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Regulating Audiovisual Services

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Series Preface

Media law issues frequently dominate the news. A libel or privacy action by a politician or celebrity, an investigation into an alleged broadcasting scam, and the use of the Internet for downloading terrorist material or pornography are all stories which attract national, and increasingly international, publicity. Freedom of expression, whether on the traditional press and broadcasting media, or through the new electronic media, remains of fundamental importance to the workings of liberal democracies; indeed, it is impossible to see how a democracy could exist without a free, pluralist media for the dissemination of information and the discussion of political and social affairs. The media also provide us with celebrity gossip and popular entertainment.

But a free media does not entail the complete absence of law and regulation. Far from it. Laws are needed to balance the competing interests of the media, the public whom they inform and entertain and those individuals whose reputation, privacy, or even safety, might be endangered by newspapers, broadcasters and bloggers. All these branches of the media exercise considerable power and they can abuse it to distort the truth and harm individuals. Competition and other laws must be framed to prevent the emergence of media monopolies and oligopolies which are as incompatible with an effective democracy as is the domination of one political party. The Internet has been characterised by little or no regulation, beyond general criminal and civil laws, but it is legitimate to question whether this can remain the case given the ease with which, say, pornographic images can be circulated round the world in a moment. The globalisation of the media exacerbates legal problems, for a communication can be published more or less simultaneously in a number of different jurisdictions; some countries might, for example, protect privacy strongly, while others might not protect it at all because they consider privacy laws inimical to media freedom.

There is now a rich literature on many aspects of media law and regulation. The aim of these four volumes has been to present a sample of this literature, grouped round particular themes. Some of them concern topics which have been explored in legal periodicals for decades: freedom of the press, the balance between this freedom and reputation and privacy rights, media publicity prejudicing fair trials. Others deal with more modern aspects of the law, in particular whether and how the broadcasting and electronic media should be regulated. Inevitably, many essays are drawn from United States periodicals, as that country, with its strong attachment to freedom of speech and its powerful media industries, has produced an immense literature on all areas of media law. But we have also included articles from many Commonwealth countries. We have selected those which discuss issues of media law from a theoretical or comparative perspective. Lawyers in all jurisdictions can learn something from the treatment of common problems in other countries. The globalisation of the media means that knowledge of comparative law in this area is now of importance to practising lawyers.

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Introduction

The audiovisual industries have developed from terrestrial analogue radio and television broadcasting to encompass now a wide range of new media services based on mass communications to the general public by means of digital technology. The model of the vertically integrated broadcaster, dealing with all aspects of the process from the production of programmes to their transmission to the audience, has been replaced by more fragmented arrangements which have been made possible by convergence between different platforms. Digital technology means that the same content can be delivered by a range of methods, whether it be broadcasting, cable, satellite, the Internet or mobile telephony. Content can be sourced from a variety of creators, and packaged in a variety of ways, enabling users to exercise much greater choice over the kind of material that they receive and when they receive it. This volume of essays deals with the impact of the changing nature of audiovisual services on regulatory policy and design. Volume 3 in this series, *Free Speech in the New Media*, examines the issues of political and constitutional principle and theory that arise from the emergence of new media.

Convergence and Regulation

One effect of technological convergence is that the particular characteristics of the delivery mechanism – broadcasting, whether terrestrial or satellite, or telecommunications, whether mobile or cable – are much less relevant for regulatory purposes. There is little point in creating different regimes for each medium if the same content can be delivered across all of them. The general implication is that the focus of regulation will be on issues of content, and the appropriateness of imposing requirements that are common to all media.

At the outset, it should be cautioned that, although change is happening quickly, its pace and impact are rarely as radical as the industry predicts. Chapter 1, an essay by Wolfgang Hoffmann-Reim,[1] opens by noting that the advent of the multi-media age was being heralded in the mid-1970s. Yet it seems that traditional forms of programming still provide the core of audiences' media experiences and of business models.[2] Hoffman-Reim was writing soon after publication of the European Commission's Green Paper on Convergence(European Commission, 1997), which had invigorated policy debates about the implications of convergence (Goldberg, Prosser and Verhulst, 1998, Marsden and Verhulst, 1999; Marsden, 2000).

