbrother & Hammer 2005). Migration also provides openings for legal globalization via governance. Cross-border communications and collaborations among those in diasporic communities contribute to what Karim (2006) describes as “globalization-from-below”. Such groups contribute to policy convergence when they succeed in pressuring their home states to include absent citizens within a state for legal purposes (Fitzgerald 2006) and conform to international human rights standards (Brainard & Brinkerhoff 2006). Other areas of civil society activity that contribute to legal globalization via governance include the increasingly popular practices of privately providing law and order, adoption of managerial values and principles in state administration (reversing the post-World War

II directionality), and the spread of notions of corporate social responsibility (Rus 2004).

Those who assume that strengthening civil society will improve the global situation for communicative rights and civil liberties confront at least two challenges. First, civil society groups represent all political positions from the most conservative to the most progressive, with the greatest current successes being achieved by those who are oriented around capital accumulation. Second, activity does not necessarily yield intended, or any, results. Transnational activists and advocates are often isolated from domestic social movements and find themselves unable to bridge the local and the global, undermining the ability of transnational coalitions to achieve their goals (Tarrow 2005). Theatrical or carnivalesque protests may express political frustrations, but don't often have traceable political impact (Chvasta 2006). The processes by which international and global decision-making take place so differ from those found at national and subnational levels that NGOs can find it difficult to operate effectively (Steinhardt 2005). Even when there is civil society participation in international or global meetings, it receives relatively little media coverage, in turn further limiting impact (Bennett, et al. 2004).

Private law and legal services

One of the most striking changes in law-state-society relations in recent decades has been the ever-increasing privatization of formerly public functions. (Deregulation, liberalization, forbearance from regulation, and privatization are all different regulatory and legal processes, but the common linkage of privatization with deregulation in the telecommunications and broadcasting industries from the 1980s on has caused many to inaccurately conflate these processes. All involve regulatory change, but it is privatization that shifts policy processes from government to governance.) Privatization increases the importance of the roles of private law relative to those of public law and makes it easier to use the private provision of legal and cognate services as a means of legal globalization through governance. Some believe these developments have gone so far that private entities performing sovereign functions should be offered the same immunity to which states are entitled (Wen 2003).

There are many examples involving communication. Digitization of legal databases by private entities facilitates the use of cross-national arguments, precedents, and types of evidence (Katsh 1989). Satellite communications provide an interesting terrain for examining the globalizing effects of privatization (Florini & Dehqanzada 2003; Thussu 2002) because these systems inherently have global functions even though they are put in place by and serve specific states (Gabrynowicz 2005).

Private law includes those areas of the law that are open to ordering by private parties rather than the state, a type of law-making that has been particularly important when working with digital issues for which there previously

was no law. Law firms such as Debevoise and Plimpton have had a great deal of global influence through the crafting of contractual arrangements on behalf of their private clients that then serve precedential roles for public law (see, e.g., Bruce, Cunard & Director 1986).

Globalization of the delivery of legal services was underway before the formation of the World Trade Organization (WTO) (Dezalay 1989, 1990), but the General Agreement on Tariffs in Services (GATS) administered by the WTO made it much easier for large firms based in one country to operate globally (Dezalay & Garth 1996). Software is now being written specifically to support the globalization of legal services (see, e.g., Contreras & Poblet 2005). The same developments are underway with cognate services such as accounting (Dilevko & Gottlieb 2002). Use of the same accounting systems and techniques globally has an impact on the law by providing the information architectures through which media law and economic decision-making are implemented (Braman 1993).

Technological systems

The structuration functions of computer code mean that the global architecture of the telecommunications network and of services offered through that network also serve law-like functions (see, e.g., Biegel 2001; Lessig 1999; Shah & Kesan 2003). Technical standard-setting, of course, has always been dominated by private sector decision-makers even when there is ultimately a public sign-off (Schmidt & Werle 1998). Standardization processes are so important economically that they can introduce new legal issues (Hayashi 1992).

The processes of governmentality

Globalization of media law and policy is a matter of *governmentality* when it is driven by cultural habits and predispositions that enable and sustain both governance and government. The term is Foucauldian, but other important work contributing to our understanding of culture and the law comes from the law and society movement (Sarat & Kearns 1998) as well as the anthropology of law (Moore 2001, 2005). Governmentality contributes to legal globalization in the areas of legal consciousness, cultural citizenship, and popular culture.

Legal consciousness

Law is, in Clifford Geertz's phrase, a "distinctive manner of imagining the real" (1983: 493). Legal consciousness is what people think of as natural and normal ways of doing things (Kennedy 1980); in turn, law influences how we think and relate to each other (Berman 2005b). Because we "imbibe" legal culture (Merry 2003), even non-enforceable conventions and law-like decisions of

non-governmental actors can have law-like effect. The communicative processes of the public sphere thus actively contribute to the construction of law and legality.

While promoting legal consciousness is often an explicit goal of those agencies that seek to export democracy, the direction in which transformations of legal consciousness will go cannot always be predicted. It is commonly believed that intensification of the rule of law will lead to an expanding interest in rights, but the reverse may take place. Engel (2005), for example, found that in northern Thailand the introduction of new narratives about and conceptions of injury and compensation inclined the population towards an increased reliance on Buddhist concepts that justified *refraining* from engagement with the legal system in pursuit of compensation.

Some innovative work is being done on legal consciousness and the globalization of media law and policy. Yar (2005) looks at film piracy not as a crime wave but as a product of shifts in attitudes towards intellectual property rights, and Liang (2005) understands the circulation of “non-legal” media as an aspect of the shifting nature of citizenship today. Unfortunately, many transnational issues of importance simply don’t appear in legal consciousness, such as many of those raised by satellites and, for a long time, international trade (Gabrynowicz 2005).

