

# From eyeball to creator – toying with audience empowerment in the Audiovisual Media Service Directive

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## 1. 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>2</sup> of Web 2.0, the individual nodes of the network – the users – assume at a large scale functions as aggregators, disseminators, raters, storers, etc. A new generation of audiovisual services seek to integrate value created by viewers for viewers.<sup>3</sup> Examples are plentiful: YouTube, ikopty, Skoeps, Pandora.TV, and many others.

In response, the amended Television without Frontiers Directive (now the Audiovisual Media Service Directive)<sup>4</sup> advocates a new image of the viewer: the

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<sup>1</sup> Portions of this article are based on N. Helberger, 'The Media Literate Viewer', in: N. van Eijk and B. Hugenholtz, *Dommering\_Bundel*, Liber Amicorum for Egbert Dommering, Otto Cramwinckel, forthcoming, 2008 and a paper N. Helberger, 'The Changing Role of the User in the "Television Without Frontiers" Directive', presented at a workshop organised by the European Audiovisual Observatory, the Institute for European Media Law and the Institute for Information Law, "Legal Aspects of Video on Demand", Berlin, June 2007 (the proceedings of this workshop were published in: *Legal Aspects of Video on Demand*, IRIS Special, December 2007).

<sup>2</sup> 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)

<sup>3</sup> 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\\_38393116\\_119666\\_1\\_1\\_1,00.html](http://www.oecd.org/LongAbstract/0,3425,en_2649_33757_38393116_119666_1_1_1,00.html) (OECD 2007).

<sup>4</sup> 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,

responsible or media-literate viewer, and it suggests a corresponding modified regulatory approach. The directive's new image of the viewer signals a move away from the traditional idea of the viewer as powerless eyeball, which has inspired existing audiovisual law and policy, and questions some fundamental assumptions regulation of this sector was so far based on.

This article takes a closer look at the idea of the media-literate viewer, places it in the context of the traditional role of viewers and examines how it will influence future audiovisual law and policy. The article first describes how the traditional perception of the viewer as passive receiver has shaped existing audiovisual law. This part is followed by a brief sketch of how technological and market developments have changed the viewer's role in audiovisual markets. It then discusses the Directive's new concept of viewer sovereignty and how it has influenced scope and character of the directive's regulatory approach. In a final section, the article observes that the directive, while it toys with the idea that the role of audiovisual viewers is changing, it still remains captured in traditional broadcasting-style thinking, and fails to respond to some deeper implications of the sovereign viewer.

## 2. 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

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OJ L 332, 18 December 2007.

<sup>5</sup> Council of Europe, European Convention on Transfrontier 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, Considerations.

<sup>6</sup> US Supreme Court, *Red Lion Broadcasting v. FCC* 395 US 367, 390 (1969).

<sup>7</sup> German Federal Constitutional Court, BVerfGE 57, 295 (1981), C.II.

<sup>8</sup> 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.

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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>

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>10</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>11</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>12</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>13</sup>

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<sup>9</sup> T. Gibbons, *Regulating the Media*, 2<sup>nd</sup> edition, Sweet & Maxwell, London 1998, p. 54. But see also 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*, RMIT Publishing, Melbourne, 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.

<sup>10</sup> E. Barendt, *Broadcasting Law. A Comparative Study*, Clarendon Press, 1993, Oxford, p. 6. However, Barendt rightly also 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.

<sup>11</sup> A. Peacock, 'The Future of Public Service Broadcasting', in C. Veljanovski (ed), *Freedom in Broadcasting*, Institute of Economic Affairs (IEA), London, 1989, p. 53.

<sup>12</sup> 'Publieke Omroep tussen Overheid en Markt', in: N.S.J. Koeman, A. ten Veen & J.R. van Angeren (eds.), *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*, Kluwer Law International, Amsterdam, 2005, p. 69 subseq.; N. Van Eijk, *Omroep vrijheid & overheids bemoeienis*, Otto Cramwinckel, Amsterdam, 1992, p. 186-188.

<sup>13</sup> Compare Van Eijk 1992, p. 188-189.

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>14</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>15</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 governments 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>16</sup> 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>17</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>18</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

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<sup>14</sup> Barendt 1993, p. 49.

<sup>15</sup> 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*, Intellect Books, Bristol, 2007, p. 54-74. G. Thomas, 'The Listener's Right to Hear in Broadcasting', 22 *Stanford Law Review* 1970, p. 863, 864 and subsq. (for the US).

<sup>16</sup> 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, 2 October 1997, Protocol on the system of public broadcasting in the Member States, 10 November 1997, C 340/109.