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1 For decades, the leading expert on German media regulation, Hoffmann-Reim also served as Minister of Justice of the State of Hamburg, and was more recently a judge of the Federal Constitutional Court.

2 See, for example: Ofcom (2007); CRTC (2008) – a compilation of research and stakeholder views.

Hoffmann-Reim's perspicuous discussion of the challenges of new media will continue to have contemporary relevance. He argues that there is no reason to discard the ideas of responsibility and public interest, which are associated with notions of public service broadcasting, when considering the appropriateness of media policy and regulation for the future. Insofar as interventions in media activities are justified, in order to encourage individual self-development as well as the healthy functioning of democracy, thought needs to be given to the implications for the 'information' and 'knowledge' society. However, the issues will manifest themselves in different ways. Older forms of scarcity, in broadcasting frequencies, will be replaced by new scarcities created by technological and market barriers to access. In both cases, it is not the fact of scarcity in itself that justifies regulation,[3] but the excess of power by the media, over recipients and users of information, which it represents: 'scarcity constellations of all kinds are at the same time power constellations' (p. 9). As a response, Hoffmann-Reim does not advocate the mere continuance of traditional-style state regulation. He points out that the market and different regulatory techniques, such as self-regulation, will have important roles to play. However, he also maintains that a normative criterion – of fairness – should be applied in designing the best regulatory structures.

In Chapter 2, Douglas Vick provides a case study of developments in the United Kingdom, a jurisdiction where the implications of convergence generated an extensive policy discussion in the 1990s, leading to what was supposed to be an integrated and 'future-proof' scheme for regulating communications. Vick sets the debates in the context of the tensions between what he calls 'market liberalism' and 'social liberalism'. He argues that the differing approaches to regulating the media are explained less by perceptions of technological change than by shifts and tensions in political theory. In particular, he believes that they can account for variations in the level of official supervision (formal regulation or self-regulation), the amount of positive obligations, and the use of sector-specific regimes rather than general rules and principles. This use of 'models' of political thought is very helpful in highlighting the axes across which regulatory choices are made, provided that it is appreciated that there is a risk of oversimplification (as indeed does Vick).[4] With that caveat, the suggestion is that market liberalism, with its emphasis on minimal state interference, individual freedom of expression and the belief that market mechanisms can best allocate resources and satisfy readers' wants, explains the way that print and the press are treated. He suggests that telecommunications regulation is also explained by market liberalism, since regulation was implemented mainly to correct the market failure caused by the existence of what was regarded as a natural monopoly – the telecommunications network. By contrast, social liberalism accounts for the general approach to broadcasting policy, being concerned about the power of the media and the desirability of intervening to ensure that those who control that power will use it to benefit free democratic discussion. In the UK, this is manifested in the aspirations of public service broadcasting towards citizenship, universality and quality.

Vick offers a view of how these positions, and the compromises between them, appear to have influenced the passage of the UK Communications Act 2003. The Act was intended

3 For further discussion of the 'scarcity rationale' as a justification for media regulation, see Volume 3 of this series.

4 Not every theorist mentioned by Vick would endorse his classification. In particular, 'social liberal' covers many strands of what others might describe as democratic or republican theory.

to create a framework that would anticipate changes in media technology and business. It attempts to reconcile the need for competitiveness and innovation with the protection of basic social goals, adopting a 'light-touch' approach to regulation. A single regulator, Ofcom, has responsibility for all aspects of communications, including concurrent competition powers with the general competition regulator.[5] The Act has transposed the European Community's Electronic Communications Directives, which have liberalised telecommunications regulation and laid the foundation for a fully competitive market in electronic communications. In addition, it makes provision for spectrum use, including spectrum trading; it has simplified the licensing of digital channels; and it has eliminated controls on foreign ownership and on most concentrations of ownership. There is an increased emphasis on 'softer' forms of regulation such as co- and self-regulation. Nevertheless, an inclination towards economic regulation of communications markets is balanced by Ofcom's duties to promote public service television and its regulation of basic content standards in programming and in advertising.[6]