Cultural citizenship

Cultural citizenship involves the political implications of media-oriented dimensions of legal consciousness. Some activists and advocates are explicit, deliberate, and self-aware in their declarations of cultural citizenship, but the notion also refers to everyday activities of “ordinary people.” Global cultural citizenship shares with cultural citizenship at the national level the rights to belong to a community, offer one’s views, and express one’s preferences; the responsibilities of cultural citizenship include respecting other people’s tastes and how other people differ from oneself (Hermes 2006). The idea that rights inhere in groups as well as individuals (Delanty 2006) is of increasing importance to the media because of its operationalization in intellectual property law. Cultural citizenship also affects the public sphere when laws protecting journalists’ rights are extended to citizen media such as blogs (Deuze 2006), specific rights and responsibilities for the media are developed (Stevenson 1997), and there is encouragement to maximize shared media opportunities (Frith & Tsao 1998).

Cultural citizenship includes making popular culture one’s own (Hermes 2006; Merelman 1998). Even the popular culture content of television fills public sphere functions when it makes us feel welcome, offers a means of identifying with each other, allows us to fantasize about our hopes and fears for the social future about which policy-making is taking place, and links the domains of the public and the private. Analysis of popular discourses by which people link the local and the global can be a source of new policy concepts (Clarke &

Gaile 1997). The acts of consumption often promoted by popular culture are increasingly suffused with citizenship characteristics (Scammell 2000).

The impact on television and the public sphere

If we put together a matrix of the legal globalization processes discussed here, most of the cells would be empty of media policy research. We know next to nothing about critically important questions: How do legal developments favouring investors in transnational corporations contribute to the increase in media concentration and consequent reduction in media content diversity? How does the harmonization of practices of surveilling what people watch on television come about, and to what extent does it chill the public sphere? How does the necessity of relying upon private sector Internet service providers (ISPs) for access to content initially or previously broadcast affect relations between the polity and the state when it comes to free speech issues?

With the long history of intertwined media and political systems at the national level, the shift to a global environment necessarily introduces new theoretical issues. The Axford and Huggins (2001) collection identifies many of the elements of media policy that have been transformed as a result of globalization, including the nature of citizenship (Coleman 2001), the political audience (Huggins 2001), political leadership (Stromer-Galley & Jamieson 2001) and governance itself (Newton 2001). Chakravarty and Sarikakis (2006) frame contemporary media policy issues as global, and Katz (2005) addresses ways in which globalization of markets and the modelling of new regulatory approaches has affected media policy across states. Bertrand (2003) has reconsidered the principles and practices of media ethics for a globalized world. We have looked at the use of state-level media policy as a tool of power in the international arena (Braman 1995), and at press-state relations under conditions in which globalization has undermined the effectiveness of the state itself (Waisbord 2007).

Much, however, remains to be done. Relationships between media and political structures remain critically important but must be conceptualized in quite different ways to be adequate for understanding global rather than national processes, and to cope with governance and governmentality as well as government. While revisiting press-state relations in the twenty-first century is of value for thinking about media policy at the national level (Hallin & Mancini 2004), the question of relationships between transnational media corporations and global civil society is a different matter. Dutton (2007) took a valuable first step in thinking about the role of the media vis-à-vis power in governance and governmentality as well as government with his suggestion that the Internet serves as a "fifth estate," ensuring the accountability of both public and private parties around the world. This is useful as a concept, and also as a model for innovative thinking about what is changing in our environment. Indeed, in this period it is particularly important to visit emerging and conflicting media

policy-making processes theoretically (Braman 2004a). Media policy issues that are next to invisible from the perspective of legal consciousness need to be made more generally accessible.

Going beyond media law and policy, however, contemporary globalized conditions require revisiting theories of relations between the media and power. Conceptualizations of media-state relations remain important but are no longer sufficient in the twenty-first century environment. Effects of the globalization of media law wrench the three elements necessary for an effective public sphere apart from each other, yielding scales and boundaries that are no longer contiguous and units of analysis that are no longer analytically comparable. The constitutional locus as the source of foundational principles for the nature of the public sphere has moved away from the state. Policy-making beyond the state level is non-representative, making the notion of a polity that can be politically effective through what claim to be democratic processes irrelevant. Indeed, there is growing ambiguity regarding the definition of the polity to be served by any given policy-making process altogether. Attention has shifted from the protection of rights to issues involving system design. And points of leverage are more likely to be found in governance and governmentality than government. Thus we need to re-theorize press-governance relations. This will include rethinking the role of the public sphere in democracy in general, and the role of television as a public sphere in particular. Media-governance relations now clearly go beyond the activities of the press, and we must learn anew what it is to be politically effective in this legally globalized environment.

Walking down this path reshapes our research questions. Oligopolization of broadcasting remains a problem, but it may be more useful under contemporary political conditions to work with stockholders than it is to fight trends in regulation. Participatory governance remains a goal, but today the most fruitful activity may be that which engages governing epistemic communities. There are also pedagogical implications. Law and policy courses should not be history courses, and classes in these areas must be linked to those in international and global communication, technology, media sociology, and cultural studies.

Notes

1. The notion of 'information law and policy' is an umbrella concept to refer to all law and policy dealing with any aspect of information, communication, and culture (Braman 2007). Here the focus is on media law and policy as a subset of information law and policy, but the dividing line is increasingly difficult to draw (Braman 2004b).
2. Some observers believe that the lack of an issue-specific international organization means there is no supra-state law in that area, others point out that organizations are not a necessary requirement for transnational legal operations. The case of regulation of foreign direct investment (FDI), the location of which has become contestable in the world of electronic communications, provides an example: Avi-Yonah (2003) argues that there is no supra-state law dealing with FDI because no international organization is responsible for it, but Elkins, et al. (2006) point out that FDI has been the subject through the different technique of bilateral treaties for many years.

3. Harmonization is 'hailed' when changes are made in one issue area in order to effect convergence desired in other issue areas (Margheritis & Maldonado 2007).

