Online video content: Regulation 2.0? An analysis in the context of the new Audiovisual Media Services Directive[1]

Monica Ariño

This paper explores the challenges faced by content regulators in Europe in the light of the increasing online delivery of video material. The discussion is informed by the recently adopted Audiovisual Media Services Directive, which modernises the European framework for content regulation and which will need to be implemented in the Member States by the end of 2009.

Keywords

Regulation, audiovisual, online video, web 2.0, Audiovisual Media Services Directive.

Monica Ariño
International policy advisor for Ofcom [2]

> 'The future is not an overarching leap into the distance; it begins in the present.'
>
> (Daniel Bell, 1967)

Introduction: A user-centric convergence

In 2006, U.S. *TIME* Magazine feature "You" as *Person of the Year*, an award that is given to a man, woman, couple, group, idea, place, or machine that "for better or for worse, ...has done the most to influence the events of the year".[3] Why?

> *"For seizing the reins of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game."*

This was a recognition of the impact that the so-called "Web 2.0" phenomenon, which can be described as a second generation of Internet based services that emphasize online collaboration and sharing among users, has had in the architecture of communications and media more generally, and by extension in the way citizens' all around the world engage with and participate in their societies.

1 This paper draws on an earlier publicationr: Ariño, M. "Content Regulation and New Media. A case study of online video portals" in *Communications & Strategies*, no. 66, 115-135.

2 Monica Ariño works as an international policy advisor for Ofcom, the UK media and communications regulator. The views expressed in this paper are those of the author and are not endorsed nor do they necessarily reflect Ofcom's position in any of the issues discussed.

3 Time. *Person of the Year: 75th Anniversary Celebration*. Special Collector's Edition, Time Books, 2002

At the heart of the web 2.0 concept is the idea that users are not just browsing and consuming content in the traditional media fashion, but they participate, contribute, create, reuse, repurpose, rank, link, and share the content with other users, generally at a global scale. Examples include social networking sites (*MySpace* and *Facebook*), wikis, sharing sites allowing users to upload photographs (*Flickr*), music profiles (*Last.fm*), favourites (*del.icio.us*) or videos (*YouTube* or *Dailymotion*), and mash-ups. Crucially, applications and services are not just rivals, but mutually enhancing (40% of *YouTube*'s videos are viewed on *MySpace*). The fact that consumers actively look for content as opposed to waiting for the content to be pushed to them, that they not only consume, but also create, alter and share that content, has brought in a whole new perspective of the potential of convergence. It illustrates the central role that the user –rather than the provider or the device– is meant to play in a convergent environment. As John Naugton (2006) suggests, in a "net-centric" world the consumer is in charge.

Convergence and the ubiquitous Internet are thus altering the very foundations of information and communications exchanges, providing for a new and powerful means of freedom of expression, encouraging greater participation in democratic processes, and contributing to the development of a new and different public sphere. As high-speed broadband penetration grows, next-generation networks are rolled out, and spectrum is freed up for new and varied uses, the integration, combination of services and platforms and the extent of consumer empowerment will continue to increase.

In this context, this paper considers the challenges faced by traditional content regulators through a case study of online video portals. These are widely defined as websites or applications providing access to television services, or to video material, which can be either of a professional nature, semi-professional, or created by users and that is generally viwed on a PC. The discussion is limited to regulatory approaches within Europe, and informed by the new Audiovisual Media Services (AVMS) Directive, which reviews the Television without Frontiers Directive, in an attempt to modernise the rules that apply to the cross-border provision of television broadcasting services and address the challenges posed by new video content delivery.[4] Despite agreement on what the newly extended scope of the Directive should be, there are still open questions as regards the treatment of audiovisual services that remain outside of the Directive's scope, as well as those services which might sit in the boundary. These questions are critical, since Member States are currently considering the options for transposition and implementation into national law. This creates an opportunity to reflect on whether traditional approaches to the regulation of content (including current institutional arrangements) remain fit for purpose.

After a short description of current trends in consumption and distribution of audiovisual content on the Internet, I discuss the challenges to regulate content in a new media environment, with an emphasis on the difficulties around the practical application of the criteria that should determine the "regulability" (i.e., elegibility for sector specific regulation) of online video services. The AVMS Directive is used as the starting basis for the analysis, but the discussion aims to be wider in scope in an attempt to break free from what risk being artificial distinctions between services, looking at the ultimate rationale for regulation.

