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Free Speech in the New Media

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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

New media is a term that has come to describe forms of communication which are based on digital technology. It embraces the various kinds of content that are delivered and received across digital broadcasting, digital cable and satellite, mobile telephony and the Internet. Compared to traditional media, the significance of digital technology is that it enables information to flow between creators/producers and users/audiences in radically different ways. The nature of content need no longer determine the way that it is disseminated and the people it can reach, and new markets for new products can more easily be established. In particular, because digital technology allows information to be bundled into discrete elements that can be marketed separately, it allows the flow of information to be controlled more easily by producers and consumers. The resulting phenomenon, of convergence between different forms of media and communications, throws earlier debates about free speech and broadcasting regulation into sharp relief and raises fresh questions about the continued persuasiveness of justifications for government interference with media activity.[1] This volume of essays deals with questions of political and constitutional principle and theory that affect new media. An accompanying volume, *Regulating Audiovisual Services*, examines more closely the issues of regulatory design and technique that convergence raises for the audiovisual sector.

Free Speech and Converged Media

Freedom of expression is a political and constitutional principle of major importance that normally requires governments to provide very strong justifications for interfering with flows of communication.[2] In the case of radio and television broadcasting, however, the presumption against regulation has been more easily overcome. As Barendt (1993, ch. 1) has discussed, there have traditionally been three main arguments offered to justify regulating broadcasting. One is that the electromagnetic spectrum is a public resource. But this may as easily provide a reason for the creation of a property market in spectrum as for the regulation of content transmitted across it. Another argument is that spectrum is scarce, so government has to allocate its use fairly and efficiently, thereby necessarily excluding some speakers from accessing it. Again, a non-regulatory, market-based approach may be equally compelling. Third, it is argued that mass media have an especially powerful impact on public opinion and therefore need to be regulated in the public interest. There are really two strands to this argument: one is that the audience is unable to control the material it receives (the apparent pervasiveness of broadcasting's intrusion into the household and its impact on a general audience including children); the other strand is a mass medium's potential to reduce diversity of expression and

1 For a discussion in the United Kingdom context, see Gibbons (2001/2002).

2 See the first volume in this series, *Freedom of the Press*, edited by E. Barendt (2009). See also Barendt (2005).

of content. Here, the acceptability of either point is more dependent on empirical data about media effects than on opposition to possible excesses of power over communication.

Assuming it is granted that some regulation of traditional analogue broadcasting may be justified, what are the implications for new media? The appropriate outcome is not self-evident from the fact of convergence in itself. Convergence does not necessarily require rationalization in the direction of the 'first amendment' approach that has traditionally been applied to print media; it may be that the reasons for intervening in broadcasting are also applicable to new media. What is required is the identification of satisfactory principles for deciding how free speech is to be preserved in the new media.

As a starting point, Chapter 1, a well-known article by Lee Bollinger, discusses what he calls two opposing constitutional traditions in the United States. The print media are given almost complete protection from government interference, whereas the broadcast media may be subject to various forms of control, based on the requirement, under the Communications Act 1934, that the Federal Communications Commission (FCC) exercise its responsibilities with reference to the 'public interest, convenience or necessity'. Although Bollinger's discussion is relevant to other kinds of media regulation, such as measures to control harmful or indecent content, his particular focus is affirmative regulation for the purpose of enabling the public to receive access to a variety of ideas and experiences. That was exemplified by the FCC's 'fairness doctrine', which required broadcasters to provide fair and adequate coverage of opposing views related to controversial issues. Bollinger's aim is to discover whether there is any rational basis for treating one sector of the media differently from the other. He concludes that there is no such basis but, nevertheless, suggests that a dual approach may be justified in order to balance freedom of the media with a way of mitigating 'the serious inequality in speech opportunities' (p. 4) that exist.