Techniques of Regulation

Although media convergence has encouraged a deregulatory mood, reasons for continuing at least some form of regulation continue to be advocated. The early part of the essay by Cass Sunstein (Chapter 3) is an example of the claim that there are justifications, based on democratic ideals, for regulating television programming in the public interest. Sunstein rejects the view that 'consumer sovereignty' is the appropriate benchmark. One set of reasons deals with the effects of market failure in broadcasting markets. The other set supports the overriding importance of certain non-market objectives: fostering the education of children; providing a substantive and diverse coverage of civic issues; and improving the viewing experience of the hearing impaired.[7] Throughout, he assumes that television programming has a distinctive social and economic role, although he recognizes that convergence may change that, albeit in the distant future. However, his piece is as interesting for its discussion of a range of mechanisms to promote the public interest, ones that are alternatives to 'command-and-control' forms of governmental intervention. The wish to regulate but to experiment with different techniques, is a feature of much contemporary writing about new media. In Sunstein's essay, the emphasis is on disclosure, economic incentives and voluntary self-regulation.

The first proposal is that that every broadcaster should be required to disclose details of their public service and public interest activities. This is prompted by the apparent success of similar measures in the field of environmental regulation, where publicity about firms' environmentally negative activities has led to political and consumer resistance which has secured positive changes in behaviour. As Sunstein recognizes, the analogy with broadcasting is not quite apposite. Furthermore, a relatively similar approach in the UK, whereby commercial public service broadcasters are required to self-certify their positive, more-than-the-minimum contributions to quality programming, has not been sufficient to overcome

5 Although Ofcom has no power to regulate Internet content, as such.

6 For discussion of public service broadcasting, see Volume 3 of this series. For recent discussion of the further implications of Ofcom's remit, see Gardam and Levy (2008).

7 Here, his arguments complement the discussion of justifications for regulation that are considered in Volume 3 of this series.

economic incentives to seek more popular scheduling.[8] Sunstein's second proposal is to provide economic incentives, again modelled on environmental regulation, by allowing a trade in public interest obligations. The idea of requiring the commercial sector to subsidize public interest media is not new[9] but, as he again acknowledges, the possibility of some firms' avoiding universal obligations may be more controversial. His third proposal is to introduce a self-regulatory code, although he is once more aware that there may be insufficient incentives or effective enforcement for that to make an impact.

Self-regulation has indeed been long regarded as a way of satisfying public interest concerns about an industry whilst minimising state interference in its activities.[10] It has been considered especially suitable for the media because self-restraint is consistent with freedom of speech.[11] However, as Angela Campbell shows in Chapter 4, there are a number of questions to be answered before self-regulation can be adopted as a policy option. First, the meaning of self-regulation is open to wide interpretation. It involves some form of regulation by the industry rather than government, but the exact relationship between the two is variable, with schemes having different levels of involvement in drafting a code and in enforcing it.[12] There are also nuances in the idea of 'self', with some industries genuinely subscribing to the public interest values at stake, while others are prompted to act when the threat of government intervention is considered imminent.[13] Secondly, the relative advantages and disadvantages of self-regulation are contestable. The industry will claim that it can achieve public interest objectives with flexibility and expertise at a reduced cost, whereas detractors will say that self-constraints are likely to be self-serving. Thirdly, and relatedly, the success of self-regulation may be difficult to measure.

Campbell discusses the problems in the light of the USA's experience in broadcasting and other media. As she notes, there is little reason to believe in the effectiveness of self-regulation, but it does have some political resonance. That may be why it appears attractive as a means of managing some aspects of new media, especially the Internet and mobile telephony, for which convergence may point in the direction of imposing content controls where previously there were none.[14] However, the realization that industry cannot generally be trusted to promote public policy through this means – because it has few incentives to do so – has prompted a more recent emphasis in Europe on 'co-regulation' This describes the situation where a regulator retains clear responsibility for imposing regulation, but sub-contracts one or more parts of its legislative brief to an industry body. The latter then implements the regulatory scheme but, importantly, the regulator retains 'back-stop' powers to intervene if the industry fails to be effective (Hans Bredow Institute, 2006).