I argue that traditional regulatory instruments and tools are not only inappropriate but also unlikely to prove an effective means of delivering protection in the online video environment, particularly if consumers remain unaware of where regulatory protection begins and ends, and of where they should be taking greater responsibility. Even if the unsuitability of traditional models is increasingly accepted, it is yet to be translated into regulatory practice. Furthermore, the question of what alternative mechanisms should be used to deliver protection remains subject to debate and controversy. In the new environment, regulators should also adapt their roles, focusing their efforts on facilitating a dialogue between the various actors, encouraging greater and more informed involvement from users and cooperating with their

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 332/27 of 18 December 2007.

international counterparts. There will always be a 'next YouTube' that will test regulatory solutions and question the fundamental principles behind them. The credibility of media regulatory systems critically depends on whether they pass such test.

Online video portals. And then there was video…

Whereas just a few years ago, demand for online video content was technically constrained and there was little mainstream content legally available, today it seems almost impossible to discuss content regulation without mentioning *YouTube*, the paradigm of online video distribution. And yet, online video portals are a relatively new phenomenon. *YouTube* itself was created in February 2005, but only officially launched in December 2005, the same month when the Commission published its proposals for a new Directive.

Over the last couple of years, video blogs (online diaries where individuals post personal videos alongside text), online video portals and video sharing sites that allow users to upload and share videos, music, pictures and other information have mushroomed and their popularity is growing rapidly. Based in California and with less than a hundred employees, *YouTube* was receiving around 70,000 new uploads per day in 2007, and over 100 million downloads, with videos lasting from 5 seconds to 20 minutes.

Not all video portals are the result of Californian inspiration. *YouTube* is probably the most popular of the thousands of services offering online content distribution, but it is certainly not the only one. Some of the most prominent sites include *Dailymotion*, a French-based video portal translated into six languages and which offers search and zoom options. *Metacafe*, an Israeli site specialised in astonishing or particularly provocative videos, also offers other content such as games or gallery images. Other major video sharing sites are *Google Video, VideoEgg, Guba, Grouper, Blip.tv, Gotuit, iFilm, Neave.tv* or *Veoh Networks*. There are also video aggregators like Mefeedia who do not host content themselves but rather help users navigate and find content from other various sources. While most are largely platforms for the delivery of amateur content, some aspire to provide a TV-like viewing experience, and are starting to offer professional and premium content. In addition, social networking sites such as *MySpace, Facebook* or *Bebo* are increasingly offering video sharing features and are planning to reach beyond computer screens to mobile phones.

If you can't beat them, join them

Several traditional broadcasting, print and telecommunications companies are responding to these developments by embracing the philosophy and technologies of Web 2.0. In the UK, for example, broadcasters are expanding into the online content distribution market. The *BBC*'s interactive Media Player uses P2P technology to give viewers the chance to catch up on TV and radio programmes they have missed for up to seven days after broadcast. *Sky Anytime* offers premium subscribers on-demand access to 400 films, news bulletins and pay-per-view content, while *Channel 4* and *ITV* are also making the majority of their output available for download.

This is a good illustration of how traditional broadcasters are seeing new media as an opportunity, and not just a challenge. Initially perceived as a threat to established media companies, who feared piracy and who viewed video sharing portals as simply enabling illegal copying, the TV and film industries seem to have learnt from the experience in the music sector and are seeking to develop innovative services designed to meet demand for downloaded video content in a manner that does not violate intellectual property rights. The established media have also seen the benefit of working in partnership with the new media, reaching deals and contractual agreements to enhance the distribution and promotion of their content through new outlets (e.g., *NBC* and the *BBC* with *YouTube*, or *MTV* with *iFilm*).

Get played and get paid

In the web 2.0 environment, business models primarily rely on making available content or services for free, with increasingly embedded advertising. For example, *Grouper* offers over 100 clips from Sony movies, and encourages users to embed, share and send them to others. Each video clip incorporates an advert at the end encouraging the user to buy the entire film, with a link to the *Sony* online store. But this is not just an ad-supported market, and a number of players are participating and generating revenue in non-

traditional ways. A few community video portals such as *Eefoof* or *Revver* have recently started to share revenue with video owners that upload their videos to the site. *LuluTV*, for example, puts 80% of the site's ad revenue into a cash pool and pays video creators based on their share of the traffic. *Metacafe* is also paying their top producers and keeps a running tally of the site's top earners on the front page.

Regulating new media content: The Audiovisual Media Services Directive

The new Audiovisual Media Services Directive represents the European attempt to address the regulatory challenges posed by new video content delivery, if only partially. The intention is to provide the basic framework for the regulation of new audiovisual services in a converged and technologically neutral manner. The European Commission also wanted to achieve a "level playing field" between traditional broadcasters and providers of video-on-demand services, so far categorised as "information society services" under the E-commerce Directive[5] and therefore excluded from the application of minimum content rules.