Bollinger demonstrates that there are serious flaws in the 'scarcity rationale', mentioned above, both as a basis for regulation in itself and as a reason for distinguishing between print and broadcast media. His observations are all the more pertinent in the light of developments since he was writing, in the shape of cable, satellite and Internet distribution of content. However, one of his main points is to claim that discussion of the scarcity rationale is really concerned with a deeper principle, that 'when only a few interests control a major avenue of communication, those able to speak can be forced by the government to share' (p. 11).[3] The anomaly in US constitutional doctrine is that this principle appears to be applicable only to broadcasting and not to print. Furthermore, it is only permissive and does not require government to intervene and, indeed, since Bollinger wrote, the FCC has abolished the fairness doctrine. Are there other rationales to explain the different approaches to print and broadcasting? Bollinger considers arguments that broadcasting is distinctive because it is a more concentrated industry or because it has a special impact on its audience (especially that of television on viewers), but he does not find them convincing. Nevertheless, he believes that a '*partial* regulatory scheme' (p. 34; original emphasis) may be defended because, however

3 For a different understanding, see Lively (1992). Lively agrees that the scarcity rationale has had a major influence in accounting for the press/broadcasting divide, but he regards it as illogical and leading to a unique interpretation of the First Amendment that elevates the rights of viewers and listeners above those of broadcasters (at p. 609).

illogical its historical emergence, it enables competing first amendment values – editorial freedom and exposure to a full range of ideas and opinions – to complement each other.

Bollinger's conclusions, if not his basic analysis, have been criticized as an unsatisfactory compromise (Barendt, 2005).[4] Nevertheless, as Hitchens points out, it may serve to highlight that, 'the issue may really be not why broadcasting is regulated, but why the press is not' (2006, p. 47). As her book shows, the values of pluralism and diversity may justify positive regulatory intervention to enhance interests in freedom of communication. Indeed, this is a view that is not so controversial from a European perspective, where the free speech principle is not regarded solely as a matter of negative liberty.

One reason, then, why Bollinger's conclusion may be insufficient is that his explanation for the contrasting approaches to print and broadcasting regulation requires further elaboration. In Chapter 2 Jonathan Weinberg argues that the explanation is that the free speech philosophy applied to print is the manifestation of a different 'world-view' from that which underlies broadcasting policy. Free speech reflects 'individualism and a sharp public-private distinction' (p. 51), whereas broadcasting emphasizes community interests that may justify some government paternalism. Weinberg notes that each has its advantages and drawbacks. Free speech philosophy is highly sceptical about extending governmental power over communication, but it assumes that a marketplace of ideas will function effectively to encourage expression and to bring a wide range of competing views to public attention. Broadcasting regulation is sensitive to structural inequalities in access to public debate and to the possible effects of different kinds of communication on its audiences, but it proceeds by way of imposing public interest requirements that may be vague, contestable and subject to excessive administrative discretion.

For Weinberg, the point is that, if traditional free speech is regarded as the basic standpoint for judging broadcasting regulation, the process of licensing and enforcing licence requirements may indeed be seen as unjustified interference with editorial independence. But if the adequacy of that free speech standpoint is questioned, a different picture may emerge. In particular, he argues that the 'marketplace metaphor' is flawed because it does not recognize that members of society do not have sufficient meaningful opportunities to speak and to convince others of their views, and it assumes that discourse will be rational and thereby yield some conception of truth or democratic self-determination. At the same time, he is suspicious of governmental intervention to improve the process by way of controlling broadcasters' speech, concerned that it could undermine the benefits of free speech doctrine. His solution to the dilemma is to examine the possibilities of public service broadcasting on the one hand and the potential of the Internet on the other, as means of providing greater exposure for 'unprivileged' viewpoints.

As Bollinger (p. 28) foresaw, new technology forces existing regulatory principles to be reconsidered and modified where appropriate. In Chapter 3 Thomas Krattenmaker and Lucas Powe ask the question, 'How can one reconcile the fact of technological and media convergence with the legal presumption of distinct treatments?' (p. 149). They argue that, in choosing which approach to adopt for converging media technologies, the broadcast model should be discarded in favour of the print model. In their view, not only is special regulation for broadcasting a constitutional anomaly, but new forms of media can be dealt with more

4 Barendt (2005) also describes it as incoherent; see also Hitchens (2006, p. 47). The regulation of media ownership is considered in Volume 4 of this series.

appropriately under the traditional first amendment principles that have been applied to print.

In presenting the case for the general application of these first amendment principles, Krattenmaker and Powe are reflecting a broader antipathy to governmental interference in communications. For them, editorial control over speech is a matter for private institutions, because attempts at regulation serve to chill speech or to stifle it. Imposing a public interest standard on programming serves to deny the viewing or listening choices that adults would otherwise make. The marketplace is the appropriate means for ensuring speakers' access to the media and the availability of a diversity of content for audiences.