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8 In the UK, the problems are recognized in Ofcom (2008).

9 The Canadian radio and television regime is a good example.

10 For general discussion, see Baldwin and Cave (1999) chap.10; Ogus (1994), chap. 6; Black (1996), p. 24.

11 For example, the UK's Press Complaints Commission (at www.pcc.org.uk).

12 See also Hans Bredow Institute for Media Research and The Institute of European Media Law (2006). See links from the European Commission's Information Society Thematic Portal (at ec.europa.eu/information_society/activities/sip/index_en.htm.

13 On this and more generally, see Tambini, Leonardi and Marsden (2007).

14 For discussion in the context of European audiovisual regulation, see Volume 3 of this series.

Taking further the possibilities for alternative modes of regulation, in Chapter 5 Andrew Murray and Colin Scott offer a more theoretical analysis in the light of new media developments. Their essay offers a conceptual framework for designing regulation across all kinds of new media, including dimensions of Internet regulation not hitherto discussed. They concentrate on three problems associated with new media, which arise from opportunities that are presented by shifts in the power of those who conduct its operations, compared to traditional media. One is the problem of regulatory arbitrage, created when new media providers are sufficiently mobile to be able to choose the jurisdiction to govern their operations. Another is the problem of anonymity, which may prevent regulators from enforcing desired standards. The third problem identified is that of scarce resources. Here, Murray and Scott make the point that digital technology does not allow unlimited flows of information, since there are constraints on the amount of spectrum, bandwidth and network facilities that can be made available. Other problems, which are raised elsewhere in this volume, but which are equally compelling, are disparities in consumer access to digital media and the extent to which content should be controlled.

How, if at all, should regulators respond to these kinds of problem? Murray and Scott suggest that analysis should proceed in terms of Lessig's 'modalities of regulation'. For his terms – law, norms, markets and architecture – they substitute hierarchy, community, competition and design. Their aim is to capture a broader and more fluid set of control variables and, following Lessig, they envisage various combinations – 'hybrids' – as bases for regulation. Thus, self-regulation may have elements of hierarchy and community, combining official public standards with norms that are enforced socially, at the workplace or across an industry; an example would be the European Community's approach to preventing harm to children from Internet content. Of particular interest, for which Lessig's work is well known, is their discussion of design (architectural) elements, which include the organization of domain names on the Internet, content filtering and encryption. In each case, other modalities of trademarks, content rating and copyright may combine, respectively, with the design feature in order to create the requisite level of control. Murray and Scott's essay challenges us to think more creatively about regulation of audiovisual services and new media more generally. But it also reminds us that new forms of regulation are often evolutionary, building on traditional tools.

As Murray and Scott mention, an example of such a composite approach is the range of regulatory techniques adopted to prevent children from receiving harmful or illegal content. The essay by Michael Birnhack and Jacob Rowbottom (Chapter 6) provides a comparative analysis of the methods deployed in the USA and the European Community. In the latter, a broad set of 'Information Society' policies are intended to co-ordinate regulation of audiovisual services in a 'graduated' way in the light of media convergence. At one end of the spectrum, traditional television broadcasting ('linear services') should 'not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence'.[15] In respect of interactive and on-demand services ('non-linear services'), appropriate measures must be taken to ensure that similar material is only made available in such a way that minors will not normally hear or

15 Audiovisual Media Services Directive 2007, Art. 22.

see them.[16] Although the logic of convergence is that such non-linear services can be available on the Internet, the latter is regulated differently, through a combination of hard and soft law encompassed by the Safer Internet Programme 2009–2013.[17] This involves a number of initiatives, including the use of criminal law, technology, self-regulation and education.

