

# The Media-Literate Viewer

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## INTRODUCTION

For decades, broadcasting viewers have remained discreetly in the background of media policy, rolling their eyes and faithfully consuming what's on tv. The regulator took the viewers by the hand and presented them with a carefully regulated broadcasting offer. The viewers remained where they were: stretched out lazily on the couch, consuming popcorn and programmes.

A number of technical and market developments are aimed at ending the viewers' comfortable existence as veritable couch potatoes. Digitization caused a first wave of 'viewer empowerment'. Digitization ('the end of scarcity') and the proliferation of increasingly sophisticated content control technologies favour a host of interactive business models in which viewers actively exercise choice over the content as well as the time, place and other conditions of access. Examples are pay-tv, on-demand, pay-per-view and similar models. Improvements in the technological infrastructure of the internet introduced a second wave of viewer empowerment. In the emerging, decentralized 'architecture of participation'<sup>1</sup> of Web 2.0, the individual nodes of the network – the users – assume at a large scale functions as aggregators, disseminators, raters, storers, et cetera. A new generation of audiovisual services seek to integrate value created by viewers for viewers.<sup>2</sup> Examples are plentiful: YouTube, IkoPTV, OhmyNews, persoTV, iTalkNews and many others.

The sheer abundance of audiovisual content services and the changing role of viewers question the traditional role of the media regulator as guardian of a diverse audiovisual offer free from harm and illicit advertising. Dommering called this the first regulatory crisis of broadcasting regulation. He signalled a fundamental mismatch between what media regulators regulate and what viewers are interested in.<sup>3</sup> Characteristic features of this crisis are the commercialization of the audiovisual scene and a decentralization of the audience. In response to the resulting loss of regulatory steering power, the amended Tel-

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evision without Frontiers Directive (now the Audiovisual Media Service Directive)<sup>4</sup> advocates a modified regulatory approach. Central to this approach is a new image of the viewer: the media-literate viewer.

This article takes a closer look at the idea of the media-literate viewer and places it in the context of the traditional role of viewers in audiovisual law and policy. The article first describes how the traditional perception of the viewer as passive receiver has shaped existing audiovisual law. It then introduces the Directive's new concept of 'media-literate' viewer and briefly muses on some possible implications for the future of audiovisual law.

#### THE ROLE OF VIEWERS IN TRADITIONAL AUDIOVISUAL LAW AND POLICY

The traditional role of viewers in audiovisual policy is characterized by a curious mix of absence and omnipresence. Protection of the viewer's interest in access to a diverse and high-quality broadcasting offer is one of the most important goals of existing audiovisual law. The Council of Europe has emphasized on various occasions that information technologies, and the policies dealing with them, must be seen in the light of the viewer's right to seek and receive information and ideas.<sup>5</sup> And in the US, Judge White immortalized the viewers' position in broadcasting law and policy with his famous and much quoted words that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the end and purposes of the First Amendment. It is the right of viewers and listeners, not the right of broadcasters, which is paramount."<sup>6</sup> The German 'Bundesverfassungsgericht' called this the "dienende Rolle der Rundfunkfreiheit".<sup>7</sup> The ultimate purpose that media freedom serves is the self-deployment of the individual.<sup>8</sup>

Yet, one has to look hard to find in any of the existing audiovisual laws a definition of 'viewer' or 'consumer', or rules that would address viewers directly, give them rights or impose obligations. The presence of viewers in broadcasting law is, if at all, a spiritual one. The explanation for this mystery can be found in the idea of the viewer as passive receiver that has shaped large parts of audiovisual law and policy in Europe.

For a long time, the viewers' contribution to shaping the broadcasting offer was indeed very limited. The activity of broadcasting remained the privilege of a few and access to broadcasting was controlled through a licence scheme. The



selected few would then ‘broad-cast’ prescheduled programming to an anonymous mass of receivers. Mechanisms for viewers to participate, to express preferences or to voice dissatisfaction were not part of the system. The viewers’ ability to exercise choice remained restricted to switching between different predefined programme packages. The most revolutionary improvement of the viewers’ ability to exercise choice was probably the introduction of the remote control. The powerlessness of the viewer and the lack of responsiveness of audiovisual media have been described as “one of the most difficult problems for media regulation”.<sup>9</sup> An interesting question, the in-depth exploration of which would exceed the scope of this article, is the extent to which this ‘problem’ was intentional – radio was intrinsically an interactive medium<sup>10</sup> and, for a long time, governments opposed competition from commercial operators that could have resulted in more choice for viewers.