<sup>17</sup> R. Collins and Z. Sujon, 'UK Broadcasting Policy: The "Long Wave" Shift in Conceptions of Accountability', in: P. Baldi and U. Hasebrink, *Broadcasters and Citizens in Europe. Trends in Media accountability and Viewer Participation*, Intellect Books, Bristol, 2007, p. 34-36.

<sup>18</sup> B. Brecht, 'Der Rundfunk als Kommunikationsapparat. Rede über die Funktion des Rundfunks.', in: B. Brecht, *Werke*, Suhrkamp, Berlin/Frankfurt/M., 1992, Vol. 21, S. 553 (in German, the English translation is available at <http://home.freeuk.net/lemmaesthetics/brecht1.htm>).

consumers demand the right information about political matters.’<sup>19</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>20</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>21</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>22</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>23</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>24</sup> The ‘split-

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<sup>19</sup> In this sense, for example, D. Wentzel, *Medien im Systemvergleich. Eine ordnungsökonomische Analyse des deutschen und amerikanischen Fernsehmarktes*, Schriften zu Ordnungsfragen der Wirtschaft, Lucius & Lucius, Stuttgart, 2002; E. Noam, ‘Der Einfluß von Marktstruktur und Eintrittsschranken auf die Vielfalt der Fernsehprogramme’, in Mestmäcker (ed.), *Offene Rundfunkordnung*, Bertelsmann Stiftung, Gütersloh, 1988. B.M. Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment*, Ballinger, Cambridge, 1975, p. 27. R. H. Coase, ‘The Economics of Broadcasting and Government Policy’, *American Economic Review* 1966/56, p. 440, 446.

<sup>20</sup> Home Office, Reports of the Committee on Financing the BBC, Cmnd. 9824, Londong: HMSO, 1986, para 592.

<sup>21</sup> S. Brittan, ‘The case for the consumer market’, in: C Veljanovski (ed), *Freedom in Broadcasting*, IEA – Institute of Economic Affairs, London 1989, p. 25, 28.

<sup>22</sup> A. Peacock, ‘The Future of Public Service Broadcasting’, in: C Veljanovski (ed), *Freedom in Broadcasting*, IEA – Institute of Economic Affairs, London 1989, p. 51, 54.

<sup>23</sup> M. Scammel, ‘The Internet and Civic Engagement: The Age of the Citizen-Consumer’, 17 *Political Communication* 2000, p. 351, 352.

<sup>24</sup> See the interesting discussion of Collins and Sujon about the question whether both notions, consumer and citizen, are compatible, Collins & Sujon 2007, p. 39-49. See also the discussion overview in H. Keum, N. Devanathan, S. Deshpande, M. R. Nelson, D. V. Shah, ‘The Citizen-

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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>25</sup>

## 2. Viewer "empowerment" through technology and market

The trigger behind the Peacock report and other initiatives that call for more regard for viewer sovereignty in the audiovisual sector is the observation that "recent" technological and market developments have empowered viewers to exercise more influence on audiovisual markets. Digitisation caused a first wave of "viewer empowerment" and transformed the viewer from "eyeball" to consumer. Before that, the audiovisual market was

"quite different from that of most commodities. A television program presumably benefits the listening audience, yet the market transaction is one where the station or network sells the program not to this audience but to advertisers."<sup>26</sup>

Digitisation brought with it more capacity, more sophisticated content control technologies, like Digital Rights Management and Conditional Access systems, and more possibilities to interact with viewers and invite them to actively exercise choice over the content, time, place and other conditions of access. It then became possible for service providers to communicate at a large scale directly with their users via return channels, to establish direct commercial relationships and to offer a choice of personalised and diversified services. Examples are pay-TV,<sup>27</sup> on demand, pay-per-

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Consumer: Media Effects at the Intersection of Consumer and Civic Culture', 21 *Political Communication* 2004, p. 369, 370-377.

<sup>25</sup> See Home Office, 'Broadcasting in the '90s: Competition, Choice and Quality', Cmnd 517, HMSO, London 1988; Department of Culture, Media and Sport, and Department of Trade and Industry, 'Regulating Communications: Approaching Convergence in the Information Age', Cmnd 4022, HMSO, London 1998; Department for Culture, Media and Sport, 'A public service for all: BBC in the digital age', Cm 6763, HMSO, London 2007; Ofcom, Ofcom review of public service television broadcasting, 2004; Department for Culture, Media and Sport, 'A public service for all: BBC in the digital age', March 2006; Ofcom, Ofcom's second review of public service broadcasting, 11 September 2007. See also the critical discussion by C. Veljanovski, 'Competition in broadcasting', in: C Veljanovski (ed), *Freedom in Broadcasting*, IEA – Institute of Economic Affairs, London 1989, p. 10-19. Brittan 1989, p. 25, 39-48, and S. Deakin & S. Pratten, 'The New Competition in Broadcasting: Trick or Treat?', 20 *Economic Affairs* 2000, 27-32.

