

Regulating old values in the Digital Age

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‘Nieuwe wijn in oude zakken’: New wine in old bags. This Dutch saying, taken from the Bible², fully applies to regulating the internet, the information age, the digital age, the world wide web, or whatever term one uses to indicate the fact that electronic communications are at the core of our present society (for practical reasons I will stick to the term ‘the Internet’). It’s new wine in old bags.

What do I mean by this? What I will try to make clear is that the Internet is not something that changes fundamental rights such as the freedom of information. Freedom of information includes the right to receive and impart information as it has been defined throughout history and - within a European context - has been included in national constitutions and international treaties such as the European Convention on Human Rights. These old values - the old bags - are the foundations of society and should not be called into question because someone is pouring in a new wine called Internet.

The Internet is primarily a technology, a network enabling communications. The Internet is not something that changes the world. It is people who cause change by using technologies. It is quite common to fall into this trap of idolizing technological progress. I have a book from the nineteen seventies, full of beautiful predictions about the benefits of interactive cable television networks: free choice, new services, active participation of citizens, contribution to further democratization, etc. None of these were realized with the creation of cable television networks. Just recently, a huge amount of money was spent in the Netherlands to create a ‘Kenniswijk’ (‘Information-rich Neighborhood’). A part of the city of Eindhoven was to get high-speed internet access (by building a fiber network that reached all the way to homes³) and strong support for the introduction of new services. Introducing fiber turned out not to be a financial viable option and hardly any new service materialized. During a presentation of the project, I was informed about one of those so-called

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² Matthew 9: 17 ‘Neither do men put new wine into old bottles’.

³ Also called ‘Fiber to the Home’ or FttH.

innovative services: a babysitter who could watch six children in six different apartments at the same time using web cams. When I asked what would happen if two children got sick at the same time, there was no answer...

I have picked three examples rather randomly to further illustrate my point. First, I will say something about the confusing notion of Internet Governance; then I will discuss the evils of search engines; finally, I will deal with the risk of technology neutral regulation.

Internet Governance

In my view, internet governance is one of most abused concepts. For some, it relates to the position of ICANN. Others see it as a legitimation for extensive governmental influence on the content of the Internet. The recent WSIS-conference, the World Summit on the Information Society (held in Geneva in December last year) is a good example of what can go wrong, despite the fact that it ended with a rather balanced Declaration of Principles and Plan of Action⁴. Originally set up by the International Telecommunications Union to strengthen its own position, the conference somewhat backfired and produced lengthy political statements, sketching all the dangers and risks of the Internet and aiming at more state control over the content.

I'm slightly amazed by how much this WSIS-thing looks like a replica of discussions we had in the seventies and eighties about satellites. Satellites would change the world and would lead to new ways to spread knowledge, but were also seen as a threat. Borders would disappear, allowing for propaganda from capitalists or communists to indoctrinate innocent citizens. Marshal McLuhan preached his global village and UNESCO published the McBride-report 'One World, Many Voices', proclaiming a 'New World Information and Communication Order (NWICO)'. Receiving countries wanted prior control over satellite content and nations around the equator were claiming ownership of satellites in orbital positions above their countries.

In my opinion, we should try not to make the same mistake with the Internet. Let's not create unnecessary global involvement. There is little need for global regulation of the Internet. It takes away attention from the real underlying fundamental problems and creates the risk that we will end up with lower levels of protection of the freedom of information. And let's not forget: the whole satellite discussion ended with hardly any global regulation. Satellites are mostly dealt with on the national and regional level. There is no specific global jurisdiction on information distributed by satellites. We were able to handle most issues based on the existing system of fundamental rights.

⁴ World Summit on the Information Society, *Declaration of Principles*, Document WSIS-03/GENEVA/DOC/4-E, Geneva, 12 December 2003; *Plan of Action*, Document WSIS-03/GENEVA/DOC/4-E, Geneva, 12 December 2003. Documents can be found at <http://www.itu.int/wsis/>

Search engines

Search engines are a second case that I would like to use to underline the need for sticking to existing values. Last week, Google became a public company. Out of nothing, a 27 billion Euro company was created. Have you ever asked yourself what kind of services Google intends to make money with? Well, its main activity is selling the attention of end users to advertisers. It does so by showing advertising that matches the searches of its users. It is a good thing that Google is not hiding this: several other search engines prefer not to disclose their commercial approach.