References

- Alber, J. (2006) 'The European Social Model and the United States', *European Union Politics*, 7(3): 393-419.
- AviYonah, R. S. (2003) 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization', *Columbia Journal of Transnational Law*, 42(1): 534.
- Axford, B. & Huggins, R. (eds.) (2001) *New Media and Politics*, London: Sage Publications.
- Baker, J. S., Jr. (2006) 'Citing Foreign and International Law to Interpret the Constitution: What's the Point?' *Albany Law Review*, 69: 683-696.
- Bartholomew, A. (2006) *Empire's Law: The American Imperial Project and the "War to Remake the World"*. London: Pluto Press.
- Bauman, Z. (2002) 'Reconnaissance Wars of the Planetary Frontierland', *Theory, Culture & Society*, 19(4): 81-91.
- Bellia, P. L., Berman, P. S., & Post, D. G. (2007) *Cyberlaw: Problems of Policy and Jurisprudence in the Information age*, 3rd ed. St. Paul, MN: Thomson/West.
- Bennett, C. J. (1991a) 'How States Utilize Foreign Evidence', *Journal of Public Policy*, 11: 31-54.
- Bennett, C. J. (1991b) 'What is Policy Convergence and What Causes It?' *British Journal of Political Science*, 21(2): 215-233.
- Bennett, W. L., Pickard, V. W., Iozzi, D. P., Schroeder, C. L., Lagos, T., & Caswell, C. E. (2004) 'Managing the Public Sphere: Journalistic Construction of the Great Globalization Debate', *Journal of Communication*, 54(3): 437-455.
- Benvenuto, O. J. (2006) 'Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent', *Fordham Law Review*, 74: 2695-2759.
- Berman, P. S. (2005a) 'Choice of Law and Jurisdiction on the Internet', *University of Pennsylvania Law Review*, 153(6): 1819-1882.
- Berman, P. S. (2005b) 'From International Law to Law and Globalization', *Columbia Journal of Transnational Law*, 43(2): 485-556.
- Bertrand, C. (2003) *An Arsenal for Democracy: Media Accountability Systems*, Cresskill, NJ: Hampton Press.
- Biegel, S. (2001) *Beyond our Control: Confronting the Limits of our Legal System in the Age of Cyberspace*. Cambridge: The MIT Press.
- Blanchard, M. A. (1986) *Exporting the First Amendment*, New York: Longman.
- Blume, P. (1989) 'The Economics of Legal Information', Presented to the 8th European Conference of Critical Legal Studies, Budapest, Hungary, October.
- Brainard, L. A. & Brinkerhoff, J. M. (2006) 'Sovereignty under Siege, or a Circuitous Path for Strengthening the State? Digital Diasporas and Human Rights', *International Journal of Public Administration*, 29(8): 595-618.
- Braman, S. (2007) *Change of State: Information, Policy, and Power*, Cambridge, MA: MIT Press.
- Braman, S. (ed.) (2004a) *The Emergent Global Information Policy Regime*, Houndsmills, UK: Palgrave Macmillan.
- Braman, S. (2004b) 'Where has Media Policy Gone? Defining the Field in the Twenty-first Century', *Communication Law and Policy*, 9(2): 153-182.
- Braman, S. (1996) 'Interpenetrated Globalization: Scaling, Power, and the Public Sphere', in S. Braman & A. Sreberny-Mohammadi (eds.) *Globalization, Communication, and Transnational Civil Society*, Greenskill, NJ: Hampton Press, pp. 21-37.
- Braman, S. (1995) 'Horizons of the State: Information Policy and Power', *Journal of Communication*, 45(4): 4-24.
- Braman, S. (1993) 'Harmonization of Systems: The Third Stage of the Information Society', *Journal of Communication*, 43(3): 133-140.