A merit of their approach is that it does not succumb to technological determinism. There has been a tendency in some policy debates to emphasize technical similarities and differences, in comparing media in order to chart the direction of convergence, and to draw the conclusion that the appropriate approach to regulation will necessarily follow from the way that the medium is characterized.[5] Just prior to the time that Krattenmaker and Powe were advancing their perspective in the United States, the European Commission had issued a Green Paper on convergence which suggested that new, converged media would have more in common with telecommunications than broadcasting and, since telecommunications regulation was more market- and competition-oriented, that would be the best model for future regulation of all communications (see Harrison and Woods, 2007, ch. 5).

Nevertheless, there may still be a case for regulating television, even in the new media environment, as an important essay by Sunstein (2000) demonstrates.[6] Sunstein maintains that there is a public interest in television content and that regulation may be justified, on both economic grounds and its social functions, in order to promote democratic objectives. Furthermore, he argues that the introduction of digital broadcasting does not diminish the case for intervention to support those objectives in new forms of television content. In support of these claims, Sunstein suggests that broadcasting is not an ordinary market commodity. This is because it is characterized by a number of market failures, whereby typical economic relationships between providers and consumers do not exist or function ineffectively, and its particular association with public discussion requires measures to support its democratic significance.

Indeed, implicit in the essays considered so far is the recognition that media activities are inextricably bound up with democracy. However, it may be that earlier debates about the scope of media regulation (including the relationship between print and broadcasting) have been constrained by a particular view of democracy. This is the view of Jack Balkin (Chapter 4), who advances a challenging argument that Internet and digital technologies serve to highlight features of freedom of expression that have hitherto been underemphasized, namely its cultural and participatory dimensions. For Balkin, 'The digital revolution makes possible widespread cultural participation and interaction that previously could not have existed on the same scale ... and makes the production and distribution of information a key source of wealth' (p. 175).

5 For criticism of this approach, see Goldberg *et al.* (1998).

6 The essay also contains a valuable discussion of innovative forms of regulation, and is therefore reproduced in Volume 4 of this series.

The first trend is essentially democratic, making it possible for an increasing number of people to take part in the creation and distribution of material. It extends beyond formal representative institutions and public deliberation, encompassing what Balkin describes as a 'democratic culture' (p. 175) in which individuals are closely involved in the processes that give meaning to their lives. A theory of freedom of expression for the digital era requires protection for the ability to participate in the system of culture creation. But the second trend may run counter to those developments. Digital technology enables methods of control over information to be more effective, and that can restrict democratic participation. Balkin argues that media companies deploy free speech arguments both broadly and narrowly, in order to secure their commercial interests in exploiting the wealth potential of digital expression. To resist the regulation of digital networks, they say that intervention will prevent open access to information. To resist the expansion of the public domain in intellectual property rights, they say that free speech implies the ability to protect the manner of expression. Balkin is concerned that these arguments are beginning to dominate and that freedom of speech is in danger of becoming a general right against economic regulation of the information industries.

As Balkin observes, these issues have also been discussed in relation to more traditional media and have prompted initiatives to control media ownership and to ensure greater diversity of content and access for a broader range of viewpoints. He acknowledges that (contrary to what some suppose) the existence of the Internet (with its open and relatively unrestricted nature) will not compensate for the democratic deficiencies of existing media, because the Internet is not independent of traditional media but builds upon them. Nevertheless, he thinks that we no longer live in an age where a few speakers broadcast to a largely inactive audience; Internet speech has made a difference, and free speech theory must accommodate that change. For him, the principal features of Internet speech are its reflection of popular culture, its innovation, its creativity in re-working content and ideas (what he calls 'glomming on', p. 182), its interactivity and participation, and its association with virtual communities.

Balkin's approach to solving the trend to control new, digital speech is to focus on free speech values, rather than constitutional rights, and to build their recognition and respect into the very infrastructure of communications and its regulation. He wants opportunities to be made for individual expression to surface without being subjected to the kinds of constraint that may be imposed on more traditional media. But is he being too optimistic in believing that the Internet will revolutionize communications? He does not believe that it will hasten the demise of traditional media but he does suggest that it will act as a counterbalance which should be protected by free speech theory.

