

[Tarlach McGonagle, “Practical and Regulatory Issues Facing the Media Online”, in Christiane Hardy & Christian Möller, Eds., *Spreading the Word on the Internet: 16 Answers to 4 Questions* (Vienna, OSCE Representative on Freedom of the Media, 2003), pp. 81-94, available online at: http://www.osce.org/documents/rfm/2003/10/971_en.pdf]

Practical and regulatory issues facing the media online

This chapter explores some of the issues concerning the role, activities and regulation of the media in an online environment. It does not set out to be exhaustive in its treatment of relevant issues; rather its aim is merely to raise a selection of issues for discussion and further probing.

The media and democracy

One of the profound paradoxes of democracy is that if it functions well, criticism of it will thrive. Criticism should pervade throughout society, but it is rooted in the media and, increasingly, civil libertarian and other non-governmental organisations. It is not without reason that many people have come to regard the media as the Fourth Estate; a would-be extra pillar in a radical reworking of Montesquieu’s tripartite division of powers.

The centrality of the (mass) media to the dynamics of democracy has been recognised time and again by the European Court of Human Rights, having ascribed to the media the “vital role of public watchdog”.¹ The Court has stated that it is incumbent on the media to impart information and ideas on all matters of public interest. It has also consistently held that “[n]ot only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.² In light of this function of the media (corrective, supervisory, stabilising – call it what you will), the Court has tended to carve out a zone of protection for the media’s right to freedom of expression that is even greater than that of ordinary individuals.

One hallmark of the expanded zone of the media’s freedom of expression is the notion of journalistic independence. Importantly, this independence filters from the editorial level down to coal-face journalism and reporting. A key pronouncement in this regard reads: “the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists”.³ This commitment to the autonomy of the media in a democratic society goes a long way to guaranteeing operational latitude for journalists. Moreover, this operational latitude stretches to include “possible recourse to a degree of exaggeration, or even provocation”.⁴ However, alongside the enjoyment of journalistic

¹ *The Observer & Guardian Newspapers Ltd. v. United Kingdom*, Judgment of the European Court of Human Rights of 26 November 1991, Series A, No. 216, para. 59.

² *The Sunday Times (No. 1) v. United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, Series A, No. 30, para. 65.

³ *Bladet Tromsø & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999-III, para. 63, drawing on *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298, para. 31.

⁴ *Prager & Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 26 April 1995, Series A, No. 313, para. 38.

freedom – as defined by the Court - are concomitant duties and responsibilities⁵ (discussed below).

The growth and maturation of the European Court's attitude towards the media can largely be attributed to their function to serve the aforementioned public interest through the provision of information. The Court's attitude would appear to be premised at least in part on the point-to-multipoint nature of mass media communications; on the understanding that information purveyed and disseminated by the mass media will reach a larger section of society than communications between ordinary individuals. The contiguous considerations of impact and influence are key to this conception of the role and activities of the media.

Could or should this state of affairs under which the media enjoy preferential status change in the online world (as broadly defined)? Or, in other words, in a world where the barriers to mass communication are drastically diminished? Or in a world where communications services are becoming increasingly customised, personalised and individualised? Or in a world where the 'proliferation of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas';⁶ cutting them off from the rough and tumble of democracy; denying them the formative experience of being confronted with unwanted ideas; denying them exposure to situations where tolerance has to be learnt? Or, more poetically, in a world with a diminished incidence of 'serendipitous encounters'⁷?

Some of these highlighted trends can contribute to the erosion of shared, collective experience and the reduction of common reference points; thus negatively affecting participatory democracy and engendering social fragmentation.⁸ The net result of these trends and tendencies is that individuals are increasingly cocooning themselves in informational and communicational universes of their own creation; potentially leading to a Hall-of-Versailles type of effect where their own views are merely mirrored on all sides and distorted somewhat by virtue of excessive amplification. This stark prognosis is one of the arguments frequently invoked in favour of prohibition of websites and chat-groups dedicated to the propagation of hate speech and other types of extremist activities, for example.

Its starkness should not, however, be exaggerated. Filtering trends and proclivities towards self-insulation in the comforting surrounds of like-minded opinions are age-old practices and tendencies respectively. The Internet, like all of its forerunner communications technologies, will take some getting used to. It is typical for pioneering technological changes to set a blistering pace; for regulatory responses to lag somewhat behind this *peloton*, gasping for breath, and for cultural changes to remain largely out of the picture, with much ground to make up. Familiarity with the workings and potential of the online world will eventually harness much of the awe and apprehension that have characterised the debate thus far.