The image of the powerless viewer inspired the arguments that would later be used to justify exceptionally strict government intervention for audiovisual media as compared to other media: namely the pervasiveness and intrusiveness of broadcasting. Broadcasting as a medium would intrude into people’s home, and would not leave viewers much choice but to watch.<sup>11</sup> Even if consumers had a choice, they could not be trusted to exercise it accurately. Alan Peacock described the prevailing perception of viewers in traditional audiovisual policy as follows: “while broadcasting is designed to benefit viewers and listeners, they neither know what they want nor where their interests lie”.<sup>12</sup>

So, while broadcasting is considered an essential factor of citizenship and of the ability of viewers to form their opinions, it is up to governments and broadcasters, not viewers, to determine what kind of programming is actually needed to serve these goals. This conclusion is based in part on the idea of the positive protection duty of states and the responsibility of the media regulator to safeguard the quality and accessibility of audiovisual services for viewers,<sup>13</sup> and in part on the fact that governments were quick to recognise audiovisual mass media as a powerful and effective means of transmitting messages and educating people.<sup>14</sup> The idea of a viewer who needs, for his own benefit, guidance and protection supports every ambition of government paternalism and own agenda setting.

Because of the viewers’ weakness, their interests in audiovisual law are “institutionally rather than legally protected through the Parliamentary Commission and the political process”.<sup>15</sup> Viewers are protected by the obligations that



apply to the institutions that inform them, namely broadcasters. Traditional audiovisual regulation is characterized by a host of obligations that instruct broadcasters in broadcasting. Widely absent are rules that would allow viewers to hold broadcasters accountable for the quality and accessibility of programming.<sup>16</sup> Audiovisual law stipulates that the programmes that are finally presented to viewers must not be offensive or harmful, but responsive to the different groups and interests that exist in a heterogeneous society. Programmes must reflect the cultural and educational agenda that the government envisage for their people. Probably the most prominent example of how the perception of the viewer has influenced broadcasting regulation is the concept of public broadcasting.

The role that public broadcasters play as the audiences' 'Grundversorger' has been accepted across Europe.<sup>17</sup> The German Federal Constitutional Court emphasized that public broadcasting has the task of anticipating the information needs of viewers and of responding to them in the form of a balanced and pluralistic programme offer.<sup>18</sup> According to the BBC Charter, the BBC "exists to serve the public interest", to sustain citizenship, promote education and learning and to stimulate creativity and cultural excellence and bring the UK to the world, and the world to the UK.<sup>19</sup> Similarly, the Dutch media law stipulates that public broadcasting has to provide every household with a diverse and high-quality offer of information, culture, education and entertainment (Article 13c par. 1 Mediawet, Dutch Broadcasting Law). The programme has to reflect all the social, cultural and philosophical streams and interests of Dutch society (Article 13c par. 2 Mediawet). Or to speak in consumer lingo: the public broadcasting diet is ready-made and home-delivered, instead of making consumers 'shop' around for the different ingredients and cook their own information stew. The question of whether the programme *is* indeed to the taste of the audience matters little. Viewers in most European Member States are obliged to pay a flat rate broadcasting fee irrespective of whether they watch the programme or feel that it responds to their interests: exiting is not an option.<sup>20</sup>

Earlier attempts to pave the way for a more active and responsible role for the viewer, and accordingly a reduced or different role for the media regulator, remain unsuccessful. Already in 1930, B. Brecht suggested to

"change this apparatus over from distribution to communication. The radio would be the finest possible communication apparatus in public life, a vast network of pipes. That is to say, it would be if it knew how to receive as well as to transmit, how to let the listener speak as well as hear, how to bring him into a relationship instead of isolating him."<sup>21</sup>





Economists continuously criticized broadcasting regulation as overly patronizing and unnecessarily paternalistic, and suggested that “‘information on demand’ is all that is essential to freedom of expression (from a constitutional viewpoint) providing consumers demand the right information about political matters”.<sup>22</sup> Finally, in 1989, Sir Alan Peacock claimed in a report about the future of the BBC that an increasing choice of channels and the ability to charge viewers directly for programming would call for a more ‘consumer-driven’ approach to public service broadcasting and broadcasting regulation in general.