The Commission initially proposed to extend the scope of the Directive to cover "audiovisual media services" and defined these as any service providing moving images with or without sound, in order to inform, entertain or educate the general public by electronic communications networks.[6] This was a very wide definition, which could potentially have resulted in the extension of regulation far beyond traditional TV broadcasting to a wide array of other content services including video blogs, or websites hosting or sharing user-generated content, mobile multimedia applications, and even online games or gambling websites. After intense discussions in both the Council and the Parliament, the scope of the Directive has been narrowed down to so-called "television-like" services. In other words, the Directive only covers services which are essentially similar in form and content to television broadcasting, but delivered on-demand, and in respect of which users might expect some kind of regulatory protection. The Directive aspires to be technologically neutral, and covers any such services, irrespective of the technology used to deliver them, or the platform through which they are accessed.

In recognition of the fact that users exercise greater choice and control over on-demand offers, the Directive distinguishes between linear and non-linear services, and applies different regulatory requirements: linear services are defined as analogous to television broadcasting, with scheduled content 'pushed' by the broadcaster to the viewer, while non-linear services are 'pulled' by the viewer. The Directive applies a higher tier of regulatory controls to linear services, similar to the ones currently applied to television broadcasting, albeit with some modest liberalisation of advertising restrictions (for example the removal of the requirement that twenty minutes elapse between advertising breaks) and product placement, which can now be permitted in certain genres (e.g., cinematographic films and series made for television) and under certain conditions (e.g., signalling requirements and no undue prominence). On-demand services, on the other hand, are subject to lower levels of regulation, primarily designed to provide protections for minors against content which could seriously cause harm (i.e., adult and extremely violent content), prohibit content which incites to hatred on the basis of sex, religion, race and nationality, promote the production and distribution of European works, encourage greater access to services by people with disabilities, and ensure that the content meets minimum qualitative advertising rules (e.g., general prohibition of tobacco advertising and restrictions on advertising of alcohol to minors).

Finally, the Directive puts a strong emphasis on self and co-regulation as effective means for implementation of the non-linear tier, recognising that in the new media environ-

5 Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

6 Article 1a of 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, COM (2005) 0646 final.

ment where technology and markets change rapidly and where viewers are taking greater responsibility for their media consumption, self and co-regulation schemes can prove to be a better and more flexible means of delivering a high level of consumer protection. Debates in the Council and in the Parliament also highlighted the importance of media literacy, understood as the skills, knowledge and understanding that enable people to use media effectively. In this respect, media literacy is seen as a necessary condition for the success of any self and co-regulatory initiatives.

Implementation in the Member States

The Directive was finally adopted in December 2007, and stipulates a two-year period for transposition into national law. The challenges for legislators and regulators are many and varied. Far from being a straightforward exercise, national implementation will most likely raise, again, questions about the appropriateness or otherwise of regulating audiovisual content on the Internet.

The Directive establishes only minimum requirements, but Member States can go further and adopt stricter rules in accordance with their national interests and culture (which most have done in the area of broadcasting). The European Commission has called for a "light touch" implementation, in the hope that Member States will refrain from implementing a detailed and burdensome regime, as currently exists for television. Although this is certainly welcome, it is yet to be seen whether, in effect, the detailed design of national rules applicable to this new category of services will reflect the difference in consumption patterns, as well as the greater degree of choice and control exercised by users.

Approaches are likely to vary across Europe, as a result of different constitutional frameworks and institutional settings. In most European countries (including Spain), video-on-demand is currently unregulated beyond the application of the general law, while in other countries (for example the UK) an industry self-regulatory body (the Association for Television on-Demand or ATVOD) has been in place for some years now. It is expected that in the majority of Member States, legislation will be adopted to extend the remit of broadcasting regulators to cover video-on-demand content. In some countries, such as Germany, the regulatory framework already extends to video-on-demand and, more widely, to content in the internet, but only insofar as the protection of minors is concerned. Day-to-day monitoring and enforcement activities have been delegated to a separate self-regulatory body (Freiwilligen Selbstkontrolle Multimedia) set up by the online industry and formally accredited and entrusted to attend to issues concerning harmful and illegal material on the internet.[7]

It is important that Member States give careful consideration to the extension of the competences of broadcasting regulators, not only because of the practical challenges associated with it, but also because it will inevitably create a risk of progressive regulatory creep into Internet video content more generally, something that, as will be argued next, is both problematic in principle and in practice.

What criteria for regulability?

What criteria should determine the "regulability" of an audiovisual media service?[8] To answer this question, we need to look at Article 1 of the new Directive and accompanying recitals. Taken together, these various provisions define when a particular service falls within scope.