Quo vadis, then, for the media? First, is the cherished freedom of expression of the media – as staked out by the European Convention on Human Rights and the European Court of Human

⁵ See Article 10(2) of the European Convention on Human Rights.

⁶ T. McGonagle, 'Changing Aspects of Broadcasting: New Territory and New Challenges', *IRIS plus* 2001-10, p. 5. For a more expansive treatment of these issues, see generally, C.R. Sunstein, *Republic.com* (Princeton, N.J., Princeton University Press, 2001).

⁷ A.L. Shapiro, *The Control Revolution* (USA, Public Affairs, 1999), p. (xvi).

⁸ See further, C.R. Sunstein, *op. cit.*, especially Chapter 1, 'the daily me', pp. 3 -22.

Rights – likely to be transposed *en bloc* to the online world? This is by no means sure. Crucially, though, the enjoyment of relevant freedoms by media actors in the off-line world has always been contingent on the simultaneous exercise of certain duties and responsibilities (including, first and foremost, that journalists obey the ordinary criminal law,⁹ and also that they act ‘in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism’¹⁰). There is nothing to suggest that such a proviso would not (or does not already!) apply online as well. This line of analysis begs further questions: for instance, in the online world, where it is much easier for individuals to engage in mass communication, are the above-mentioned distinctions between media actors and ordinary citizens *qua* communicators still valid? On what grounds could such distinctions then be sustained? Would the rationales of impact, influence and service of the public interest, discussed above, be able to survive the transition to the online world?

The second line of analysis is more oriented towards the practice of journalism in an online environment. With the ease of direct access to original sources of information, including official information and in any case, the information which shapes the news of the day, there may be less of a role to be played by media professionals according to traditional conceptions of straight reporting. However, not everyone will invest the time and effort in checking original sources. Those who do will have to re-examine their approach to the intake and digestion of news and information available online. This need is prompted not only by the explosion of information caused by the advent of Internet-technology, but also by various qualitative features of that information: anonymity of, or lack of information about, the provider; lack of traditional intermediaries processing/providing the information; resultant difficulties in assessing the credibility of the information, especially when it originates in foreign or unfamiliar institutions, organisations or cultural contexts.¹¹

A particular role could perhaps be envisaged here for public service broadcasters if they were to assume the role of intermediaries or trustees by pointing the public towards other online material (extraneous to their own sites) to which they would have awarded a sort of ‘seal of approval’. By doing so, they would vouch for the reliability of content on other websites as being of the same high standards as on their own websites. Such a public-service kite-marking initiative could develop to become a useful navigational tool in the online world; enabling the website of the broadcaster to become a portal which would confer credibility on external content.¹² This ‘reliability-enhancing’¹³ initiative would lead any reputable public service broadcaster to be identified as a ‘beacon of trust’¹⁴ in the online world.¹⁵

Overall, the media will have to take on a more intermediary role; place greater emphasis on analysis and interpretation; counter the self-interest agenda of organisations providing information; help to sift facts from rhetoric and comment on the extracted matter. This is no

⁹ *Fressoz & Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999, Reports of Judgments and Decisions, 1999-I, para. 52.

¹⁰ *Bergens Tidende & Others v. Norway*, Judgment of the European Court of Human Rights of 2 May 2000, Reports of Judgments and Decisions, 2000-IV, para. 53, drawing on *Goodwin v. United Kingdom*, Judgment of the European Court of Human Rights of 27 March 1996, Reports of Judgments and Decisions, 1996-II, para. 39.

¹¹ See further, A. Vedder, ‘Misinformation through the Internet: Epistemology and Ethics’, in A. Vedder, Ed., *Ethics and the Internet* (The Netherlands, Intersentia, 2001), pp. 125-132, at p. 128.

¹² *Ibid.*, p. 130.

¹³ *Ibid.*, p. 131.

¹⁴ D. Docherty, ‘Empires and evolution: public service content in the new media’, 27 *Intermedia* (Issue No. 2, May 1999), pp. 20-23, at p. 23.

¹⁵ See further, T. McGonagle, ‘Changing Aspects of Broadcasting: New Territory and New Challenges’, *op. cit.*, pp. 6-7.

mean challenge for a sector which arguably bears the most responsibility for ‘the triumph of idiot culture’ (i.e., the rise of a media culture in which serious journalism is eclipsed by an obsession with sensation and scandal).¹⁶ This is a call for the media to rediscover their roots; their informative, dissident tradition. They will have their work cut out for them.