- Braman, S. (1991) 'Contradictions in Brilliant Eyes', *Gazette: The International Journal of Communication Studies*, 47(3): 177–194.
- Bruce, R. R., Cunard, J. P. & Director, M. D. (1986) *From Telecommunications to Electronic Services: A Global Spectrum of Definitions, Boundary Lines, and Structures*, London: Butterworths.
- Burnett, C. D. (2005) 'United States: American Expansion and Territorial Deannexation', *University of Chicago Law Review*, 72(3): 797–879.
- Busch, P. & Jorgens, H. (2005) 'The International Sources of Policy Convergence: Explaining the Spread of Environmental Policy Innovations', *Journal of European Public Policy*, 12(5): 860–884.
- Calabrese, A. (2004) 'The Promise of Civil Society: A Global Movement for Communication Rights', *Continuum*, 18(3): 317–329.
- Chakravarty, P. & Sarikakis, K. (2006) *Media Policy and Globalization*, Edinburgh, Scotland: Edinburgh University Press.
- Charnovitz, S. (2003) 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)', *Indiana Journal of Global Legal Studies*, 10: 45–77.
- Cho, T. M. (2007) 'Hollywood vs. The People of the United States of America: Regulating High-definition Content and Associated Anti-piracy Copyright Concerns', *Marshall Review of Intellectual Property Law*, 6, 525–549.
- Chvasta, M. (2006) 'Anger, Irony, and Protest: Confronting the Issue of Efficacy, Again', *Text and Performance Quarterly*, 26(1):4–16.
- Clarke, S. E. & Gaile, G. L. (1997) 'Globalization and the Changing US City: Dimensions of Transformation – Local Politics in a Global Era: Thinking Locally, Acting Globally', *The Annals of the American Academy of Political and Social Science*, 551: 28–43.
- Coleman, S. (2001) 'The Transformation of Citizenship?' in Axford, B. & Huggins, R. (eds.) (2001) *New Media and Politics*, London: Sage Publications, pp. 109–126.
- Contreras, J. & Poblet, M. (2005) 'NetCase: An Intelligent System to Assist Legal Services Providers in Transnational Legal Networks', *Law and the Semantic Web*, 3369: 218–232.
- Cox, R. W. (1999) 'Civil Society at the Turn of the Millennium: Prospects for an Alternative World Order', *Review of International Studies*, 25(1): 3–28.
- Cunningham, S., Jacka, E., & Sinclair, J. (1998) 'Global and Regional Dynamics of International Television Flows', in D. Thussu (ed.) *Electronic Empires: Global media and Local Resistance*, London: Arnold, pp. 17–26.
- Delanty, G. (2006) 'Cosmopolitan Citizenship', in J. Blau, & K. Smith (eds.) *Public Sociologies Reader*, Lanham, MD: Rowman & Littlefield Publishers, pp. 37–50.
- DeLuca, K. & Peebles, J. (2002) 'From Public Sphere to Public Screen: Democracy, Activism, and the "Violence" of Seattle', *Critical Studies in Media Communication*, 19(2), 125–151.
- Dennis, M. J. (2006) 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' *ILSA Journal of International & Comparative Law*, 12: 459–480.
- Deuze, M. (2006) 'Ethnic Media, Community Media and Participatory Culture', *Journalism*, 7(3): 262–280.
- Dezalay, Y. (1990) 'The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field', *Theory, Culture & Society*, 7: 279–293.
- Dezalay, Y. (1989) 'Putting Justice "into Play" on the Global Market: Law, Lawyers, Accountants, and the Competition for Financial Services', *Tidskrift för rättssociologi*, 6(1-2): 9–67.
- Dezalay, Y. & Garth, B. G. (1996) *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago, IL: University of Chicago Press.
- Dilevko, J. & Gottlieb, L. (2002) 'Subject Access to Government Documents in an Era of Globalization: Intellectual Bundling of Entities Affected by the Decisions of Supranational Organizations', *Government Information Quarterly*, 19(2): 123–145.
- Dommering, E. (2006) 'Regulating Technology: Code is not Law', in E. J. Dommering & L. F. Asscher (eds.) *Coding Regulation: Essays on the Normative Role of Information Technology*, The Hague: T.M.C. Asser Press, pp. 1–17.
- Donovan, L. M. (2006) 'Importing Plaintiffs: The Extraterritorial Scope of the Sherman Act after *Empagran*', *Iowa Law Review*, 91(2): 719–749.

- Downing, R. W. (2005) 'Shoring up the Weakest Link: What Lawmakers around the World Need to Consider in Developing Comprehensive Laws to Combat Cybercrime', *Columbia Journal of International Law*, 43, 705–762.
- Dutton, W. (2007, Oct. 15) *Through the Network (of Networks): The Fifth Estate*, Oxford, UK: Oxford Internet Institute, Oxford University, Inaugural Lecture.
- Dyson, K. (1986) 'West European States and the Communication Revolution', in K. Dyson & P. Humphreys (eds.) *The Politics of the Communications Revolution in Western Europe*, London: Frank Cass, pp. 10–55.
- Edelman, M. (2005) 'Written Constitutions, Democracy, and Judicial Interpretation: The Hobgoblin of Judicial Activism', *Albany Law Review*, 68: 585–596.
- Effron, R. J. (2003) 'Secrets and Spies: Extraterritorial Application of the Economic Espionage Act and the TRIPS Agreement', *New York University Law Review*, 78(4): 1475–1517.
- Elkins, Z., Guzman, A. T. & Simmons, B. A. (2006) 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', *International Organization*, 60(4): 811–846.
- Engel, D. M. (2005) 'Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand', *Law and Social Inquiry*, 30(3): 469–514.
- Faber, M. J. (1982) 'The Peace Movement in Europe', in P. Radhakrishna & M. Agrawal (eds.) *Arms and Survival*, New Delhi: Satvahan, pp. 208–217.
- Fairbrother, P. & Hammer, N. (2005) 'Global Unions: Past Efforts and Future Prospects', *Industrial Relations*, 60(3): 405–431.
- Fitzgerald, D. (2006) 'Rethinking Emigrant Citizenship', *New York University Law Review*, 81(1): 90–116.
- Florini, A. M. & Dehqanzada, Y. A. (2003) 'The Global Politics of Commercial Observation Satellites', in J. C. Baker, K. M. O'Connell, & R. A. Williamson (eds.) *Commercial Observation Satellites: At the Leading Edge of Global Transparency*, Santa Monica, CA: RAND Corporation, pp. 443–448.
- Frith, K. T. & Tsao, J. (1998) 'Advertising and Cultural China: Challenges and Opportunities in Asia', *Asian Journal of Communication*, 8(2): 1–17.
- Froomkin, M. (1997) 'The Internet as a Source of Regulatory Arbitrage', in B. Kahin & C. Nesson (eds.) *Borders in Cyberspace*, Cambridge, MA: MIT Press, pp. 129–163.
- Gabrynowicz, J. I. (2005) 'The Perils of Landsat from Grassroots to Globalization: A Comprehensive Review of US Remote Sensing Law with a Few Thoughts for the Future', *Chicago Journal of International Law*, 6(Summer): 4567.
- Gaskin, J. (1999) 'Policing the Global Marketplace: Wielding a Knife in a Gunfight', *Columbia Journal of Transnational Law*, 38: 191–208.
- Geertz, C. (1983) 'Local Knowledge: Law and Fact in Comparative Perspective', in *Local Knowledge: Further Essays in Interpretive Anthropology*, pp. 167–234. New York: Basic Books.
- Greenfeld, L. (1992) *Nationalism: Five Roads to Modernity*. Cambridge, MA: Harvard University Press.
- Habermas, J. (2001) 'The Postnational Constellation', in D. Held & A. G. McGrew (eds.) *The Global Transformations Reader: An Introduction to the Globalization Debate*, Cambridge, UK: Polity, pp. 542–547.
- Hafez, K. (2007) *The Myth of Media Globalization*, Cambridge, UK: Polity.
- Hallin, D. C. & Mancini, P. (2004) *Comparing Media Systems: Three Models of Media and Politics*. Cambridge: Cambridge University Press.
- Harms, L. S. (1980) 'An Emergent Communication Policy Science: Context, Rights, Problems, and Methods', *Communication*, 5: 65–87.
- Hayashi, K. (1992) 'From Network Externalities to Interconnection: The Changing Nature of Networks and Economy', in C. Antonelli (ed.) *The Economics of Information Networks*, pp. 195–215. New York/Amsterdam: North-Holland.
- Headrick, D. R. (1990) *The Invisible Weapon: Telecommunications and International Relations, 1851–1945*. New York: Oxford University Press.
- Hermes, J. (2006) 'Hidden Debates: Rethinking the Relationship between Popular Culture and the Public Sphere', *Javnost/The Public*, 13(4): 27–44.