<sup>26</sup> J. Rothenberg, 'Consumer Sovereignty and the Economics of Television Programming', 4 *Studies in Public Communication* 1962, p. 45, 46.

<sup>27</sup> Note, the history of pay-TV services reaches far beyond the begin of digitisation. The first paid-for broadcasting service was offered in the 1950s: this service by the Musak Corporation in New York was distributed via telephone lines and allowed radio services to be received in the connected households by means of a specially designed 'injector box.' For more on the history of US subscription broadcasting see D. Gunzerath, "'Darn that Pay-TV!': STV's Challenge to American Television's Dominant Economic Model", 2000 *Journal of Broadcasting & Electronic Media* 655 subseq. Having said this, the pay-TV model as an enhancer of consumer choice and responsiveness of the broadcasting media required substantial improvements in scale and capacity to gain weight. These were brought by digital technologies.

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view and similar business models. Particularly economists greeted this first step towards a more market-based approach to audiovisual services with enthusiasm.<sup>28</sup>

Meanwhile, improvements in the technological infrastructure of the internet have further propelled the active involvement of viewers with the supply chain for audiovisual services. The power of so called web 2.0 applications lies in aggregating the intelligence, workforce, (storage and distribution) capacities and time of users, and in maximising network effects by involving the long tail (i.e. the bulk of niche markets that are not or not primarily served by traditional media).<sup>29</sup> While some services are being operated by independent new players, an increasing number of UCC services is being operated by traditional enterprises of the audiovisual industry, such as broadcasters and cable operators. The motives for engaging and investing in UCC range from self-promotion and the wish to “bond” with viewers (aka customers), to new opportunities for generating revenues from advertising and, finally, search for new talent and material.

Existing UCC services can be classified according to the level of publicness, division of work between professional provider and lay-contributor and commercialisation/professionalisation of the contributions of viewers. A great deal of content on the web is private in character and not really meant to be shared with a greater public – diaries, travel reports, photos, home videos.<sup>30</sup> Social network services such as Facebook,<sup>31</sup> Flickr,<sup>32</sup> Cyworld,<sup>33</sup> Hyves,<sup>34</sup> etc. aim at this audience and offer users the possibility to share photos, stories, videos, commentaries with each other. Other services have more serious aspirations to engage in “broadcasting”-like activities and journalism, and to eventually compete with traditional broadcasting. Veoh, for example, describes itself as a “revolutionary Internet TV service that gives viewers the power to easily discover, watch, and personalize their online viewing experience... Veoh is an open platform for content publishers of all sizes and sophistication who want to reach tomorrow’s television audience”.<sup>35</sup> And clipfish tells its users: “Du bist Teil einer grossen Community, und gemeinsam macht ihr euer Fernsehen einfach selbst“ (You are part of a large community, together you make your own television).<sup>36</sup>

Characteristic of this second category of services is that they experiment with ways of integrating amateur content and professional journalism or entertainment. Users are being involved to varying degrees into the supply chain. Some services encourage users to rate and rank material, thereby exploring alternative ways of editorial control

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<sup>28</sup> B.M. Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment*, Ballinger, Cambridge, 1975, p. 27; Deakin & Pratten, 2000, p. 27 subseq., with further references.

<sup>29</sup> O’Reilly 2005.

<sup>30</sup> Many of these services have embedded privacy features that allow users to restrict sharing to family and “friends”.

<sup>31</sup> <http://www.facebook.com/> (a social networking site that allows people to build and join networks, and connect/interact with others by text, photos, videos, etc.).

<sup>32</sup> <http://www.flickr.com/> (a photo management and sharing site).

<sup>33</sup> <http://us.cyworld.com/> (a South Korean site that offers combined photo gallery, message board, guestbook, video, and personal bulletin board).

<sup>34</sup> <http://hyves.net/> (presently the most popular Dutch social networking site).

<sup>35</sup> <http://www.veoh.com/static/corporate/aboutUs.html>

<sup>36</sup> <http://www.clipfish.de/faq.php#10>

(e.g. Digg<sup>37</sup>). Others let viewers contribute material, which is eventually being grouped in different categories, depending on the level of editorial involvement of the site's operator. The Dutch service ikoptv<sup>38</sup> is 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". Citizen-reporters are offered a mobile phone (with photo and video functions) and the opportunity to win a prize for the best report each month. Another Dutch service, SKOEPS, operates a national network of citizen journalists, and sells images of citizen journalists through to traditional media (citizen journalists receive the helft of the income generated by their picture(s)).<sup>39</sup> And Pandora.TV, a leading video sharing site in South Korea, allows viewers to run their own personal TV stations via internet and mobile phones.