However, there is one big question: how does Google's search engine work? This is an important issue, because Google is a dominant gateway to information. Nowadays, electronic content can't be found without using search engines. In a way, they replace library indexes and other existing search facilities.

How the search engines exactly make their selection is still a big mystery. Like Microsoft Windows, the source code of Google is not public and we have to rely on what Google tells us about its functions. For example, the brochure of the public offering first mentions the fact that Google gives 'relevant and useful information' and that it 'only takes the interests of users in mind', but that on the other hand a search might also result in 'pertinent, useful commercial information'. It is common knowledge that there are ways to get your website on the first search page. Not so long ago Google was manipulated and the words 'funny hair' were linked with the webpage of the Dutch prime minister, Jan Peter Balkenende. There are other examples of these so-called Google bombs. Some time ago typing in the question 'Who is more evil than the devil?' would give 'Microsoft' as a search result. Google tries to fight these manipulations. I would say that in such a case, Google is manipulating the manipulation. But how does Google really work? We just don't know.

Search engines directly or indirectly influence the freedom to receive and impart information. They facilitate access to information, but at the same time can foreclose the access to information. The users are left in the dark. Fortunately, the impact of search engines is getting more attention. In Germany, a special non-profit organization has already been created for the promotion of search engine technology and free access to information. In German it sounds even more impressive: 'Gemeinnütziger Verein zur Förderung der SuchmaschinenTechnologie und des freien Wissenszugangs' (SuMa-eV).⁵ This organization, founded by a lot of serious-looking German professors, wants search engines to be 'free, versatile, and non-monopolistic'.

To prevent the erosion of access to information as a basic value, the application or modification of existing legislation could be an option. For example, consumer protection regulation might oblige

⁵ <http://www.suma-ev.de>.

search engines to inform end users about the way they operate. Or they could be obligated to make the source code public. Moreover, it might be advisable to give the public policy aspects more emphasis by making available transparent public facilities similar to transparent public library indexes or comparable facilities that offer an alternative for the commercially available services. Even the WSIS-action plan recognizes the importance of this issue when it states the need to ‘Support the creation and development of a digital public library and archive services...including reviewing national library strategies and legislation...’⁶

Technology-neutral regulation

My third example concerns the notion of technology-neutral regulation as a goal in its own right. We see that a lot of legislation and regulation which attempts to reflect the underlying values is based on static technological concepts. These technological concepts evolve. Old ones sometimes disappear (the telegraph), others get new functions (film), and new ones are added (cd, dvd, the Internet). Because of this process, legislation often lags behind new developments. Existing legislation no longer works or creates all kinds of complexities. For example, in some countries the regulation of television depends on whether or not a screen is involved. This automatically makes the television regulation applicable to computer screens and therefore to the Internet.

It is often said that in this new information age, we should no longer make a distinction between technologies. In principle, such an approach is good. However, the question then arises: What kind of regulation should apply to the Internet? For example, should we use the telecom model (known for the absence of content control) or are we better served with the broadcasting model (known for its content regulation)? If this is the real question, the outcome is clear: with the increasing importance of the Internet as a information resource, we may expect that more and more elements of the broadcasting model will enter the arena of Internet regulation, certainly when the Internet becomes a substitute for traditional broadcasting reception. However, this question is based on a false proposition. A technologically neutral approach should be based on the catalogue of fundamental rights. This could mean that regulation will not always be technologically neutral, but will partly depend on the technology used. This is nothing new. For example, take the jurisprudence of the European Court for Human Rights. It gives more freedom to certain types of expression in a closed, private environment such as a theatre or gallery than to expressions that are located in areas without restrictions and accessible to an undefined audience. In such a case, the regulation is not technology-neutral, but the underlying fundamental right is.

Conclusion

⁶ page 4.

Many more examples can be given. In a rather fragmented way, I have tried to illustrate that there are a lot of questions and tensions surrounding the regulation of the Internet. Most of those derive from the fact that we often turn things upside down. We think the Internet is something special and make it our point of departure for regulatory intervention or non-intervention. This should be done the other way around. The source of inspiration should be basic constitutional values, such as the freedom of information and its interpretation in jurisprudence. These values are a 'living instrument' allowing us to interact with the factual circumstances, resulting in tailor-made regulation where necessary.