An interesting corollary question is often overlooked: what is the likely impact of the inexorable rise of Internet-related communication on the more traditional, off-line media? Will Darwinistic theories apply? Will adaptation solely within the confines of the off-line world prove possible? Or will virtually all (mass) media concerns have to reinvent themselves in such a way as to secure footholds in the off- and online worlds?

Possible role for regulation?

Having “developed by accretion, as piecemeal responses to new technology”, contemporary media regulation can be considered “complex and unwieldy”.¹⁷ Different regimes often apply to different media and each regime is characterised by its own specificities. In consequence, it can prove difficult to identify or achieve consistency in these different regimes. The reality of ongoing and projected technological changes has already precipitated fresh thinking about the best (regulatory) means of attaining desired objectives; of honouring specific values. This is particularly true in light of trends of convergence and individualisation.¹⁸

Such is the global and complicated nature of information technology and the modern media in general, that a multitude of additional regulatory difficulties (many of them unprecedented) has arisen. As concisely stated by Lawrence Lessig: “[R]elative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption – all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace.”¹⁹ Coupled with this detailed observation is the fact that the innovative features of new information technologies have heightened the exposure of the traditional shortcomings of already-existing regulatory structures. It is at this juncture that the notions of self- and co-regulation (S&CR) have been introduced into the debate.

Another impetus for the emergence of the notions of S&CR has been the current debate on, and quest for, better governance at the European level.²⁰ In this context, the European Commission’s White Paper on European Governance has enumerated five key principles of good governance: openness, participation, accountability, effectiveness and coherence.²¹ S&CR have been mooted as suitable means of helping to honour these principles in practice.

¹⁶ C. Bernstein, in E. Hazelcorn & P. Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Dingle, Ireland, Brandon Book Publishers Ltd., 1993), pp. 17-25, at p. 20.

¹⁷ T. Gibbons, *Regulating the Media* (2nd Edition) (London, Sweet & Maxwell, 1998), p. 300.

¹⁸ See further, T. McGonagle, ‘Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea’, *IRIS plus* 2002-10, p. 2.

¹⁹ L. Lessig, *Code and other laws of cyberspace* (New York, Basic Books, 1999), p. 166.

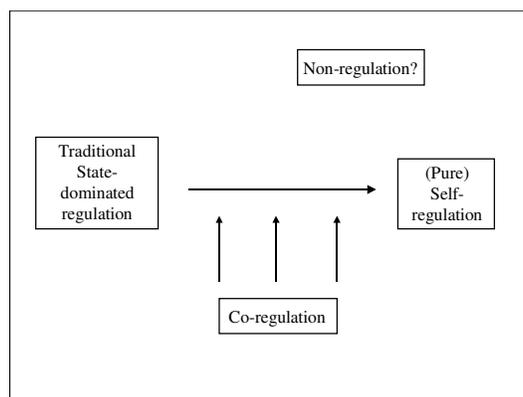
²⁰ See, in this connection, European Governance: A White Paper, Commission of the European Communities, 25 July 2001, COM(2001) 428 final; Mandelkern Group on Better Regulation Final Report, 13 November 2001; both of which were welcomed by the Laeken European Council, 14-15 December 2001.

²¹ White Paper on European Governance, *op. cit.*, p. 10.

As demonstrated elsewhere,²² the notions of S&CR are characterised by their fluidity. This definitional dilemma has been compounded by a lack of consistency in interpretations of the relevant (and other proximate) terms. (Pure) self-regulation is widely regarded as the “control of activities by the private parties concerned without the direct involvement of public authorities”.²³ Co-regulation, for its part, refers to the “control of activities by a combination of action from private parties and public authorities”.²⁴ Another term, coined to embrace as wide a selection of co-regulatory practices as possible, is “regulated self-regulation”, which describes “a form of self-regulation that fits in with a framework set by the state to achieve the respective regulatory objectives”.²⁵ Another variant on the co-regulatory terminology is “audited self-regulation”,²⁶ a term which tends to enjoy greater currency in the US than in Europe. The least that can be stated with certainty is that the terms indicate “lighter-touch” forms of regulation than the traditional State-dominated regulatory prototype.