- Hill, C. (1991) 'Diplomacy and the Modern State', in C. Navari (ed.) *The Condition of States*, Milton Keynes, UK: Open University Press, pp. 85-101.
- Howard, P. N. (2007) 'Testing the Leapfrog Hypothesis: The Impact of Existing Infrastructure and Telecommunications Policy on the Global Digital Divide', *Information, Communication & Society*, 10(2): 133-157.
- Huggins, R. (2001) 'The Transformation of the Political Audience', Axford, B. & Huggins, R. (eds.) (2001) *New Media and Politics*, London: Sage Publications, pp. 127-150.
- Hughes, J. (2003) 'The Internet and the Persistence of Law', *Boston College Law Review*, 44: 359-396.
- Jasanoff, S. & Martello, M. L. (2004) *Earthly Politics: Local and Global in Environmental Governance*. Cambridge, MA: MIT Press.
- Jordan, A. (2005) 'Policy Convergence: A Passing Fad or a New Integrating Focus in European Union Studies?', *Journal of European Public Policy*, 12(5): 944-953.
- Karim, K. H. (2006) 'Nation and Diaspora: Rethinking Multiculturalism in a Transnational Context', *International Journal of Media and Cultural Politics*, 2(3): 267-282.
- Katsh, E. (1989) *The Electronic Media and the Transformation of the Law*, New York: Oxford University Press.
- Katz, Y. (2005) *Media Policy for the 21st Century in the United States and Western Europe*, Cresskill, NJ: Hampton Press.
- Keithley, T. (2005) 'Does the National Labor Relations Act Extend to Americans who are Temporarily Abroad?' *Columbia Law Review*, 105(7): 2135-2170.
- Kelemen, R. D. & Sibbitt, E. C. (2004) 'The Globalization of American Law', *International Organization*, 58: 103-36.
- Kennedy, D. (1980) 'Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940', *Research in Law and Sociology*, 3: 3-24.
- Keohane, R. & Nye, J. (1977) *Power and Interdependence*, Toronto: Little, Brown.
- Kirby, M. (2006) 'International Law: The Impact on National Constitutions', *American University Law Review*, 21: 327-364.
- Lessig, L. (1999) *Code and Other Laws of Cyberspace*, New York: Basic Books.
- Liang, L. (2005) 'Cinematic Citizenship and the Illegal City', *Inter-Asia Cultural Studies*, 6(3): 366-385.
- Magder, T. (2006) 'International Agreements and the Principles of World Communication', in J. Curran & D. Morley (eds.) *Media and Cultural Theory*, London: Routledge, pp. 164-176.
- Margheritis, A. & Maldonado, M. (2007) 'Regional Integration and (Hauled) Integration Policy: What Does the European Experience Teach Us?' *Journal of European Public Policy*, 14(1): 152-166.
- Mattei, U. (2002) 'Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction', *American Journal of Comparative Law*, 50: 87-98.
- Mattei, U. (1998) *Comparative Law and Economics*, Ann Arbor, MI: University of Michigan Press.
- McChesney, R. (1999) *Rich Media, Poor Democracy: Communication Politics in Dubious Times*, Urbana, IL: University of Illinois Press.
- Merelman, R. (1998) 'The Mundane Experience of Political Culture', *Political Communication*, 15(4): 515-535.
- Merry, S. E. (2003) 'Constructing a Global Law: Violence against Women and the Human Rights System', *Law and Social Inquiry*, 28(4): 941-977.
- Michaels, R. & Jansen, N. (2006) 'Private Law beyond the State? Europeanization, Globalization, Privatization', *The American Journal of Comparative Law*, 54: 843-889.
- Molennar, E. J. (2007) 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage', *Ocean Development and International Law*, 38(12): 225-257.
- Moore, S. F. (ed.) (2005) *Law and Anthropology: A Reader*. Oxford, UK: Blackwell Publishing.
- Moore, S. F. (2001) *Law as Process: An Anthropological Approach*, Münster, Germany: Lit Verlag.
- Moremen, P. M. (2006) 'National Court Decisions as State Practice: A Transnational Judicial Dialogue?', *North Carolina Journal of International Law & Commercial Regulation*, 32(winter): 259-309.