In response to the changing role of viewers, the report recommended that

“[B]ritish broadcasting should move towards a sophisticated market system based on consumer sovereignty. That is a system which recognizes that viewers and listeners are the best ultimate judges of their own interest, which they can best satisfy if they have the option of purchasing the broadcasting services they require from as many alternative sources of supply as possible.”<sup>23</sup>

The underlying assumption was less that viewers were per se better prepared to judge the quality of programmes, but that there was no reason to assume that government would succeed better in making superior choices.<sup>24</sup> The report suggested a switch to a more liberal market model with more power and responsibilities for viewers. This included suggestions to replace the BBC’s public licence fee by a subscription model, regulatory retention (with the goal of ultimately phasing out sector specific audiovisual regulation), and the promotion of the consumers’ “power to force producers to cater for a greater variety of tastes”.<sup>25</sup>

But Peacock’s image of the sovereign consumer did not fit well with another facet of the traditional viewer, namely the idea of the viewer as a Janus-faced creature. The viewer is first of all a citizen. As a citizen, he or she is the ‘hero of democracy’,<sup>26</sup> devoted to civic participation and the public interest. As a consumer, however, the viewer is often perceived as self-centred and consumption-oriented, with only his or her own interest in mind; someone who measures quality in terms of quantity, maximum pleasure and price. The general fear was that accepting a more liberal approach to media regulation and more responsibility and sovereignty for the viewer/consumer would undermine the function of broadcasting as a democratic institution that serves civic-mindedness and public engagement.<sup>27</sup> The ‘split-personality-argument’ has led to the somewhat bizarre conclusion that the citizen in the viewer must be protected from his or her consumer. Not surprisingly, Peacock’s invitation to move to a more liberal approach to media regulation with a stronger focus on consumer



sovereignty was not, or only to a very limited extent, reflected in the ensuing initiatives to adapt the UK's approach to audiovisual regulation.<sup>28</sup>

#### UPGRADE: THE MEDIA-LITERATE VIEWER

The traditional perception of the viewer is more difficult to uphold in times of video on demand and the 'democratization of media production'.<sup>29</sup> Viewers are more and more challenged to make active choices in a commercialized and interactive programme landscape. Some argue that by doing so, viewers enjoy a new power, as consumers, to influence the programme output.<sup>30</sup> More audiovisual content is offered by more commercial organizations. Suppliers must expect to be held accountable by consumers for the content they offer. Accordingly, one could argue that choice and competitive pressure empower viewers, in their capacity as consumers, to express specific preferences and to demand programmes that respond to their civic interests.<sup>31</sup> And should the market not follow suit? Then maybe the viewers could produce their own competitive programme offer. The increasing popularity of services such as OhmyNews, YouTube and others could be understood as further expressions of viewer emancipation.

There is, however, a second reason why the traditional perception of the viewer is increasingly difficult to defend. Governments realize the difficulties of upholding top-down regulatory approaches in an increasingly decentralized and privatized environment. Moreover, in audiovisual markets, private ordering in the form of subscription contracts, for example, is slowly but surely replacing traditional government safeguards. Examples that make the quality and accessibility of audiovisual content subject to private regulation are the contractual rules about programme packages, the costs of extending the package, the acceptance of advertisement, the conditions under which programmes are (not) made accessible to minors, et cetera. Traditional audiovisual law loses its steering power. Sectoral self-regulation, or co-regulation, is increasingly perceived as a viable and necessary alternative, providing it is effective in reaching public policy goals and includes mechanisms of accurate supervision.<sup>32</sup> Making a meaningful statement in favour of self-regulation, however, presupposes that the parties that are expected to regulate themselves are sufficiently responsible and sovereign. In other words, they must be the opposite of the traditional viewer.