Birnhack and Rowbottom point out that the European approach essentially leaves the regulation of material that is harmful to children to the market, but in the context of a governance framework that encourages self-regulation. One advantage of this apparently more liberal path is that it avoids the kind of constitutional challenges which have prevented legislative action from being successful in the USA. The latter has followed the route of 'direct public-ordering', which has led to open confrontation between the free speech principle and the child protection policy. Although the European Court of Human Rights has been willing to place more weight on the latter, in balancing the competing interests, European Community policy-making has followed the route of indirect or private ordering, whereby government promotes and supports self-regulation without explicit interference in media and Internet companies' decisions.[18] This route is not without its difficulties, as Birnhack and Rowbottom show: in particular, ratings and filtering are controversial; and the general problems of self-regulation, raised by Campbell in Chapter 4, are also apparent.

Structural Regulation: Media Concentration and Ownership

In economic terms, the structure of an industry is characterized by the number of firms operating in it and the degrees of power that they have over relevant markets. Where an industry shows tendencies to monopoly, market dominance or anti-competitive practices, a number of remedies are available under competition (anti-trust) law and regulation. The aim is to prevent too few firms from controlling too much of a market, both to prevent excessive prices being charged to consumers and to allow new products to be supplied. In general, the same problems and justifications for regulation will apply equally to media markets. However, is competition law sufficient to deal with those markets? Part III offers a selection of essays that explore the relevant arguments. Initially, they turn on whether media products are perceived to be the same as any other, or whether the association between the media and the political values of free speech and democracy renders at least some media outputs in some way special. But, even if they are special, it may still be the case that competition law is adequate to take account of that.

Two kinds of argument are typically advanced to show why structural regulation of media markets is desirable in order to prevent concentrations of control. One reflects the importance of securing a diversity of ideas and opinions to promote the interests that justify the priority given to free speech – the accumulation of knowledge and participation in a democracy. Here,

16 Audiovisual Media Services Directive 2007, Art. 3h. See the discussion by Craufurd Smith, in Volume 3 of this series.

17 This succeeds the Safer Internet Action Plan 1999–2004, and the Safer Internet *plus* Programme 2005–2008. See links from the European Commission's Information Society Thematic Portal.

18 The European Community's highest court, the European Court of Justice, follows the jurisprudence of the European Court of Human Rights (under the auspices of the Council of Europe), where appropriate.

creating an industry structure for a diversity of sources and platforms may be regarded as a necessary condition for pluralism – although it is important to appreciate that this will not in itself guarantee a plurality of viewpoints.[19] The other kind of argument is directed at the excess of power that may be wielded over public opinion and a broader understanding of the world, when only a few media firms (or individual proprietors) dominate public expression.

In both cases, the desire for a diversity of content might also be satisfied by directly imposing positive obligations to provide a range of perspectives, but that may be regarded as too much interference with freedom of the media. For the most part, such direct obligations may form part of a public service broadcasting remit but are rarely imposed on commercial media more generally (Craufurd Smith, 1997; Barendt, 1993).

In Chapter 7, Rachael Craufurd Smith discusses the issues in the context of the European Union, where debates about media concentration and ownership have been particularly active since the mid-1990s. National supervision of media ownership has long been a matter of peculiar political sensitivity, perhaps attributable to politicians' distrust of, yet respect for, perceived media power. Unsurprisingly, the details of national media ownership rules are usually context-specific. However, the European Commission floated the possibility of rationalizing the different approaches to be found in the European Community, at the same time questioning the technical basis for ownership regulation, through a draft directive on media ownership. The idea was to impose minimum requirements on all member states, based on a market share methodology for measuring concentrations of influence. Both the UK and Germany reformed their media ownership legislation in the light of the proposal, but the draft Directive was dropped, partly because of doubts about its legal standing, partly because competition law was thought by some to be a better tool, but mainly because of political resistance from the member states (Doyle, 2002; also Hitchens, 2006). Craufurd Smith's discussion covers the legal considerations in detail but she also explores various 'softer' techniques, developing some of the themes of the previous section. As she indicates, the expansion of new media does not, as some suppose, necessarily lead to greater diversity of content across the media, but it may require new responses to the problem.[20]