In Chapter 5 Jacob Rowbottom offers a more sceptical response to claims that the Internet will herald a more democratic media. Acknowledging the features of Internet speech (on which Balkin places much emphasis) – the low cost of communication, the relative ease of participation and the greater scope for user control – he argues that online expression is likely to manifest the same problems as traditional media: '[it] can not only perpetuate existing media elites, but also create new ones' (p. 232). His starting point is that media freedom is not the same as individual expression, because control over expression is vested in a relatively small number of people, so there will continue to be a need to regulate to ensure that such expression is exercised in accordance with social and democratic responsibilities. However, he takes issue with the idea that the greater emphasis on individual expression on the Internet has the effect of making such regulation less important and re-orienting the rationales for

intervention. Rather, he argues that even the online world is characterized by a small number of speakers or mediators addressing a mass audience and controlling the content that it receives, so existing regulatory approaches will continue to be appropriate for them.

Public Service Broadcasting

Debates about the relationship between free speech and electronic media are predicated on policy assumptions about the nature of that media. Chapter 6, by Georgina Born and Tony Prosser, opens with a question that captures the main issue: 'Is broadcasting [broadly conceived] best conceived as a commercial activity or as an expression of cultural norms and expectations?' (p. 259). Outside the United States, and especially in Europe, the latter – public interest – dimension has dominated from the outset. For decades, but to varying degrees, governments controlled the airwaves and organized broadcasting through public service monopolies which had duties to provide for the public as a whole. This was no longer a general model by the 1980s as new forms of delivery offered competition to broadcasting, the European Convention on Human Rights was invoked to secure greater pluralism in broadcasting provision (Craufurd Smith, 1997) and economic liberalization gained political ascendancy. The trend in Europe has been a gradual deregulation away from total public service programming, but the essential compatibility of its values with free speech doctrine has hardly been challenged. In policy terms, although one effect of the European Community's 'Television without Frontiers' directive was to liberalize many Member States' broadcasting systems, those States have jealously guarded the public service traditions of their national broadcasters (see Amsterdam Treaty, p. 262).

Many of the core principles of public service broadcasting can be attributed to the institution of the UK's British Broadcasting Corporation (the BBC) (see Barendt, 1993; Craufurd Smith, 1997; Curran and Seaton, 2003, chs 8–11). It developed its original 1920s remit, to 'inform, educate and entertain', into an elaborate set of practices that were at once both creatively challenging and universally appealing, yet arguably elitist and paternalistic. Quality programming was funded entirely from a licence fee, without commercial support from advertising or sponsorship. Over the years, the BBC has developed its conception of public service values in a critical and reflexive way and various elements of public service broadcasting have been imposed on commercial providers by regulation in the UK and more widely in Europe. Nevertheless, a number of questions about public service broadcasting continue to be keenly discussed.

One question is the nature of the public service remit. Increasingly, there have been demands for its substance to be explicitly articulated, rather than repose in the broadcasters' culture and practice. Justifications need to be offered for the degree of public expenditure that it involves, and for the level of subsidy that it entails in attracting audiences from commercial competitors. Another question is the extent to which public service providers should produce programme genres similar to those provided by commercial providers, or concentrate on content which the market will not supply. A third question is whether, in the light of media convergence, the public service remit should be extended to new media, including online content. The essay by Born and Prosser discusses these issues in the context of the lengthy and wide-ranging reform process that started in the late 1990s in the UK, and led to new communications regulation,

the Communications Act 2003, and a new Charter for the BBC in 2006.[7] They particularly emphasize the democratic or 'citizenship' element of public service, which has always been a rationale for its existence, if sometimes only latently, and takes on added significance as the scarcity rationale diminishes in cogency.

More recently, the UK's regulator, Ofcom, has restated the principles of public service broadcasting in terms of its purpose and key characteristics, rejecting a 'genre' approach to its definition and implicitly accepting its democratic function.[8] The purposes of public service service broadcasting are:

- to inform ourselves and others and to increase our understanding of the world through news, information and analysis of current events and ideas;
- to stimulate our interest in and knowledge of arts, science, history and other topics through content that is accessible and can encourage informal learning;
- to reflect and strengthen our cultural identity through original programming at UK, national and regional level, on occasion bringing audiences together for shared experiences; and
- to make us aware of different cultures and alternative viewpoints, through programmes that reflect the lives of other people and other communities, both within the UK and elsewhere.