This is where the media-literate viewer comes into play. In response to the arrival of on-demand services, the Audiovisual Media Service Directive (AVMSD)

embraces the concept of the media-literate viewer.<sup>33</sup> Part of the Directive's strategy is to embrace self-regulation and co-regulation as regulatory alternatives.<sup>34</sup> In this context, it also propagates a new role for viewers. According to the Directive, viewers are not as helpless as they used to be. Modern market developments that give viewers more choice also enable them to take the protection of their interests and concerns into their own hands. As a consequence, modern viewers could "protect themselves and their families from harmful or offensive material".<sup>35</sup> The precondition is a certain level of media literacy. Media literacy enables viewers to "exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communication technologies".<sup>36</sup> In other words, today's viewers are expected to choose audiovisual services in accordance with their own personal needs and to take responsibility for their own choices.

The AVMSD defines 'media literacy' as the "skills, knowledge and understanding that allow consumers to use media effectively and safely".<sup>37</sup> Shortly after the adoption of the Directive, the European Commission published a Communication on media literacy.<sup>38</sup> The Communication explained that the new media-literate viewer is part of a broader European approach to media literacy in the digital environment. It defines media literacy as "the ability to access the media, to understand and to critically evaluate different aspects of the media and media contents and to create communication in a variety of contexts".<sup>39</sup> According to the Communication, viewers must henceforth not only be able to use modern forms of audiovisual and other electronic services, but must also be able to assess informational content in terms of quality and accuracy, and be able to recognize advertising as such, as well as the safety of contents or illegal activities that are harmful to minors. Moreover, future viewers are expected to understand issues as complex as "the economy of the media and the difference between pluralism and media ownership", human rights and copyright law.<sup>40</sup>

Media literacy is becoming an important component of future European and national information policy. Note that by making the right choices, viewers are expected to serve not only their own interests, but to promote wider public policy objectives. According to the European Commission, media literacy is both a cornerstone of full and active citizenship<sup>41</sup> and part of a strategy to boost competitive and prosperous information markets in the sense of the Lisbon agenda.<sup>42</sup> More specifically, media literacy is seen as an instrument to realize no lesser public policy goals than the accessibility of informational content, pluralism, the protection of intellectual property rights, the stimula-

tion of competitive communication and information markets and, last but not least, the stimulation of innovation and creativity. These are goals that, so far, have remained reserved to the traditional top-down, supply-side oriented approach.

The new enthusiasm for the responsible and sovereign viewer parallels a similar trend in consumer law.<sup>43</sup> Here, the image of the consumer as sovereign market actor has shaped large parts of the more recent European consumer law.<sup>44</sup> The average or sovereign consumer in the sense of European consumer law and policy is “reasonably well informed and reasonably observant and circumspect”.<sup>45</sup> This average consumer, provided he or she is adequately informed, is well equipped to address his or her own needs and preferences and is able to search among the services and products that are publicly available for those that best meet his or her needs. Such needs can be economic or non-economic, self-centred or altruistic, consumption-oriented or civic-minded.<sup>46</sup> In European consumer policy, too, the sovereign consumer plays a more active, public role. He or she is considered an active driver of competitive and diverse markets that reflect the heterogeneous preferences of Europe’s citizens:<sup>47</sup> “[c]onsumer policy is central to the EU’s objective of continuously improving the quality of life of all EU citizens”.<sup>48</sup> Common to both the concept of the media-literate viewer and sovereign consumer is that they are considered important stepping stones for deregulation in the sense of a policy that encourages self-regulation and empowers consumers/citizens/viewers to play their assigned roles in the European knowledge economy.

With regard to the media-literate viewer in the AVMSD, this translates first of all into a lighter approach to the regulation of non-linear audiovisual services.<sup>49</sup> In the logic of the Directive, because media-literate viewers can be expected to use their brains, the traditionally high level of intervention is neither needed nor desirable.<sup>50</sup> This is true for protection from harmful content as well as from an overdose of advertising<sup>51</sup> and ambiguities in the separation between journalistic expression and commercial communication.<sup>52</sup> According to an earlier version of the AVMSD, the more interactive and less television-like a service is, the less viewers can rely on public regulation of the quality of audiovisual content.<sup>53</sup>

Second, and similar to European consumer policy, the Directive aims at empowering viewers. The primary tool that the Directive suggests here is viewer information. The Directive introduces a new obligation for all providers of au-



audiovisual services (including broadcasting and on-demand services) to provide consumers with information on the name, address, website and email of the provider.<sup>54</sup> The underlying idea is to empower consumers by giving them detailed information about the source of their information.<sup>55</sup>