- Mowlana, H. (1996) *Global Communication in Transition: The End of Diversity?* Thousand Oaks, CA: Sage Publications.
- Mueller, M. (1999) *Ruling the Root: Internet Governance and the Taming of Cyberspace*, Cambridge, MA: MIT Press.
- Murillo, M. V. & MartinezGallardo, C. (2007) 'Political Competition and Policy Adoption: Market Reforms in Latin American Public Utilities', *American Journal of Political Science*, 51(1): 120–139.
- Najjar, O. A. (1998) 'The Ebb and Flow of Press Freedom in Jordan, 1985-1997', *Journalism and Mass Communication Quarterly*, 75(1): 127–142.
- Newton, K. (2001) 'The Transformation of Governance?', Axford, B. & Huggins, R. (eds.) (2001) *New Media and Politics*, London: Sage Publications, pp. 151–171.
- Nordenstreng, K. & Kleinwachter, H. (eds.) (1991) *Confidence-building in the non-military field*, Tampere, Finland: University of Tampere.
- O'Heffernan, P. (1991) *Mass Media and American Foreign Policy: Insider Perspectives on Global Journalism and the Foreign Policy Process*, Norwood, NJ: Ablex Publishing Corp.
- Occhipinti, J. D. (2003) *The Politics of EU Police Cooperation: Toward a European FBI?* Boulder, CO: Lynne Rienner.
- Oettinger, A. G. (1980) 'Information Resources: Knowledge and Power in the 21st Century', *Science*, 209: 191–198.
- Okediji, R. (2000) 'Toward an International Fair Use Doctrine', *Columbia Journal of Transnational Law*, 39: 75–175.
- Petersmann, E. (1991) *Constitutional Functions and Constitutional Problems of International Economic Law*. Fribourg, Switzerland: University Press.
- Petrella, R. (1996) 'Globalization and Internationalization: The Dynamics of the Emerging World-order', in R. Boyer & D. Drache (eds.) *States against Markets: The Limits of Globalization*, London/New York: Routledge, pp. 62–83.
- Pircher, W. (1987) 'Tours Through the Back-country of Imperfectly Informed Society', in J. D. Slack & F. Fejes (eds.) *The Ideology of the Information age*, Norwood, NJ: Ablex, pp. 63–77.
- Piven, F. F. (2001) 'Globalization, American Politics, and Welfare Policy', *The Annals of the American Academy of Political and Social Science*, 577: 26–35.
- Pool, I. de Sola. (1983) *Technologies of Freedom*. Cambridge, MA: Belknap Press.
- Posner, E. A. & Sunstein, C. R. (2007) 'Chevronizing Foreign Relations Law', *Yale Law Journal*, 116(6): 1170–1228.
- Price, M. E. & Thompson, M. (eds.) (2002) *Forging Peace*, Bloomington, IN: Indiana University Press.
- Proulx, V. (2005) 'Borrowing from our Common Law Cousins: American and British Influences on the Merger of Canadian Trademark and Internet Domain Name Laws', *Arizona Journal of International and Comparative Law*, 22(fall): 505–582.
- Rabkin, M. A. (2007) 'When Consumer Fraud Crosses the International Line: The Basis for Extraterritorial Jurisdiction under the FTC Act', *Northwestern University Law Review*, 101(1): 293–330.
- Raboy, M. (2004) 'The World Summit on the Information Society and its Legacy for Global Governance', *Gazette*, 66(3-4): 225–232.
- Radaelli, C. M. (2005) 'Diffusion without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment', *Journal of European Public Policy*, 12(5): 924–943.
- Randeira, S. (2007) 'The State of Globalization: Legal Plurality, Overlapping Sovereignties and Ambiguous Alliances between Civil Society and the Cunning State in India', *Theory, Culture & Society*, 24(1): 1–33.
- Rus, E. P. (2004) 'The Lasting Marriage between Nation and State Despite Globalization', *International Political Science Review*, 25(3): 251–257.
- Sachs, S. E. (2006) 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant"', *American University International Law Review*, 21: 685–812.
- Sajo, A. (2006) 'Terrorism, Globalization and the Rule of Law: From Militant Democracy to the Preventive State?', *Cardozo Law Review*, 27(March): 2255–2294.

- Sarat, A. & Kearns, T. R. (1998) 'The Cultural Lives of Law', in A. Sarat & T. R. Kearns (eds.) *Law in the Domains of Culture*, Ann Arbor: University of Michigan Press, pp. 1–20.
- Sassen, S. (2003) 'The Participation of States and Citizens in Global Governance', *Indiana Journal of Global Legal Studies*, 10(5): 5–31.
- Scammell, M. (2000) 'The Internet and Civic Engagement: The Age of the Citizenconsumer', *Political Communication*, 17(4): 351–355.
- Schick, S. E. (2006) 'Globalization, Bankruptcy and the Myth of the Broken Bench', *The American Bankruptcy Law Journal*, 80(spring): 219–258.
- Schmidt, S. K. & Wërle, R. (1998) *Coordinating Technology: Studies in the International Standardization of Telecommunications*. Cambridge, MA: MIT Press.
- Schmitt, M. N. (1999) 'Computer Network Attacks and the Use of Force in International Law: Thoughts on a Normative Framework', *Columbia Journal of Transnational Law*, 37, 885–937.
- Schoen, E. J., Falchek, J. S., & Hogan, M. M. (2005) 'The Alien Tort Claims Act of 1789: Globalization of Business Requires Globalization of Law and Ethics', *Journal of Business Ethics*, 62(1): 41–56.
- Seastrum, E. C. & Getlan, M. S. (2001) 'The Globalization of International Trade Litigation: AD/CVD Litigation – Which Forum and Which Law?', *Brooklyn Journal of International Law*, 26: 893–916.
- Sepper, E. (2006) 'The Ties that Bind: How the Constitution Limits the CIA's Actions in the War on Terror', *New York University Law Review*, 81(5): 1805–1843.
- Shah, R. & Kesan, J. (2003) 'Manipulating the Governance Characteristics of Code', *Info*, 5(4): 3–9.
- Silberman, B. S. (1993) *Cages of Reason: The Rise of the Rational State in France, Japan, the United States, and Great Britain*, Chicago/London: University of Chicago Press
- Simmons, B. A., Dobbin, F., & Garrett, G. (2006) 'The International Diffusion of Liberalism', *International Organization*, 60(4): 781–810.
- Smith, A. (1990) 'Towards a Global Culture?', *Theory, Culture & Society*, 7: 171–191.
- Smith, R., Woodward, D., Acharya, A., Beaglehole, R. & Drager, N. (2004) 'Communicable Disease Control: A "Global Public Good" Perspective', *Health Policy and Planning*, 19(5): 271–278.
- Sparks, C. (1998) 'Is there a Global Public Sphere?' In D. Thussu (ed.) *Electronic Empires: Global Media and Local Resistance*, London: Arnold, pp. 108–124.
- Steinhardt, B. (2005) 'Three Cheers for International Cooperation', *Index on Censorship*, 34(3): 44–49.
- Stevenson, N. (1997) 'Globalization, National Cultures and Cultural Citizenship', *The Sociological Quarterly*, 38(1): 41–67.
- Street, P. (2003) 'Stabilizing Flows in the Legal Field: Illusions of Permanence, Intellectual Property Rights and the Transnationalization of Law', *Global Networks: A Journal of Transnational Affairs*, 3(1): 7–28.
- Stromer-Galley, J. & Jamieson, K. (2001) 'The Transformation of Political Leadership?', in Axford & Huggins, *op. cit.*, pp. 172–190.
- Sunstein, C. R. (1996) *Legal Reasoning and Political Conflict*, Oxford/New York: Oxford University Press.
- Swank, D. (2006) 'Tax Policy in an Era of Internationalization: Explaining the Spread of Neoliberalism', *International Organization*, 60(4): 847–882.
- Taki, T. (2005) 'Labor Migration and the Language Barrier in Contemporary Japan: The Formation of a Domestic Language Regime of a Globalizing State', *International Journal of the Sociology of Language*, 2005(175–176): 55–81.
- Tarrow, S. (2005) 'The Dualities of Transnational Contention: "Two Activist Solitudes" or a New World Altogether?', *Mobilization*, 10(1): 53–72.
- Taylor, A. L. (2004) 'Governing the Globalization of Public Health', *Journal of Law, Medicine, & Ethics*, 32(3): 500–508.
- Teitel, R. (2005) 'The Alien Tort and the Global Rule of Law', *International Social Science Journal*, 57(3): 551–561.
- Thussu, D. K. (2002) 'Privatizing Intelsat: Implications for the Global South', in M. Raboy (ed.) *Global Media Policy in the New Millennium*, pp. 39–53. Luton, UK: University of Luton Press.