The distinctive characteristics of public service programmes are:

- high quality – well funded and well produced;
- original – new UK content, rather than repeats or acquisitions;
- innovative – breaking new ideas or re-inventing exciting approaches, rather than copying old ones;
- challenging – making viewers think;
- engaging – remaining accessible and enjoyed by viewers; and
- widely available – if content is publicly funded, a large majority of citizens need to be given the chance to watch it. (Ofcom, 2005, para. 1.11)[9]

Ofcom has recognized that, in the digital age, public service content and its distribution will change, to reflect new technologies and users' behaviour, but that it will continue to have a major role in the new media.

Nevertheless, the precise role of public service provision, and especially its relationship with commercial providers, is by no means settled. As Born and Prosser indicate, wider developments at the European level are of critical importance for national policies to support public service broadcasting. In particular, European Community law on freedom to provide services within the internal market, and the provisions of its competition law on 'state aid', place limits on the way that public service content can be imposed on national media markets.

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7 Royal Charter for the Continuance of the BBC, 2006, Cm. 6925, available at: http://www.bbc.co.uk/bbctrust/

8 This reflects Ofcom's duty to promote citizenship, under s.1 of the Communications Act 2003.

9 For documents relating to that first review, together with the second review in 2007/8, visit the Ofcom website at: http://www.ofcom.org.uk/. See also BBC (2005).

In Chapter 7 Mike Varney offers an overview of developments in this area. He discusses how the effect of European Community law is to remove indirect support for public service from the commercial market, and to force the detail of public subsidy to be made more explicit. At the same time, he shows that the European Court of Justice and the European Commission are not unsympathetic to the public service mission and indeed to measures intended to promote free speech through pluralism and diversity (see also Prosser, 2005).

By contrast, in Chapter 8 Mark Fowler and Daniel Brenner make the classic case for wholesale deregulation of broadcasting in favour of a market-based approach. It is particularly interesting and relevant to the public service broadcasting debate because of the way it characterizes its target, the US regime for issuing broadcast licences under the Communications Act 1934, by reference to the public interest standard. Fowler and Brenner describe this as a 'fiduciary' or 'community trustee' approach and they argue that is no longer justified. Instead, they propose that broadcasters should be regarded as marketplace participants and that broadcasting policy should be directed towards maximizing the services that the public desires. For them, normal marketplace mechanisms should be used to determine what the audience wants and the means of supplying it, rather than have the FCC decide it on their behalf: 'The public's interest, then, defines the public interest' (p. 322). The implication is that any regulation of the broadcasting industry, and the content it provides, should be confined to competition measures designed to promote the efficient functioning of the relevant market. To the extent that a liberalized market is consistent with liberty of speech, some of their arguments overlap with the constitutional points discussed in the previous section. But Fowler and Brenner are as much concerned with the economic shape of the broadcasting industry. They see the very existence of licensing as a distortion of market effects, replacing individual choice with costly governmental or regulatory paternalism. By comparison, the marketplace approach would attend to the basic commodity that can be traded in a broadcast market, namely electromagnetic spectrum.

Fowler and Brenner's thinking has had at least indirect policy outcomes. It was reflected in the Peacock review of the BBC's finances, commissioned by the Thatcher government (Peacock Committee, 1986), which prompted wider deregulation of the UK's broadcasting industry in 1990. Various forms of spectrum trading have been introduced in both the USA (in 1994) and the UK (in 1998). However, in the UK, the peculiar economics of broadcasting have been recognized as justifying at least some regulatory intervention.[10]

Content Standards

Beliefs

Part III of the volume deals with problems raised by particular kinds of content restriction. The two essays in this subsection are concerned with the advocacy of beliefs. In Chapter 10 Andrew Scott examines the legality of the UK's prohibition in the electronic media on 'advocacy advertising' – that is, advertising for the purpose of communicating social, political and moral

10 The Peacock Committee itself made the case. See also Ofcom (2005). For developments in the United States, see Goodman (2007) and Campbell (2006).