#### SOME CONCLUDING REMARKS

The Directive's new media-literate viewer breaks with a long tradition of paternalism and belittlement of the viewer. It signals a departure from the notion of the passive viewer, who has neither choice nor is able to exercise it. Instead, the Directive leans towards Peacock's concept of the responsible consumer. The idea of 'viewer empowerment' fits neatly in the EC's general 2010 agenda for the digital sector and the initiatives enabling consumers to take a more active role in shaping digital content markets. For the viewers, this might be a rude awakening, as they are subjected to a radical upgrade from couch potato to active market player. Suddenly, the eyes of the community, of regulators and market players are on them, the new champions of the information economy.

With the changing perception of the viewer, the character and justification of government intervention in audiovisual markets is also changing. The AVMSD has made a start by postulating a lighter approach to the regulation of the so-called non-linear services. Having said that, the viewers' process of becoming media-literate does not end with on-demand services. Media literacy will also stretch to cover the use of traditional broadcasting services. Increased viewer responsibility, coupled with the enormous choice of linear and non-linear services that viewers already enjoy today, will, in the medium to long term, remove important justifications for broadcasting regulation (and maybe add some new ones – we will come to this aspect later). This is especially true for public broadcasting and its mission to provide 'Grundversorgung'. The more media-literate and enabled the viewers become, the more guarded the scrutiny of public broadcasters will be.

On a more fundamental level, the acknowledgement of the media-literate viewer implies a need to rethink the conventional distrust of audiovisual regulators towards a more demand-driven approach to the regulation of audiovisual services. The traditional criticism of a market-oriented approach, namely that consumers' interests differ too widely from citizens' interests, could lose some of its force. In the perception of the media-literate viewer, two images that have so far been regarded as the opposite ends of the same spectrum come together: the citizen and the consumer. The media-literate viewer is expected to make



choices in a predominantly commercial environment. And while they do that, consumption will hopefully not be the only thing on their mind, but also civic interests and the ‘greater good’. In other words, viewers are expected to act as citizen-consumers.

The idea of the citizen-consumer is ambitious, and further research will have to prove if it is phantastic. It could find some support in the insights from behavioural economics and communication sciences. A growing body of literature suggests that consumers, when making their purchasing decisions, are often not only interested in the cheapest price and largest quantities.<sup>56</sup> Awareness for civic issues such as fair trade, environmental protection, human rights are other motives that play an increasingly prominent role in the purchasing decisions of the Western consumer. It is interesting to notice that regulators found it far less difficult to accept the citizen-consumer in other media sectors.

With regard to press products, for example, consumers are quite naturally expected to also take civic aspects such as quality, journalistic standards, respect for minors and minorities, et cetera, into consideration when purchasing a newspaper. It is difficult to see why anything different should apply to today’s viewers of audiovisual services. Maybe in this new ‘age of the citizen-consumer’<sup>57</sup> choice and interactive business models will indeed give citizens, in their capacity as consumer, the power to demand programmes that respond to their civic interests in pluralism, programme quality and the protection of minors.

Having said that, there is an imminent danger that audiovisual regulation will jump from one extreme to the other: was the viewer still regarded yesterday as a pair of eyeballs, tomorrow he’s supposed to know it all. Trained to understand and apply copyright law, the rules on media ownership, the economics of media production, the psychology behind advertising, to anticipate the adequacy of contents for his children, the new media-literate viewer must turn into an ‘Über-Ich’ of information markets. This perception is no more helpful than the idea of the passive viewer. It would be naive to assume that even the most media-literate viewer can protect all of his or her and the public’s interests simply through purchasing power.