It is imperative, however, that one avoids getting bogged down in definitional minutiae. What *is* important, though, is that one grasps that the principle of co-regulation implies a novel approach to regulation, by virtue of its in-built potential for involving an increased number of interested parties (to a greater or lesser extent) in a flexible regulatory process. It might be useful if one were to conceive of regulation in terms of a continuum stretching from the traditional State-dominated model through co-regulation to self-regulation.

Figure 1: Regulatory continuum



²² W. Schulz & T. Held, *Regulated Self-Regulation as a Form of Modern Government* (United Kingdom, University of Luton Press, 2003 – forthcoming); T. McGonagle, “Co-regulation of the Media in Europe: The Potential for Practice of an Intangible Idea”, *op. cit.*; C. Palzer, “Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-regulation Frameworks”, *IRIS plus* 2002-6; W. Schulz & T. Held, “Regulated Self-Regulation as a Form of Modern Government”, Study commissioned by the German Federal Commissioner for Cultural and Media Affairs, Interim Report (October 2001).

²³ Mandelkern Group Report, *op. cit.*, p. 83.

²⁴ *Ibid.*, p. 81; see also, *ibid.*, p. 17.

²⁵ W. Schulz & T. Held, forthcoming, *op. cit.*, p. 85. The coiners of the term elaborate on its flexibility in the following manner: “Thus, all means of governmental influence on self-regulatory processes can be described and phenomena referred to as co-regulation in other contexts are covered as well.”

²⁶ Audited self-regulation has been described as: “the delegation by Congress or a federal agency to a nongovernmental entity the power to implement laws or agency regulations, with powers of review and independent action retained by a federal agency” - D.C. Michael, “Federal Agency Use of Audited Self-Regulation as a Regulatory Technique”, 47 *Administrative Law Review* (Spring 1995), pp. 171- 254, at p. 176.

The vagueness of what exactly co-regulation entails and the relative shortage of tried and tested models to examine have served to stymie its development, both as a concept and as a practice. While it is understandably difficult to conceive of and develop practical guidelines for co-regulation *in abstracto*, some recent research is likely to make a significant contribution to the concretisation of relevant discussions.²⁷ This research examines a variety of S&CR models from different jurisdictions and from that starting point, has come up with a “tool-box” of appropriate instruments for “the regulation of self-regulation”. A related and perhaps self-evident observation is that some areas and cultural/legal contexts are better suited to S&CR than others.²⁸ But the vagueness that has characterised – and to an extent hampered – the debate on co-regulation so far should not be perceived uniquely in a negative light. It is precisely the same vagueness or intangibility that enables the notion to offer so much potential for milking.

The advantages of a committed co-regulatory system are numerous: greater representation and participation would result in the guiding documents commanding the confidence of all parties; the channelling of industry expertise into the regulatory drafting process would lead to greater sensitivity to the realities of the media world; an efficient system of sanctions, again elaborated multilaterally, would also enhance the credibility of the system (unlike State-devised equivalent structures which have traditionally tended to elicit resistance from industry players); procedural efficiency and expeditiousness; regulation would be more flexible, more easily and swiftly adapted to changing realities ushered in by technological and societal developments.

At the European level, there are increasing indications of a cautious consensus favouring the exploration of S&CR techniques specifically in relation to the media. As regards the European Union, for instance, the ongoing review of the “Television without Frontiers” Directive has listed the possibility of S&CR as one focus of its attention.²⁹ In addition, both the Directive on electronic commerce (Article 16)³⁰ and the Data Protection Directive (Article 27)³¹ have stressed the importance of codes of conduct; an approach which represents a tentative move away from traditional regulatory techniques and arguably in the direction of co-regulation.

As regards the Council of Europe, while a formal review of the European Convention on Transfrontier Television has yet to be announced, a recent report³² concludes with a

²⁷ W. Schulz & T. Held, *op. cit.*

²⁸ For a fuller discussion of the possible thematic ambit of S&CR (including with respect to the independence of journalists; tackling hate speech; the protection of minors; advertising, and technical standards), see T. McGonagle, “Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea”, *op. cit.* See also, *IRIS Special: Co-Regulation of the Media in Europe* (Strasbourg, the European Audiovisual Observatory, 2003).

²⁹ Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM (2002) 778 final, 6 January 2003.

³⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17 July 2000, p. 1.

³¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995, p. 31.