This is not to say that the entire audience has suddenly stood up like one man and turned active and participative – the majority of viewers still remain "leechers" and use UCC services passively by consuming their content without actively contributing,<sup>40</sup> though upwards trends can be observed.<sup>41</sup> What is important in the context of this article is to note that the overall offer of available audiovisual content and sources of information broadens, also for the majority of non-creating viewers, and that the traditional division of power and tasks in the supply chain is not any longer imperative.<sup>42</sup>

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<sup>37</sup> <http://digg.com/>

<sup>38</sup> <http://www.ikoptv.nl>

<sup>39</sup> <http://www.skoeps.nl/>

<sup>40</sup> P. Resnick & R. Zeckhauser, 'Trust Among Strangers in Internet Transactions: Empirical Analysis of eBay's Reputation System.; The Economics of the Internet and E-Commerce', in: M. R. Baye (ed.). *Advances in Applied Microeconomics*, vol. 11, Elsevier Science, Amsterdam, 2002, pp. 127-157, online available at <http://www.si.umich.edu/~presnick/papers/eBayNBER/RZNBERBodegaBay.pdf> (working paper version of 6 February 2001) (analysing feedback systems on auction sites, also finding, however, that only a small number of users actively participate). See also L. Rainie, 'Increased Use of Video-sharing Sites', Pew Internet Project Data Memo, 9 January 2008 [http://www.pewinternet.org/pdfs/Pew\\_Videosharing\\_memo\\_Jan08.pdf](http://www.pewinternet.org/pdfs/Pew_Videosharing_memo_Jan08.pdf). C. Pascu, 'Innovations in communications: The role of users, industry, and policy', paper presented at the EuroCPR conference, 31st March- 1st April 2008, Seville, p. 7 subseq.

<sup>41</sup> Rainie 2008, p. 3: observing a growing trend of active user participation); A. Lenhart, M. Madden, A. Rankin Macgill, A. Smith, 'Teens and Social Media: The use of social media gains a greater foothold in teen life as they embrace the conversational nature of interactive online media', Pew Internet & American Life Project, 19 December 2007 (finding that 64% of American online teens ages 12-17 have participated in one or more among a wide range of content-creating activities on the internet, up from 57% of online teens in a similar survey at the end of 2004), online available at: [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Social\\_Media\\_Final.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Social_Media_Final.pdf). Pascu 2008, p. 7 subseq.

<sup>42</sup> In this sense also e.g. T. Zarsky, 'Law and Online Social Networks: Mapping the Challenges and Promises of User-generated Information Flows', 18 *Fordham Intellectual Property, Media and Entertainment Law Journal* 2008, p. 741, 755



### 3. The changing role of the viewer and the Audiovisual Media Service Directive

The transition from viewers to consumers and eventually “prosumers”<sup>43</sup> touches upon some fundamental concepts of audiovisual law and policy. Citizen-viewers act as consumers and, at least in theory, have more opportunities to influence the programme offer through their preferences, making audiovisual services more responsive.<sup>44</sup> Private ordering in the form of subscription contracts, for example, is slowly but surely replacing traditional government safeguards.<sup>45</sup> Contents produced by viewers themselves begin to reach into the domain of traditional broadcasters. Top-down regulatory approaches are losing steering power.<sup>46</sup>

The changing role of viewers of audiovisual content was one of the driving factors that lead to the amendment of the original Television Without Frontiers Directive (now: Audiovisual Media Service Directive - AVMSD).<sup>47</sup> On the one hand, the directive acknowledges that the information seeking habits of viewers are changing, viewers look more actively for information in form of e.g. interactive services, and they do so in an increasingly commercial context, as consumers.<sup>48</sup> On the other hand, it concludes that viewers have more choice and possibilities to influence the audiovisual contents that they receive; they are not any longer the powerless viewers that they used to be.<sup>49</sup> Instead, modern viewers can ‘protect themselves and their families from harmful or offensive material.’<sup>50</sup> The proto-type viewer of near future

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<sup>43</sup> The term was coined by Alvin Toffler in his book “The Third Wave”, Morrow, 1980. See also A. Wells, “A Portrait of Early Internet Adopters: Why People First Went Online - and Why They Stayed”, Pew Internet & American Life Project, February 6, 2008, online available at: [http://www.pewinternet.org/pdfs/PIP\\_Early\\_Adopters.pdf](http://www.pewinternet.org/pdfs/PIP_Early_Adopters.pdf)

<sup>44</sup> See e.g. Scammel 2000, at p. 352, who speaks of the “age of the citizen-consumer”.