arguments to a wider public.[11] The ban has been a long-standing feature of broadcasting regulation in the UK and was re-enacted in the Communications Act 2003, notwithstanding reservations that it may be incompatible with Art. 10 of the European Convention on Human Rights (protecting freedom of expression). As Scott argues, the ban appears to conflict with the priority that the Convention jurisprudence gives to political expression in the light of its intrinsic connection with democratic practice. He considers four justifications offered for continuing the ban – protecting audiences from intrusive political comment, the existence of alternative outlets for political expression, the need to insulate the public sphere against over-powerful interests, and possible negative implications for the funding of political parties – and finds them all unpersuasive. His view appeared to find support in the European Court of Human Rights[12] but some doubt has arisen in the light of that Court's apparently inconsistent attitude to religious advertising.[13] In Chapter 9 Andrew Geddis explores possible reasons for this, arguing that there are no differences in principle between political and religious expression, but that the Court has wrongly allowed States a greater margin of appreciation in regulating religious content in broadcasting. At the root of this debate are differing views about what measures are needed to safeguard the functioning of a healthy democracy. Recently, the House of Lords has confirmed that the ban on broadcast political advertising is compatible with the Convention, effectively rejecting the criticisms advocated by Scott.[14] Especially noteworthy is its emphasis on the perceived power of the electronic media as a reason for regulating it in the interests of promoting free speech.

Indecency

A second pair of essays deals with the control of indecency. The context is set by Monroe Price's discussion of 'the newness of technology' in Chapter 11. Although his analysis resonates with those of Balkin and of Rowbottom, discussed above, his purpose is not to take sides in predicting whether new technology is likely to be truly revolutionary. Rather, he is interested in the way it is perceived and acted upon by legislators and lawyers. He notes that there is a greater tendency in the United States, as opposed to Europe, to measure new media by reference to the First Amendment issues considered in relation to traditional media. Thus, the Internet is characterized in terms of its similarities to print media and its differences from broadcasting or cable television, in order to determine the constitutionality of regulation. Relevant questions then centre on, for example, user choice, the ability to separate audiences by age (adults and children) in time or space, and the capacity to enforce controls over the new technology. Price shows how these considerations featured in the US Supreme Court's ruling in *Reno*.[15] Policy responses, and judicial reactions to them, may be based on speculation about the threats and opportunities that the Internet brings, rather than on a sense of the underlying principles at stake. In the course of his discussion, Price offers a useful commentary on the work of Lessig, who has written extensively on the relationship between the law and the

11 The title of his essay quotes from Barendt's evidence to a Parliamentary scrutiny committee. See also Barendt (2003).

12 *VGT Verein gegen Tierfabriken* v. *Switzerland* (2002) 34 EHRR 4.

13 *Murphy* v. *Ireland* (2003) 38 EHRR 212.

14 *R (Animal Defenders)* v. *Secretary of State for Culture, Media & Sport* [2008] UKHL 15.

15 *US* v. *Reno* 21 U.S. 844 (1997). For subsequent developments, see Chapter 12 in this volume.

architecture of the Internet. Lessig was critical of the *Reno* decision, which treated the Internet as analogous to print media and therefore meriting the least restrictive form of regulatory intervention, because it relied on the potential of technology (such as filtering and encryption) to protect the interests of children, but without appreciating that that technology could pose much greater threats to free speech than a regulatory measure.

As Price implies in his conclusion – 'Something is changing ... in the interaction between the staggering symbolic output of the society and the development of its children' (p. 437) – there may be other values than the First Amendment at stake when regulating the new media. In his discussion of sexually explicit expression in Chapter 12, Ian Cram argues that a Madisonian interpretation of the First Amendment, giving primacy to political speech, also implies that the strictest scrutiny of content regulation may not be appropriate for examples of speech lower down the hierarchy. Discussing *Reno* and the later litigation in *Ashcroft*, he makes a case for proportionate intervention to protect children against harmful effects of online content. Such an approach would not be controversial in Europe, and the emphasis there has been on finding effective regulatory techniques to secure protection.[16]