- Tribe, L. H. (1985) Constitutional Calculus: Equal justice or Economic Efficiency? *Harvard Law Review*, 98: 592–621.
- Turner, B. (1992) 'Outline of a Theory of Citizenship', in C. Mouffe (ed.) *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, London/New York: Verso, pp. 3362.
- Twining, W. (2000) *Globalization and Legal Theory*. London: Butterworths.
- Van den Bossche, P. & Alexovicova, I. (2005) 'Effective Global Governance by the World Trade Organization', *Journal of International Economic Law*, 8(3): 667–690.
- Van Harten, G. (2005) 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection', *Review of International Political Economy*, 12(4): 600–623.
- Waisbord, S. (2007) 'Democratic Journalism and Statelessness', *Political Communication*, 24(2): 115–129.
- Warren, M. G. III. (1990) 'Global Harmonization of Securities Laws: The Achievements of the European Communities', *Harvard International Law Journal*, 31: 185–232.
- Wen, A. H. (2003) 'Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities', *Columbia Law Review*, 103: 1538–1587.
- Winseck, D. R. & Pike, R. M. (2007) *Communication and Empire: Media, Markets, and Globalization, 1860–1930*, Durham/London: Duke University Press.
- Yanchukova, E. (2003) 'Criminal Defamation and Insult Laws: An Infringement on Freedom of Expression in European and Post-Communist Jurisdictions', *Columbia Journal of Transnational Law*, 41: 861–894.
- Yar, M. (2005) 'The Global "Epidemic" of Movie "Piracy": Crime-wave or Social Construction?', *Media, Culture & Society*, 27(9): 677–696.
- Zittrain, J. L. (2005) *Jurisdiction*, New York: Foundation Press.

The Authors

SANDRA BRAMAN (braman@uwm.edu) is Professor in the Department of Communication, University of Wisconsin-Milwaukee, USA.

KAREN DONDEERS (karen.donders@vub.ac.be) is a ph.d. researcher in the Institute for European Studies at the Free University of Brussels, Belgium.

JOSTEIN GRIPSRUD (jostein.gripsrud@infomedia.uib.no) is Professor of media studies in the Department of Information Science and Media Studies at the University of Bergen, Norway.

KARL KNAPSKOG (karl.knapskog@infomedia.uib.no) is a Lecturer in the Department of Information Science and Media Studies at the University of Bergen, Norway.

OLE J. MJØS (ole.mjøs@infomedia.uib.no) is a postdoctoral researcher in the Department of Information Science and Media Studies at the University of Bergen, Norway.

HALLVARD MOE (hallvard.moe@infomedia.uib.no) is a postdoctoral researcher in the Department of Information Science and Media Studies at the University of Bergen, Norway.

HANNU NIEMINEN (hannu.nieminen@helsinki.fi) is Professor of media policy and director of the Communication Research Centre CRC at the Department of Communication, University of Helsinki, Finland.

CAROLINE PAUWELS (caroline.pauwels@vub.ac.be) is Professor and Head of department in the Department of Communications at the Free University of Brussels, Belgium, where she is also director of the research centre SMIT (Studies of Media, Information and Telecommunication).

HELGE RØNNING (helge.rønning@media.uio.no) is Professor of media studies in the Department of Media and Communication at the University of Oslo, Norway

SLAVKO SPLICHAL (slavko.splichal@guest.arnes.si) is Professor of Communication at the Faculty of Social Sciences and director of the European Institute for Communication and Culture at the University of Ljubljana, Slovenia.

TANJA STORSUL (tanja.storsul@media.uio.no) is Senior Lecturer in the Department of Media and Communication at the University of Oslo, Norway.