³² Report by Dr Andreas Grünwald on possible options for the review of the European Convention on Transfrontier Television, Standing Committee on Transfrontier Television of the Council of Europe, Doc. T-TT(2003)002, 24 April 2003.

consideration of the architecture of future regulation, including S&CR as possible options. There has been a guarded willingness to countenance S&CR at successive European Ministerial Conferences on Mass Media Policy (eg. Prague, 1994; Thessaloniki, 1997; Cracow, 2000). The prospect has also been broached in the Committee of Ministers' Recommendation on self-regulation concerning cyber content;³³ the Standing Committee's Statement on human dignity and fundamental rights of others,³⁴ and most recently and perhaps also most explicitly, the Council of Europe's Submission to the 2nd Preparatory Committee for the World Summit on the Information Society³⁵ and the Committee of Ministers' Declaration on freedom of communication on the Internet.³⁶

The level of politico-legal support for S&CR as sketched above seems to be growing independently of any accompanying attempts to define its scope. This has predictably fuelled the criticism that passing textual references to S&CR are no more than lip-service on the part of governmental and intergovernmental organisations in their purported quest to attain high-minded principles for the enhancement of participatory practices in their decision-making processes. It has also fuelled scepticism about the practical appeal of S&CR. While this criticism is persuasive and this scepticism is not without foundation, neither should lead to the routine dismissal of S&CR as regulatory alternatives, without first attempting to engage meaningfully with the substantive issues involved.

Remaining concerns

In the preceding section, a number of so-called regulatory alternatives have been canvassed. Another, more fundamental question, is obviously whether there should be regulation at all. Or more aptly, whether there should be additional regulation, for much time and effort have thankfully been spent debunking the all-too-frequently recurring misperception that the online world is unregulated. In regulatory matters, reflex should be replaced by reflection. It is only once the need for specific regulation has been convincingly established that its possible mechanics should be considered. There is a certain unease among critics of S&CR about the sharing (or partial transfer) of regulatory responsibilities that have traditionally been the preserve of the State. The fear that S&CR bodies would lack the authority, accountability and a host of other (procedural) safeguards necessary for ensuring the public service role they would be expected to fulfil is also very palpable.

In response to these concerns, it ought to be pointed out that co-regulation should not be perceived as a result-driven phenomenon. One of the most attractive features of co-regulation is that its structures are designed to optimise quality of governance and it attaches paramount importance to process values. Greater representation and participation in regulatory structures is one of the first of these process values that comes to mind; an inclusiveness of a greater

³³ Recommendation Rec(2001)8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), 5 September 2001.

³⁴ Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the Council of Europe, 12-13 September 2002. For a fuller discussion of the relevant provisions of these texts, see T. McGonagle, 'Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea', *op. cit.*

³⁵ Democracy, human rights and the rule of law in the Information Society, Contribution by the Council of Europe to the 2nd Preparatory Committee for the World Summit on the Information Society, Doc. WSIS/PC-2/CONTR/32-E of 9 December 2002.

³⁶ Adopted by the Committee of Ministers of the Council of Europe on 28 May 2003.

selection of parties. In the same vein, responsiveness to the public and an ability to serve the stated interests and needs of diverse societal groups is another prerequisite. The process should remain transparent and easily accessible to the public. Structures should be in place ensuring user-friendliness as regards complaints and appeals mechanisms, with the possibility of ultimate recourse to an independent arbiter or the courts. Co-regulation offers a structural framework that is particularly conducive to guaranteeing these – and other – process values.

Operational autonomy for the co-regulatory body is also crucial, and adequate, independent financing is a *sine qua non* for the same if the body is to be insulated from powerful political and commercial interests. A co-regulatory system's accountability to the public could be safeguarded by structured evaluation processes (eg. governing the start-up phase which would include the drafting of codes, guidelines, etc., and equally once the system is up and running and the codes, etc., are being implemented). An earnest espousal of these principles – which could be set out in the enabling legislation that would set up the co-regulatory system – would go a long way towards meeting some of the ideals of good governance as set out in the European Commission's White Paper, such as the creation of "a reinforced culture of consultation and dialogue".³⁷

An increasing openness to the potential of S&CR is now very much a feature of the regulatory *Zeitgeist*. For co-regulation to establish itself as a viable regulatory model, it will need to bridge the gap between theory and practice; a gap of considerable scepticism and resistance. In order to do so, its drivers will have to keep a resolute focus on the primary goal to be achieved: to ensure a more equitable type of regulation which would enhance opportunities for freedom of expression, not curtail them.

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

³⁷ *Op. cit.*, p. 16.