Whatever the solution, it is clear that media ownership regulation is highly sensitive to the politics of individual states. In Chapter 8, Peter Humphreys provides a case study of the policy process that laid the basis for the current position in Germany.[21] As he discusses, it is a dual system, which provides considerable scope for consolidation amongst private broadcasters, but on condition that the public service sector is maintained. Of particular interest is the role of the German constitutional court in mandating this approach and upholding the concept of broadcasting freedom as a buffer against state interference in media content. This reflects the fact that, while competition law will have an increasing role in dealing with concentrations of media power, the democratic functions of the media remain salient in German political discourse.

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19 For a recent discussion, comparing pluralism and diversity in the UK, the USA and Australia, see Hitchens (2006).

20 In discussion leading to the revision of the Television without Frontiers Directive in 2007, the European Commission conceded that Community-wide co-ordination was not appropriate but it will continue to monitor developments: see European Commission (2007), p. 32.

21 Humphreys is a political scientist specializing in German media regulation.

Structural regulation of the audiovisual media has also been a feature of US communications regulation, albeit to a lesser extent compared to Europe. In the light of First Amendment resistance to direct content regulation, it has been the principal focus for regulation in the public interest to advance the democratic functions of freedom of speech.[22] The essay by Christopher Yoo (Chapter 9), and Edwin Baker's response to it (Chapter 10), represent major standpoints in relatively recent US debates on the topic.[23] Yoo argues that structural regulation actually has a negative impact on the content of speech, even though it has survived First Amendment scrutiny because it appears not to favour any particular speech. By way of example, he cites policies to promote free-to-air (advertising-supported) television, rate regulation of cable television, media ownership restrictions, and limits on vertical integration, policies which have been decided constitutionally not to implicate the content of expression. For Yoo, from an economics and law perspective, such 'architectural censorship' tends to diminish the overall quantity and quality of programming and also reduce the diversity of its content. However, he maintains that courts are unable to determine what should be the appropriate standard of scrutiny, for judging the status of these provisions, and are too deferential towards the policy objectives.

Baker's comments start by challenging the free market basis of Yoo's discussion. He focuses, instead, on the democratic significance of the media and the need to form arrangements that reflect democratic values. This entails the creation of structures to provide the greatest 'dispersal of power within public discourse' (p. 392). Baker's objections fall into three main categories. First, he rejects what he calls the 'reductionist commodification' underlying Yoo's analysis. He maintains that ownership rules are needed regardless of the empirical question of whether or not they actually produce greater diversity of content. For him, the presence of diversity of sources (voice) is the real issue. This perspective reflects only the expressive dimension of the free speech principle, however. A broader conception of media pluralism would also require that a diversity of information is indeed made available to audiences, but ownership regulation cannot do that without being supplemented by other measures to encourage a plurality of content and widespread access to it. Secondly, Baker takes issue with Yoo's 'enterprise-based' economics, arguing that they give insufficient weight to considerations of politics and welfare. Thirdly, he challenges the very idea of 'architectural censorship', claiming that the unintended consequences of structural design cannot be regarded as the suppression of opinion.

Structural regulation of ownership has been one of the principal ways of promoting the value of media pluralism in a democracy. But will it be appropriate for new media? The essay by Thomas Gibbons (Chapter 11) suggests that traditional, sector-specific approaches will become outmoded as media convergence occurs, but that other forms of regulation will be needed to deal with concentrations of power in the industry. The reason is that convergence between platforms for delivery will mean that the production and packaging (bundling) of content become more important in the media value chain than the means of dissemination. A particular issue is the control of 'bottlenecks', narrow points through which flows of content have to pass in the course of distribution. Competition law provides some redress for

22 See Sunstein, Chapter 3 in this volume. See also the essays in the Part I of Volume 3 of this series.

23 See also Baker (2007); Bagdikian (2004); Compaine and Gomery (2000). The FCC made a second attempt to relax local media ownership laws in December 2007.

economic bottlenecks, and the regulation to ensure access to services deals with some aspects of technical bottlenecks, but Gibbons argues that neither is sufficient to protect the interests of end-users in receiving information.