Equally ill-advised is the idea that governments can suddenly shift the responsibility for qualitative and diverse information away from the suppliers onto the informed consumers. The reality of information markets is not as easy as the European Commissioner for the Information Society and the Media, Viviane Redding, seems to suggest: “[e]veryone (old and young) needs to get to grips



with the new digital world in which we live. For this, continuous information and education is more important than regulation.”<sup>58</sup>

Initiatives to inform and educate users of audiovisual services should not obscure the fact that new forms of interactive media might reduce the need for some instances of traditional broadcasting-style public intervention. They could, however, trigger new problems for users of audiovisual content, e.g. in terms of searching, exercising choice and trust, and gaining access under fair and affordable conditions. The way digital content is marketed to consumers affects not only the consumers’ economic interests, but also fundamental communication rights (privacy, freedom of speech) and the role of the viewer as citizen-consumer.<sup>59</sup>

There is one difference, however, namely that in the future one important focus of audiovisual regulation will probably be on empowering viewers in relation to private media enterprises and less in relation to the State or through the State (by imposing one-sided supply-side obligations). Traditional rules that only oblige the supply-side in relation to the State are of limited use in a market in which terms and conditions of access and use of audiovisual services are first of all subject to private ordering. Instead, citizen-consumers will need tools to hold the providers of audiovisual services accountable for complying with their legitimate expectations. This is why ground rules that lay a basis for fairness in the relationship between viewers and media enterprises are needed. Consumer law might have a role to play in this context.<sup>60</sup> One difficult question here is whether existing consumer laws are sufficiently prepared to also protect civic viewers’ interests or if a more sector-specific approach to audiovisual consumer protection will be needed.

Finally, how much media literacy are we actually willing to tolerate? Media literacy includes not only the learning of how to use existing content, but also the skills that enable users to create new content. User-created content as the ultimate form of user emancipation from existing traditional audiovisual offers has left the sphere of strictly ‘private’. Many new audiovisual services based on user-created content strive to compete with traditional audiovisual content. In not a too distant future, media regulators will be confronted not only with the question of how to protect viewers from media enterprises, but also of how to deal with viewers as rivalling suppliers of audiovisual content (another aspect that the Directive fails to expand on). Broadcasting regulators in Europe: welcome to the age of the citizen-consumer!