<sup>45</sup> Helberger 2005, p. 37 subseq. 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, etc.

<sup>46</sup> M. Arino, ‘Content Regulation and New Media: A case study of Online Video Portals’, paper presented at the EuroCPR conference, 25<sup>th</sup> - 27<sup>th</sup> March 2007, Seville, p. 29.

<sup>47</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council 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, Brussels, 13.13.2005, COM(2005)646 final, p. 2 and 3 (European Commission 2005a).

<sup>48</sup> European Commission, Annex to the Proposal for a Directive of the European Parliament and of the Council 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, Commission staff Working Document, Brussels, 13 December 2005, SEC(2005)1625, p. 8 (European Commission 2005b). This has led the European Commission and the European Parliament to suggest extending certain regulatory safeguards also to the “new” services (e.g. protection of minors and human dignity, cultural diversity and protection from excessive or misleading advertisement); European Commission 2005a, p. 5; European Parliament, Draft Report on the proposal for a directive of the European Parliament and of the Council 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, 1 August 2006, Provisional 2005/0260(COD), Amendment 11.

<sup>49</sup> European Commission 2005a, p. 3, European Commission 2005b, p. 18.

<sup>50</sup> Audiovisual Media Service Directive, Recital 37. See also Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in

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is, in the view of the directive, “media literate”. Media literate viewers are able 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>51</sup> The changing perception of the viewer has led to a modified regulatory approach, as will be described next.

Probably one of the most remarkable elements of the AVMSD is the tentative departure from traditional audiovisual law’s rather paternalistic approach to a strategy of viewer empowerment. One goal of the directive is to empower the viewer and to devise a new role for viewers in audiovisual markets. Correspondingly, one key element of the directive’s new strategy is the notion and promotion of media literacy. The AVMSD defines ‘media literacy’ as the ‘skills, knowledge and understanding that allow consumers to use media effectively and safely’.<sup>52</sup> Shortly after the adoption of the Directive, the European Commission published a Communication on media literacy.<sup>53</sup> The Communication explained that the new media-literate viewer is part of a broader European approach to media literacy in the digital environment.<sup>54</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>55</sup>

Media literacy is supposed to further the individual but also the greater good of Europe’s information markets. 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>56</sup> and part of a strategy to boost competitive and prosperous information markets in the sense of the Lisbon agenda.<sup>57</sup> The media literate viewer is expected to function as a tool that realizes no lesser public policy goals than the accessibility of informational content, pluralism, the protection of intellectual property rights, the stimulation of competitive communication and information markets and, last but not least, the stimulation of innovation and creativity.<sup>58</sup> These are goals that,

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relation to the competitiveness of the European audiovisual and information service industry, 20 December 2006, Rec. No. 2006/952/EC.

<sup>51</sup> Audiovisual Media Service Directive, Recital 37.

<sup>52</sup> Audiovisual Media Service Directive, Recital 37.

<sup>53</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European approach to media literacy in the digital environment, Brussels, 20 December 2007, COM(2007) 833 final (European Commission 2007).

<sup>54</sup> European Commission 2007, p. 3.

<sup>55</sup> European Commission 2007, p. 4-6.

<sup>56</sup> European Commission, 'Media literacy: do people really understand how to make the most of blogs, search engines or interactive TV?', Press Release IP/07/1970, 20.12.2007, online available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1970&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>57</sup> European Commission 2007, p. 2.

<sup>58</sup> Compare European Commission 2007, p. 2 and 3.

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so far, have remained reserved to the traditional top-down, supply-side oriented approach of audiovisual regulation.

The ability to actively choose what the user is watching translates into increased personal responsibility and a reduced level of government intervention.<sup>59</sup> In line with this new image of the “empowered” and “media literate” viewer, the AVMSD has opted for an approach “that is graduated according to the degree of choice and the legitimate expectations of the user, rather than to regulate all audiovisual media content in the same way”.<sup>60</sup> This translates into a “lighter touch approach” for the regulation of non-linear services. According to the AVMS Directive,

“[n]on-linear services are different from linear services with regard to choice and control the user can exercise and with regard to the impact they have on society. This justifies imposing lighter regulation on non-linear services, which only have to comply with the basic rules provided for in Articles 3a to 3h.”<sup>61</sup>