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Director and Administration

Director: Ulla Carlsson
Telephone: +46 31 786 12 19
Fax: +46 31 786 46 55
ulla.carlsson@nordicom.gu.se

Administration and Sales:
Anne Claesson
Telephone: +46 31 786 12 16
Fax: +46 31 786 46 55
anne.claesson@nordicom.gu.se

Technical Editing and Webmaster:
Per Nilsson
Telephone: +46 31 786 46 54
Fax: +46 31 786 46 55
per.nilsson@nordicom.gu.se

Field of Activities

Media and Communication Research

Publications

Editor: Ulla Carlsson
Telephone: +46 31 786 12 19
Fax: +46 31 786 46 55
ulla.carlsson@nordicom.gu.se

Research Documentation

Nordic Co-ordinator:
Claus Kragh Hansen
State and University Library
Universitetsparken
DK-8000 Aarhus C, Denmark

Telephone: +45 89 46 20 69
Fax: +45 89 46 20 50
ckh@statsbiblioteket.dk

Media Trends and Media Statistics

Nordic Media Trends

Nordic Co-ordinator: Eva Harrie
Telephone: +46 31 786 46 58
Fax: +46 31 786 46 55
eva.harrie@nordicom.gu.se

Nordic Media Policy

Editor: Terje Flisen
terjef@nordicmedia.info

Outlook Europe & International

Editor: Anna Celsing
anna.celsing@skynet.be

The International Clearinghouse on Children, Youth and Media

Scientific Co-ordinator:
Cecilia von Feilitzen
Telephone: +46 8 608 48 58
Fax: +46 8 608 41 00
cecilia.von.feilitzen@sh.se

Information Co-ordinator:
Catharina Bucht
Telephone: +46 31 786 49 53
Fax: +46 31 786 46 55
catharina.bucht@nordicom.gu.se

National Centres

Nordicom-Denmark

State and University Library
Universitetsparken
DK-8000 Aarhus C, Denmark

Media and Communication Research

Maria Hvid Stenalt
Telephone: +45 89 46 21 67
Fax: +45 89 46 20 50
mhs@statsbiblioteket.dk

Nordicom-Finland

University of Tampere
FI-33014 Tampere, Finland

Media and Communication Research

Päivi Lukin
Telefon: +358 3 3551 70 45
Fax: +358 3 3551 62 48
paivi.lukin@uta.fi

Nordicom-Iceland

University of Iceland
Félagsvísindadeild
IS-101 Reykjavík, Iceland

Media and Communication Research

Guðbjörg Hildur Kolbeins
Telephone: +354 525 42 29
Fax: +354 552 68 06
kolbeins@hi.is

Nordicom-Norway

Department of Information
Science and Media Studies
University of Bergen
PO Box 7800
NO-5020 Bergen, Norway

Media and Communication Research

Ragnhild Mølster
Telephone: +47 55 58 91 40
Fax: +47 55 58 91 49
ragnhild.molster@infomedia.uib.no

Media Trends and Media Statistics

MediaNorway

Nina Bjørnstad
Telephone: +47 55 58 91 26
Fax: +47 55 58 91 49
nina.bjornstad@infomedia.uib.no

Nordicom-Sweden

University of Gothenburg
PO Box 713
SE-405 30 Göteborg, Sweden

Fax: +46 31 786 46 55

Media and Communication Research

Roger Palmqvist
Telephone: +46 31 786 12 20
roger.palmqvist@nordicom.gu.se

Karin Poulsen
Telephone: +46 31 786 44 19
karin.poulsen@nordicom.gu.se

Media Trends and Media Statistics in Sweden

Ulrika Facht
Telephone: +46 31 786 13 06
ulrika.facht@nordicom.gu.se

Karin Hellingwerf
Telephone: +46 31 786 19 92
karin.hellingwerf@nordicom.gu.se

Staffan Sundin
Telephone: +46 36 16 45 82
staffan.sundin@nordicom.gu.se

"Our understanding of what we mean by 'the public' has been disrupted by the huge changes in media and communications brought about by the digital revolution. This brings major new challenges for media policy and thus a need for a re-opening of fundamental questions. The essays in this timely book, by leading scholars on both sides of the Atlantic, provide much needed insight and authoritative analysis to take our thinking forward."

— Peter Golding, Loughborough University

Until recently, media policy was thought of as national, media-specific, and as part of the cultural domain. All this is changing in a digital public sphere: first, by the processes of globalization in a broad sense; second, by a blurring of borders between media, which can be summed up as convergence; and, third, by a more far-reaching commercialisation of the media. The transformations triggered by these developments are ongoing and have been so for quite a few years. Thus, it is time to take stock. The different contributions in this book set out to do that.

With a basis in the idea that media policy is fundamentally about regulating the public sphere in accordance with central democratic ideals, the book covers a wide range of issues: Transnational online television distribution; the trouble with building and opening digital audiovisual archives; the impact of recent EU regulations on global conglomerates as well as national public service broadcasters; the debate on net neutrality; the idea of the participating public in policy-making; the regulation of freedom of speech on the internet; as well as the impact of legal globalization on media policy itself.

Contributors are internationally leading European and US scholars in the field — Sandra Braman, Karen Donders, Caroline Pauwels and Slavko Splichal — along with a selection of Nordic experts: Jostein Gripsrud, Karl Knapskog, Hallvard Moe, Ole J. Mjøs, Hannu Nieminen, Helge Rønning, and Tanja Storsul.

NORDICOM

Nordic Information Centre for Media and Communication Research

University of Gothenburg

Box 713, SE 405 30 Göteborg, Sweden

Telephone +46 31 786 00 00 (op.) | Fax +46 31 786 46 55

www.nordicom.gu.se | E-mail: info@nordicom.gu.se



UNIVERSITY OF
GOTHENBURG