Issues in Regulating New Media

Part IV provides a selection of articles that deal in more detail with a range of significant issues raised by new media. The general theme is access and control over the dissemination of audiovisual material, and the ways that regulation interacts with technology, competition law, intellectual property rights, and contractual arrangements. Digital technology has the potential to confine, as well as to release, information flows.

A key feature of digital audiovisual media is their potential for interactive communication. In a comparison of the US and European approaches, the essay by Hernan Galperin and François Bar (Chapter 12) examines the regulatory implications of the development of interactive television services. Illustrating the kinds of questions that apply to new media more generally, it explores the relationship between content providers and network providers, interconnection between different services, consumer access to services, and barriers to competition. A particular concern is the possibility that, instead of allowing widespread access to information, there will be a tendency for services to depend on proprietary technologies and 'walled garden' business models. Anticipating what has come to be described as the 'digital divide', Galperin and Bar worry that this could 'leave second-class digital economy citizens with access to a limited array of entertainment, transaction and educational services' (p. 437). Their analysis is interesting because it suggests that, even if convergence leads to a deregulation of broadcasting in favour of the more market-oriented approach to be found in telecommunications, the retention of a broadcasting business model for new interactive services will inhibit the freer flow of information that might be anticipated. They show how there are opportunities and incentives for anti-competitive behaviour across the major components of a network: the transmission system, the return path (along which the user interacts with the provider) and the end-user's access (the set-top box). However, as they discuss, the US and European responses to the problems are somewhat different. The US regulator has been reluctant to intervene in an immature market, as the AOL/Time Warner case illustrated. By contrast, the European Commission has been willing to impose restrictions on dominant providers as a condition of approving joint ventures, as the BIB case illustrated.[24]

As Galperin and Bar observe, the EC's general competition rules are supplemented in this area by a co-ordinated framework of regulation for electronic communications,[25] which covers all aspects of the wireless and wired infrastructure. It is based on the premise that some *ex ante* regulation is required for enterprises with significant market power. However, that framework reflects the view, within the EC's broader Information Society policy, that infrastructure regulation can meaningfully be separated from content regulation. Natali Helberger challenges

24 Ofcom currently adopts broadly the same approach as that described for its telecommunications predecessor, Oftel.

25 For a comprehensive account, see Nihoul Rodford (2004). The Directives are under review in 2008; see links from the European Commission's Information Society Thematic Portal.

that view in Chapter 13,[26] in which she examines the connection between digital broadcasting and the right to receive information, in the light of the way that electronic access control changes the way that viewers access content. She observes that, under the jurisprudence of the European Court of Human Rights, the viewer's right is not to claim access to content that the media possess, but to be able to receive the content that the media choose to impart. This reinforces the idea that viewers are passive recipients of information, with the implication that media companies' control over access to content may have the effect of excluding members of the audience.

Helberger's focus is the European Community's review of the provision, in the 1997 amendment to the 'Television without Frontiers' Directive, for ensuring that major events of national importance can be broadcast free-to-air. That provision was a response to the growth of subscription television, both analogue and digital, and its effect on public service broadcasters' ability to secure the transmission rights for important occasions. However, because digital technology enables content to be put together into discrete digital packages, the distribution of material can be much more closely controlled and calibrated. Partly, the controls are technical, such as set-top boxes, and partly they are contractual, such as subscription management systems (tied to the technology) and the bundling of programming. In addition, intellectual property rights will interact with the technology to impose territorial restrictions on the circulation of content. As a response to those developments, as Helberger explains, a right to 'short reporting' became part of the reform agenda during the review of the Directive in 2004. That right has now been incorporated into the Audiovisual Media Services Directive 2007 (Articles 3j and 3k). However, she argues that the new provision does not take sufficient account of the way that digital television has altered the viewer's experience, from being a member of a large audience to being an individual user. She suggests that existing measures, to deal with what is broadcasters' access to infrastructure, needs to be supplemented with protection for individuals' access to specific content.