The more interactive and less television-like a service is, the less users could rely on public regulation of the quality of audiovisual content.<sup>62</sup> Accordingly, non-linear services are subjected to only some of the rules that apply to traditional broadcasting services (mainly the rules on hate speech, protection of minors, and relaxed advertisement rules and obligations concerning the share of European works). In addition, the general rules on consumer protection (e.g. in the E-Commerce Directive) apply.<sup>63</sup>

Finally, the directive has taken to empowering the viewer through a tool that is relatively new to audiovisual law: consumer information. The Directive introduces a new obligation for all providers of audiovisual services (including broadcasting and on-demand services) to provide consumers with information on the name, address, website and email of the provider.<sup>64</sup> The underlying idea is to assist consumers in being responsible for their own choices by providing them with detailed information on the source of their information.<sup>65</sup>

#### 4. Taking the media literate viewer seriously – some reflections

It is a welcome and necessary development that the directive signals a departure from the notion of the passive viewer and adopts a more realistic approach to the role of the viewer in modern audiovisual markets. Viewers are more and more challenged to make active choices in a commercialised and interactive programme landscape. Arguably, in so doing, viewers enjoy a new power, as consumers, to influence the

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<sup>59</sup> See e.g. Recitals 40 and 42 of the Audiovisual Media Services Directive.

<sup>60</sup> European Commission 2005b, p. 18.

<sup>61</sup> Recital 28 of the Audiovisual Media Services Directive.

<sup>62</sup> Recital 13 (a) of the Audiovisual Media Services Directive.

<sup>63</sup> See Recital 29 and Article 3 (4) of the Audiovisual Media Services Directive

<sup>64</sup> In addition, e-commerce law applies, including its rules on consumer information. See Recital 29 and Article 3 (4) of the Audiovisual Media Services Directive, together with Articles 5 and 6 of the E-Commerce Directive.

<sup>65</sup> Recital 29 of the Audiovisual Services Directive.

programme output.<sup>66</sup> More audiovisual content is offered by more commercial organisations. They must expect to be held accountable by consumers for the content that they offer. Accordingly, one could argue that in order to remain competitive, new, more interactive business models empower the viewer, in his capacity as consumer, to express specific preferences and to demand programmes that respond to his civic interests.<sup>67</sup> And if the market does not follow suit? Then viewers might perhaps ultimately even take to producing their own competitive programme offer. Services such as SKOEPS, clipfish, ikoptv, Pandora.tv etc. are just first experiments with the contributory potential of the viewer.

Having said this, although the directive propagates a new image of the viewer, it also shows a critical tendency to simplify matters and to postpone a more serious discussion of the possible implications from the changing role of viewers. The directive sketches a somewhat naive picture of a new viewer who, providing he is adequately informed and educated, alleviates more or less the need for regulatory intervention, and is ready to force audiovisual markets to provide the (quality of) contents that responds to his interest in an interesting, diversified, safe and qualitative offer of audiovisual services: '[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>68</sup> Unfortunately, the reality of information markets is not that simple.

*From underdog to "Ueber-ich"*

The new enthusiasm for the responsible and sovereign viewer is part of a broader trend to transfer some of the regulatory responsibility from governments and suppliers to consumers and citizens. A similar trend can be observed, for example, in consumer law.<sup>69</sup> Here, the image of the consumer as sovereign market actor has already shaped large parts of the more recent European consumer law.<sup>70</sup> The average or sovereign consumer in the sense of European consumer law and policy is 'reasonably well

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<sup>66</sup> See also Scammel 2000, p. 351, 354.

<sup>67</sup> See for a more detailed discussion Scammel 2000, p. 351 subseq., Keum et al. p. 370 subseq., critical: W.L. Bennet, 'Communication and Civic Engagement in Comparative Perspective', 17 Political Communication 2000, p. 307, 308-309. Note that 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. See e.g. F. Webster, 'Determining the Characteristics of the Socially Conscious Consumer', 2 Journal of Consumer Research 1975, p. 188-196. T. Steinrücken and 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*, Mohr Siebeck, München 1996, p. 128-133, criticizing the oversimplifying use of the „homo economicus“ by the Chicago school.

<sup>68</sup> 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>.

<sup>69</sup> Interestingly, and 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.

<sup>70</sup> 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.

informed and reasonably observant and circumspect'.<sup>71</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>72</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>73</sup> '[c]onsumer policy is central to the EU's objective of continuously improving the quality of life of all EU citizens.'<sup>74</sup> Common to both the concept of media-literate viewer and sovereign consumer is that they are considered important stepping stones for deregulation in the sense of policies that encourages self-regulation and empower consumers/citizens/viewers to play their assigned roles in the European knowledge economy.