- 1 T. O'Reilly, 'What is Web 2.0. Design Patterns and Business Models for the next Generation of Stofware', O'Reilly Network, 9 March 2005, available online at [www.oreillynet.com/lpt/a/6228](http://www.oreillynet.com/lpt/a/6228).
- 2 For example, KPN's user-created content (UCC) service Shobidoo ([www.shobidoo.nl](http://www.shobidoo.nl)), encourages users to upload videos and edit their own channels. The Dutch site IkopTV ([www.ikoptv.nl](http://www.ikoptv.nl)), a cooperation between Dutch media 'giant' Endemol and regional broadcasters, engages citizen-reporters to film and report news from their respective regions and fill television channels with their 'phonecast'. See also S. Limonard, 'User driven business models for digital television, Exploring the long tail for audiovisual content on tv and the internet online', B@Home 2007, available online at: <https://doc.telin.nl/dscgi/ds.py/Get/File-70649/User%20driven%20business%20models%20for%20digital%20television>. C. Pascu et al., 'Social computing, Implications for the EU innovation landscape', paper presented at the EuroCPR 2007 Conference 'Policies for the content industries', 25-27 March 2007, Seville, Spain. Organisation for Economic Co-operation and Development (OECD), 'Participative Web: user-created content', Report, DSTI/ICCP/IE(2006)7/FINAL, 14 April 2007 (OECD 2007), available online at: [http://www.oecd.org/LongAbstract/0,3425,en\\_2649\\_33757\\_38393\\_116\\_119666\\_1\\_1\\_1,00.html](http://www.oecd.org/LongAbstract/0,3425,en_2649_33757_38393_116_119666_1_1_1,00.html) (OECD 2007).
- 3 E. J. Dommering, 'Bestaan er in de toekomst nog gereguleerde publieke elektronische media?', in: W. A. Dolfsma & R. Nahuis (red.), *Media & economie, markten in beweging en een overheid die stuurt zonder kompas*, Preadviezen voor de Koninklijke Vereniging voor Staatshuishoudkunde 2005, Bank Nederlandse Gemeenten, p. 76, 78.
- 4 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18 December 2007.
- 5 Council of Europe, European Convention on Trans-frontier Television, Strasbourg, 5 May 1989, text amended according to the provisions of the Protocol (ETS No. 171), which entered into force on 1 March 2002, Preamble; Recommendation Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007.
- 6 US Supreme Court, *Red Lion Broadcasting v FCC*, 395 US 367, 390 (1969).
- 7 German Federal Constitutional Court, BVerfGE 57, 295 (1981), C. II.
- 8 D. Grimm, *Anforderungen an künftige Medienordnungen*, Working Paper No. 176 of the Institut für Rundfunkökonomie of the University of Cologne, November 2003, available online at <http://www.uni-koeln.de/wiso-fak/rundfunk/pdfs/17603.pdf>, p. 5.
- 9 T. Gibbons, *Regulating the Media*, 2nd edition, London: Sweet & Maxwell 1998, p. 54. See e.g. J. Hartley and T. Notley, 'User-led content and self-creating communities: history repeating itself? Understanding internet radio in the context of the development of radio', in: S. Healy, B. Berryman & D. Goodman (eds.), *Radio in the World: Radio Conference 2005*, Melbourne: RMIT Publishing 2005, p. 547-558, arguing that radio was intrinsically an 'interactive' transmitter, and describing a trend by manufacturers and governments to effectively suppress its two-way properties.
- 10 See e.g. J. Hartley and T. Notley, 'User-led content and self-creating communities: history repeating itself? Understanding internet radio in the context of the development of radio', in: S. Healy, B. Berryman & D. Goodman (eds.), *Radio in the World: Radio Conference 2005*, Melbourne: RMIT Publishing 2005, p. 547-558, arguing that radio manufacturers and governments effectively suppressed radio's two-way properties.
- 11 E. Barendt, *Broadcasting Law, A Comparative Study*, Oxford: Clarendon Press 1993, p. 6. Barendt correctly suggests that broadcasting does not intrude into people's home unless they want it to; they can still choose to switch the television off, p. 7.
- 12 A. Peacock, 'The Future of Public Service Broadcasting', in: C. Veljanovski (ed.), *Freedom in Broadcasting*, London: Institute of Economic Affairs (IEA) 1989, p. 53.
- 13 'Publieke Omroep tussen Overheid en Markt', in: N. S. J. Koeman, A. ten Veen & J. R. van Angeren (red.), *Overheid en markt*, Deventer, Kluwer 2004, 159-177; Barendt 1993, p. 6 subseq. N. Helberger, *Controlling Access to Content, Regulating conditional access in digital broadcasting*, Amsterdam: Kluwer Law International 2005, p. 69 subseq.; N. A. N. M. van Eijk, *Omroepvrijheid & overheidsbemoedening*, Amsterdam: Cramwinckel 1992, p. 186-188.
- 14 Compare Van Eijk 1992, p. 188-189.
- 15 Barendt 1993, p. 49.
- 16 B. Holznagel & C. Jungfleisch, 'The protection of viewer rights in Europe', in: P. Baldi and U. Hasebrink, *Broadcasters and Citizens in Europe, Trends in Media accountability and Viewer Participation*, Bristol: Intellect Books 2007, p. 54-74.
- 17 The Amsterdam protocol on the system of public broadcasting in the Member States acknowledges that "the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", and hence choice; Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997, Protocol on the system of public broadcasting in the Member States, 10 November 1997, C 340/109.
- 18 German Federal Constitutional Court, BVerfGE 73, 118 (1986) (*Niedersachsenurteil*).
- 19 BBC Royal Charter, 19 July 2006, Sections 3 (1) and 4.
- 20 R. Collins & Z. Sujon, 'UK Broadcasting Policy: The "Long Wave" Shift in Conceptions of Accountability', in: P. Baldi & U. Hasebrink, *Broadcasters and Citizens in*



- Europe, Trends in Media accountability and Viewer Participation*, Bristol: Intellect Books 2007, p. 34-36.
- 21 B. Brecht, 'Der Rundfunk als Kommunikationsapparat, Rede über die Funktion des Rundfunks', in: B. Brecht, *Werke*, Berlin/Frankfurt/M: Suhrkamp 1992, Vol. 21, S. 553 (in German, the English translation is available at <http://home.freuek.net/lemmaesthetics/brecht1.htm>).
- 22 In this sense, for example, D. Wentzel, 'Medien im Systemvergleich, Eine ordnungsökonomische Analyse des deutschen und amerikanischen Fernsehmarktes', *Schriften zu Ordnungsfragen der Wirtschaft*, Stuttgart: Lucius & Lucius 2002; E. Noam, 'Der Einfluß von Marktstruktur und Eintrittsschranken auf die Vielfalt der Fernsehprogramme', in: Mestmäcker (ed.), *Offene Rundfunkordnung*, Gütersloh: Bertlesmann Stiftung, 1988; B.M. Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment*, Cambridge: Ballinger 1975, p. 27; R. H. Coase, 'The Economics of Broadcasting and Government Policy', *American Economic Review* 1966/56, p. 440, 446.
- 23 Home Office, Reports of the Committee on Financing the BBC, Cmnd. 9824, London: HMSO, 1986, par. 592.
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- 42 European Commission 2007, p. 2.
- 43 As opposed to the former Television without Frontiers Directive, the Audiovisual Media Services Directive refers frequently and explicitly to the user of audiovisual services as consumer. In comparison,