Nevertheless, without a vibrant market in content delivery, access rights may lack substance. As Damien Geradin explains, in his essay on the related competition law problems in the new media (Chapter 14), the ability to supply premium content, represented mainly by football matches and Hollywood blockbuster films, is critical to a media provider's business success and its capacity to supply other kinds of content. However, where dominant (generally pay-TV operators) control the distribution and showing of content, by means of contractual and intellectual property rights, there may be few opportunities for new firms to offer different packages. Geradin's essay deals with difficulties that are not usually discussed in the regulatory literature but which are immensely important for media practice. Indeed, one effect of convergence is to expose the sometimes complicated relationship between regulation and intellectual property rights. While technical convergence means that different forms of content delivery no longer need to be regulated differently, from a rights-holder's perspective, the ability to deliver the same content across a variety of platforms means that maximum economic value can be extracted by granting separate licences for each of them. Geradin provides a number of examples of such practices, reminding us that very large sums of money are at stake, which in itself will create an obstacle for new firms. The principal regulatory tool for dealing with the resulting problems is competition law and it is clear that, although the

26 The article draws on Helberger (2005).

general principles may appear straightforward, their application is highly context-specific. It requires empirical definition and analysis of the relevant markets, which may be frequently shifting, together with detailed analysis of the particular contractual arrangements. Geradin argues that it is these arrangements in the new media, especially those involving minimum guarantees and exclusivity agreements, which prevent new media platforms from gaining access to the market and which should be subject to greater regulatory intervention.

Interests in content may also be protected through new technology and this creates another area of interaction between regulatory policy and intellectual property law. Chapter 15, an essay by Andrew Kenyon and Robin Wright, explores some of the implications for free-to-air television, comparing US, European and Australian initiatives. Originally, one of the defining characteristics of broadcasting was that it was free-to-air – that is, capable of being received without a direct charge for the content. As mentioned earlier, digital technology allows direct charging to take place, providing a basis for subscription television. Will it make a difference to free-to-air programming? On one view, it will simply enable new forms of distribution across different platforms. But Kenyon and Wright suggest that the implications will be more significant if content providers are able to use the technology to restrict the use and reuse of material freely received. In practice, this could mean limiting the copying for the purposes of time-shifting or sharing with other users. Digital technology offers content providers the opportunity to enforce restrictions on usage that were not possible or practicable when material was freely available. From a copyright perspective, the policy issues turn on the balance to be struck between a fair reward for the content creator's efforts and the public's interest in the free flow of information. From a media-policy perspective, the issues involve the viability of the traditional, advertising-funded, mass audience approach to television viewing, and the desirability of content providers being able to exert direct influence media policy. Related, there is a public governance issue at stake, since copyright has traditionally been regarded as an area of private law-making, where wider democratic concerns have not been prominent. One of the key points made by Kenyon and Wright is that the evolution of digital technology requires the joint development of appropriate broadcasting and intellectual property policies.

The trans-national dimension of media transmission, whether it be by radio, satellite or the more recent Internet, has long given rise to problems of jurisdiction and enforcement. The European Community approach has already been mentioned, but there are broader questions posed by clashes between the fundamental values of states at an international level. These are considered by Horatia Muir Watt in Chapter 16, in which she examines a set of questions prompted by litigation where one state has attempted to impose local restrictions on material that can be accessed through the Internet. As Watt notes, problems typically arise because the libertarian perspective on freedom of expression, reflected in US constitutional law, comes into conflict with public values that deem certain content offensive. For example, in the Yahoo case, French regulators prohibited offensive content originating in California from being accessed in France. The conflict between jurisdictions is exacerbated in relation to the Internet because its history and development has been associated with the idea of 'cyberspace', a metaphor which connotes the last bastion of unrestricted flows of information, disconnected from geography and jurisdiction. How should such 'cyberconflicts' be resolved?

Watt argues that the design of the Internet does not determine the normative implications of such international conflicts. Perceiving the Internet as a norm-less space is an ideological choice. In fact, the architecture of the Internet has as much capacity to restrict information