There is, however, the immanent danger that regulatory policy 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 and consumer law, the rules on media ownership, the economies 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 naïve to assume that even the most media-literate viewer can protect all of his or her and the public's interests entirely through purchasing power. Equally ill-advised is the idea that governments can simply shift the responsibility for qualitative and diverse information away from the suppliers onto the informed consumers. 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.

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<sup>71</sup> European Court of Justice, Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, 16 July 1998, E.C.R. 1998 I-04657, para. 31; European Court of Justice, Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH, 6 July 1995, ECR 1995 I-01923, para. 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).

<sup>72</sup> See e.g. T. Wilhelmsson, 'The Consumer's right to Knowledge and the Press', in: T. Wilhelmsson, S. Tuonminen & H. Tuomola (eds.), *Consumer Law in the Information Society*, Kluwer Law International, The Hague, 2001, p. 367, 379; T. Bourgoignie, *Characteristics of Consumer Law*, 14 Journal of Consumer Policy 1992, p. 293, 303.

<sup>73</sup> 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.

<sup>74</sup> [http://ec.europa.eu/consumers/overview/index\\_en.htm](http://ec.europa.eu/consumers/overview/index_en.htm). For a critical discussion of the Commission's 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)

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*Audiovisual consumer protection*

The fact that viewers are offered a new dimension of choice in form of all kinds of linear and non-linear audiovisual offers does not necessarily imply that they are free to access these services at their will and to exercise choice between different services. Earlier experience with e.g. the pay-TV sector or online video markets have demonstrated that the digital abundance can give rise to a range of new challenges and obstacles.<sup>75</sup> These obstacles do not arise so much in the relationship citizen – state (e.g. in form of restricted licensing policy or censorship) but in the relationship citizen – service provider. 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. Some of the new concerns include:

- **The fairness of contractual conditions:** for viewers, alias consumers, to benefit from the increasingly commercialised and individualised service offer, the conditions of services offered to them must be acceptable. Common not only to the broadcasting sector are examples of potentially unfair conditions, such as the demand for unreasonably high prices and the imposition of conditions that are in no way related to the request for content (e.g. the obligation to provide personal information on age, education, profession when subscribing to a service or the condition that the viewer must accept information mail).
- **Technical lock-ins/lock-outs:** of major importance is the aspect of the lack of interoperability solutions at the hardware (e.g. set top boxes) or middle ware level (e.g. API),<sup>76</sup> that make switching from one service to the other more difficult. This is particularly true for services that require some form of upfront investment from the consumer, for example by purchasing some hardware or investing time and effort in personalising a service.
- **Search and comparable service information:** access and choice are, among other things, a matter of access to trustworthy, comprehensive and comparable information about the available services from different providers. The ability to find reliable information and compare such information is a major problem in a digital multi-channel environment. Seen in this light, the information obligations in the Audiovisual Media Service appear rather inconsequential. It is difficult to see how informing viewers about the postal address of a provider can help consumers that search for quality content or content that is age-appropriate.<sup>77</sup>

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<sup>75</sup> For examples, see e.g. Helberger, 2005, p. 36-45; N. Helberger, N. Dufft, S. van Gompel, K. Kerényi, B. Krings, R. Lambers, C. Orwat and 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). More general: P. Klempere, 'Markets with Consumer Switching Costs', *The Quarterly Journal of Economics*, 1987-102, p. 375; B. Rezaabakhsh, 'Comparison of the 2006-29'; T. Wilhelmsson, 'The Consumer's Right to Knowledge and the Press', in: T. Wilhelmsson, S. Tuominen and H. Tuomola (eds.), 'Consumer Law in the Information Society', Kluwer Law International, The Hague, 2001, p. 369. P. Napoli, 'Rethinking Program Diversity Assessment: An Audience-Centered Approach', *10 Journal of Media Economics* 1997, p. 59, 64 subseq.

<sup>76</sup> Compare OECD 2007, p. 74.

<sup>77</sup> A further-going requirement in an earlier version that service providers should also convey information about who has editorial responsibility did not make its way into the final version, European Commission 2005, Annex, recital 29.

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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 managing and maintaining fairness in the relationship between viewers and media enterprises are needed. Consumer law might have a role to play in this context. 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.