- in the former Television without Frontiers Directive, the notion ‘consumer’ appears only twice and is mainly used in the context of rules on advertising.
- 44 J.G.J. Rinkes, ‘Europees consumentenrecht’, in: E.H. Hondius & G.J. Rijken (eds.), *Handboek consumentenrecht, Een overzicht van de rechtspositie van de consument*, 2006, p. 31, 36.
- 45 European Court of Justice 16 July 1998, Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky vs. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, ECR 1998 I-04657, par. 31; European Court of Justice 6 July 1995, Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. vs. Mars GmbH*, ECR 1995 I-01923, par. 24. See Recital 18 of Directive 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (text with EEA relevance), OJ L 149 (11 June 2005).
- 46 See e.g. T. Wilhelmsson, ‘The Consumer’s right to Knowledge and the Press’, in: T. Wilhelmsson, S. Tuominen & H. Tuomola (eds.), *Consumer Law in the Information Society*, The Hague: Kluwer Law International 2001, p. 367, 379; T. Bourgoignie, ‘Characteristics of Consumer Law’, 14 *Journal of Consumer Policy* 1992, p. 293, 303.
- 47 Communication from the Commission to the Council, the European Parliament and the European economic and social Committee, EU Consumer Policy Strategy 2007-2013, Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them, at 2-6, COM(2007)99 final, 13 March 2007.
- 48 <http://ec.europa.eu/consumers/overview/index—en.htm>. For a critical discussion of the Commissions new citizen-consumer approach see M. Hesselink, *European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?*, Centre for the Study of European Contract Law Working Paper Series No. 2006/04, online available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=946727](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946727)
- 49 Audiovisual Media Service Directive, Recital 42.
- 50 Compare Audiovisual Media Service Directive Recitals 52, 55.
- 51 Audiovisual Media Service Directive, Recital 52.
- 52 Audiovisual Media Service Directive, Recital 55.
- 53 Recital 13 (a) of the Audiovisual Media Service Directive.
- 54 In addition, e-commerce law, including its rules on consumer information applies. See Recital 29 and Article 3 (4) of the Audiovisual Media Services Directive, together with Articles 5 and 6 of the E-Commerce Directive.
- 55 Recital 29 of the Audiovisual Services Directive.
- 56 See e.g. Keum, Devanathan, Deshpande, Nelson & Shah 2004, p. 383-385; Scammell 2000, p. 351-355; E. Webster, ‘Determining the Characteristics of the Socially Conscious Consumer’, 2 *Journal of Consumer Research* 1975, p. 188-196; T. Steinrücken & S. Jaenichen, ‘The Fair Trade Idea: Towards and Economic of Social Labels’, 30 *Journal of Consumer Policy* 2007, p. 201-217; see also J. Drexler, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, München: Mohr Siebeck 1996, p. 128-133, critiquing the oversimplifying use of the ‘homo economicus’ by the Chicago school.
- 57 Scammell 2000, p. 352.
- 58 Cited in: EC, ‘Media literacy: do people really understand how to make the most of blogs, search engines or interactive tv?’, Press Release IP/007/1970, 20 December 2007, available online at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1970&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 59 See e.g. for the music sector N. Helberger, N. Dufft, S. van Gompel, K. Kerényi, B. Krings, R. Lambers, C. Orwat & U. Riehm, ‘Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations’, State-of-the-Art Report, INDICARE, December 2004, available online at: [www.indicare.org](http://www.indicare.org).
- 60 Helberger 2005, p. 278-279.