Content Regulation in the European Community

For the European Community, various aspects of content regulation were brought together by the 'Television without Frontiers' directive, first promulgated in 1989,[17] amended in 1997[18] and further revised in 2007 under a new title – the 'Audiovisual Media Services Directive' (AVMSD).[19] The aim of the original directive and its 1997 amendment was to coordinate aspects of television regulation within the Community's internal market. It combines a 'country of origin' principle with one of freedom of transmission and reception, for the purpose of enforcing a minimum set of harmonized standards. This means that responsibility for enforcing those standards on broadcasters or providers is given to the Member State where the media company is established, and other Member States are required to accept material received from that jurisdiction without imposing on it stricter regulation of their own. The revision in 2007 has the same aim but its scope has been extended beyond television to new forms of audiovisual media. In Chapter 13 Berend Drijber discusses the position before 2007 but his essay continues to be relevant, since it examines a range of issues that have not been substantially affected by the AVMSD. Rachael Craufurd Smith, in Chapter 14, discusses the implications of the AVMSD itself, with a particular stress on its attempt to cater for newer media.

By the very nature of the European Community, the framing of the minimum content requirements has been a highly politicized process (see Collins, 1994) and has focused on three main themes. One involves aspects of jurisdiction and potential conflicts between different Member States' own media regulation and their interpretations of the minimum requirements in the Directive. Another theme has been the imposition of positive content requirements

16 See the essays in Volume 4 of this series. For general discussion of free speech principles related to the Internet, see Barendt (2005).

17 Directive 89/552/EEC.

18 Directive 97/36/EC.

19 Directive 2007/65/EC. For background information and texts, visit the European Commission's Information Society Portal at: http://ec.europa.eu/information_society/index_en.htm.

in the form of quotas for European content and independent European production, and of protection for free-to-air programming of major events of importance to society. A third theme is a set of negative content requirements, imposing restrictions on advertising and sponsorship, harmful and illegal material that especially affects children, and the violation of some basic human rights. As Collins has noted, the positive and negative elements represent, respectively, 'dirigiste' support for the protection of European culture and media policy on the one hand, and pressure for liberalization of the market on the other.[20]

Drijber's analysis of the problems raised by jurisdiction and the country of origin principle demonstrates the tensions that lie dormant in such an elaborate political compromise. Notably, concerns about the problem of 'circumvention', whereby a media company may avoid being regulated by a strict Member State through the device of establishing in a more lenient regime and transmitting from there, have persisted, and are intended to be addressed in the AVMSD by a new conciliation process to deal with them. Similarly, the arguments for and against quotas in mainstream television have not changed, and they were strongly pursued in negotiations leading to the AVMSD, which has altered the position but only for interactive and on-demand content (now described as 'non-linear' services, and discussed by Craufurd Smith). Again, the provisions for major events of national importance have not been changed by the AVMSD. Drijber's essay has been overtaken by a relaxation of some advertising rules in the AVMSD: detailed requirements about the scheduling of advertising within programmes have been largely removed and, significantly, product placement will now be allowed, except in children's programming. Nevertheless, his general discussion illustrates the complications of seeking to coordinate, at a transnational level, the activities of an industry that combines economic pursuits with strongly held political and cultural objectives.

The complexity is intensified when the implications of new technology are added for consideration. Craufurd Smith's essay poses a question similar to the one in Drijber's title: is the new Audiovisual Media Services Directive 'fit for purpose'? In both essays, there is a sense of scepticism about the ability of regulation to keep pace with the rapid changes in technology that characterize communications. In 1997, it had been appreciated that the concept of broadcasting was becoming outdated as a basis for regulation but it was considered sufficient to make provision for new kinds of advertising (such as teleshopping) without introducing radical change. By the turn of the new century, it was apparent that the Directive would have to be substantially recast in order to respond to media convergence. Although all aspects of its themes – jurisdiction, and positive and negative content – were reviewed, the major debate focused on the scope of the Directive and the implications, a debate that ranged across many of the issues examined in Part I of this volume. On one view, new audiovisual media reflected an online world, for which minimal regulation was desirable. From the opposite perspective, if content regulation was justified in traditional media, the fact of delivery of similar material across a different platform would not alter the rationale. As Craufurd Smith shows, what the AVMSD has done is to attempt to resolve these differences by adopting a technology-neutral approach and directing attention to the user's experience as the foundation for intervention. A basic distinction is made, therefore, between 'linear' and 'non-linear' content, between material that is 'pushed' through mass dissemination and material that is 'pulled' on-demand and interactively.

20 For recent comprehensive discussion, see Harrison and Woods (2007).