*The viewer as supplier*

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.<sup>78</sup> Promoting media literacy also means promoting the user as supplier. Yet, a strict reading of the AVMSD suggests that the directive does not yet take the viewer as supplier very seriously. Audiovisual services that operate on the basis of user created content are probably not covered by the directive because such services are either not economic and/or not in competition with traditional broadcasting or the content is not directed at the public.<sup>79</sup> However, as the brief description in the previous section (section 3) may have illustrated, 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.<sup>80</sup> Services such as ikoptyv, veoh, Pandora.tv or clipfish most certainly seek to compete for the same audience as television broadcasts.<sup>81</sup> They seek to inform, entertain and educate<sup>82</sup>, do so for commercial purposes, target a public mass audience, and many exercise a certain level of editorial control over the content offered. In other words, some of these services fulfil all requirements of the definition of an audiovisual media service in the sense of the AVMSD.<sup>83</sup>

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<sup>78</sup> The Commission on media literacy 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', European Commission 2007, p. 3.

<sup>79</sup> AVMSD, Recital 16: "Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest".

<sup>80</sup> See also EC i2010 High Level Group, Issue Paper on Content and Convergence, p. 4, [http://ec.europa.eu/information\\_society/eeurope/i2010/docs/high\\_level\\_group/issue\\_paper\\_content.pdf](http://ec.europa.eu/information_society/eeurope/i2010/docs/high_level_group/issue_paper_content.pdf)

<sup>81</sup> See Recital 17 of the AVMSD: "It is characteristic of on-demand audiovisual media services that they are 'television-like', i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the services would lead the user reasonably to expect regulatory protection within the scope of this Directive."

<sup>82</sup> AVMSD, recital 18.

<sup>83</sup> Articles 1 (a) (c) of the AVMSD defines an audiovisual media services as a) a service that is offered against remuneration in the sense of services in Articles 49 and 50 of the directive, b) where a natural or legal person exercises editorial control over programme selection and presentation, c) with the purpose to inform, entertain or educate, and d) directed at the general public. Arino 2007, p. 20.

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Not taking viewers as suppliers seriously can have a number of (negative) consequences for audiovisual markets. To begin with, one reason why the directive has extended regulation to so called non-linear services was to protect viewers and to increase legal certainty and fair competition by subjecting these services to similar rules than traditional broadcasting.<sup>84</sup> 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. To the extent that some of the user created content services compete in real life with audiovisual services, differences in legal treatment are likely to result in legal uncertainty, unequal treatment and potential insecurity for viewers. The need to apply the same rules to sort-a-like services needs at least to be explored (this is not to say that the outcome of such an exploration must necessarily be that there is an actual need to do so).

Another reason why viewers as suppliers need to be taken more seriously has more directly to do with the role of viewers as producers. It was demonstrated that already now some services experiment with the integration of user created content into professional offers. The legal rights of viewers as producers, however, are still mostly in the dark (or rather: subject to arbitrary end-user licenses). Some services compensate viewers, others do not. Some services require users to authorise the operators of user created content platforms to use their contents in all possible ways (including commercial forms of exploitation), others respect the intellectual property rights of creating viewers.<sup>85</sup> Some services take the rights of creating viewers (freedom of expression, privacy, etc.) more into consideration than others. What is important to notice is that of all authors, prosumers are probably the lowest in the pecking order of information markets. They have probably the least negotiation power in relation to the professional content industry and established media players. Of Research is needed to establish of whether they might be in need of some additional assistance to protect them from exploitation and abuse, factors that might prove counter-productive to their contribution to the European knowledge economy.

Finally, taking the active viewer seriously is also advisable because the viewer himself can be part of solutions to dilemmas that traditional law is unlikely to tackle. Examples are the protection from harmful or low-quality content, the difficulty of making relevant content findable and accessible, and of policing infringement online. So far, when talking of self- or co-regulatory solutions to address some of the regulatory problems in an increasingly decentralised and privatised environment, the talk is mostly of initiatives that involve content providers, platform operators and other commercial intermediaries. To the extent that a certain proportion of the audience becomes more actively involved in the production chain, and viewers in general are becoming “media literate”, their possible contribution might also include the rating and ranking of content, the identification of inaccurate or harmful content and even the sanctioning in case of infringements. Also here, more research would be needed to explore the possible contribution of the media literate viewer to safeguarding standards of quality and legitimacy in audiovisual markets.

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<sup>84</sup> European Commission 2005a, p. 3, recitals 5. Audiovisual Media Services Directive, Recital 7.

<sup>85</sup> OECD 2007, p. 56-57. S. Karp, ‘Exploitation 2.0: Web 2.0 Wants to USE You’, Publishing 2.0, 15 April 2006, <http://publishing2.com/2006/04/15/exploitation-20-web-20-wants-to-use-you/> ;



## 5. Conclusions

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 i2010 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 promoting media literacy and by postulating a lighter approach to the regulation of the so-called non-linear services. It has yet left open more difficult questions about the future division of tasks and powers between regulator, industry and viewers, about the need for alternative forms of intervention and the organisation of viewers as an productive part of the value chain.