Firstly, we need to ask whether the specific object of regulatory attention is *video* (moving images with or without sound). In most cases, particularly as we move forward, it will be increasingly the case that Internet services will include some audiovisual component. Secondly, we need to look at whether the video can be described as being *'TV programming'*, in other words, whether the content is of a kind and in a form suitable for, or characteristic of, television broadcasting. The idea would be that the presentation, layout, shape and form of the programmes conform to what

7 For a detailed overview of the German co-regulatory system see Palzer (2003) and Schulz and Sheuer (2004).

8 *Regulability* means, in this context, the fulfilment of certain criteria that establish the nature of a service and, accordingly, the pertinence of applying sectoral rules in order to achieve specific public policy goals. It does not mean the practical possibility to regulate services in an effectively enforceable manner.

we recognise as television broadcasting. For example, the programme has opening and end credits, a narrative to it, and it is presented as an individual item. The Directive provides some examples of programmes such as feature-length films, sports events, situation comedy, documentary, children's programmes and original drama. Thirdly, we need to identify where the editorial responsibility for the service (and not necessarily for the content) lies. Editorial responsibility can be defined as the exercise of prior and continouos control both over the selection of the programmes and over their organisation either in a chronological schedule or in a catalogue. The concepts of editorial responsibility and service are intrinsically linked, and together will identify the "media service provider" who is liable for regulatory compliance. Fourthly, the service needs to be delivered over *Electronic Communications Networks* (ECN). These include cable, satellite, terrestrial, wireless, and IP networks. Lastly, and even if we concluded that there is a service which delivers TV programmes, there is a further, and crucial, test that needs to be passed: is the provision of programmes the principal purpose of that service, or is this merely incidental?

So far, the analysis does not fundamentally diverge from what is current practice for traditional television broadcasting services. However, when transposed to the new media environment described earlier, the application of these criteria is certainly not straightforward. The judgement will be particularly difficult to make for online services –as opposed to video-on-demand services delivered via say a cable or an ADSL network–, which are likely to provide some combination of text, graphic, and video content, and where distinctions about what constitutes "the service" become easily blurred (for example, is the service the whole of a website, or just the URL page(s) which offer the video content?).

Regulators will inevitably be called upon to exercise some kind of regulatory discretion. In doing so, they should be guided by three additional criteria that have been reflected in the Directive. First, there is a need to consider whether the service is *'mass media*'. Media sector specific regulation has been justified, in part, on grounds of the pervasiveness of the medium and its impact on society and on public debate. In a context with no significant barriers to entry, the specific regulation of certain content services (beyond that required by the general law) is only justified if the services are intended for and are likely to have a clear impact on a significant proportion of the population. Regulators will need to evaluate whether it is appropriate to interpret this on the basis of audience share, target, nature, and/or intended public of the service. Second, the regulator will need to make a judgement as to whether the service is *'TV-like'*. The idea here is to catch services essentially similar or identical to television in nature, content and presentation. Third, and linked to the above, the draft Directive makes a reference to the nature and means of access to the service (in other words, the *'context'* and not just the content), which can reasonably create consumers expectations of regulatory protection. When the core content of the offering is similar to that which the user has previously experienced via TV broadcasting, the user may carry, at least in some initial stages, some of their pre-existing expectations concerning regulation from the broadcast to the non-broadcast context (for example, they might expect a clear separation between editorial and advertising material).

This last consideration is critical when determining what the most appropriate regulatory model for an online environment is. The expectation that consumers have of regulatory protection will vary as services evolve. Thus, in a primarily on-demand environment, consumers will not expect to be protected by a 'watershed' restricting what hours of the day they may view the content (although it is not completely unreasonable to think that some time-restrictions apply). A focus on consumer expectations and their degree of media literacy will allow for the necessary degree of flexibility of regulation, and the possibility that it adapts as services develop, consumer attitudes and patterns of consumption change and media literacy levels grow.

All of the above criteria will need to be considered cumulatively, and decisions cannot be made before having carefully measured all of the various elements and aspects of the service. However, not all criteria might need to (or indeed should) be given equal weight, and some of them (e.g., existence of editorial responsibility) could carry more weight.

Even if the current scope criteria are somewhat clear and provide for useful guidance as to whether a service falls within or outside the scope of the Directive, implementation will be far from straightforward, particularly in areas that are

subject to rapid technological change. Furthermore, Governments and public authorities still face challenges as regards services falling outside the scope of the AVMS Directive, or at the margins. The next section outlines some of these challenges.

Beyond the AVMS Directive. Future definitional and regulatory challenges

A continuum of 'TV-like' services

We have seen above that the models of content production, distribution and consumption on the new media environment vary widely. Some services such as the *BBC iPlayer* in the UK, *Imagenio* in Spain or *Fastweb* in Italy that currently provide television programmes on-demand are likely to be covered by the future rules. Others, however, require much more careful consideration.

First, in many cases, it is unclear how significant the economic element needs to be for these portals to be considered "services". As explained earlier, most of these sites are developing some kind of revenue-generating mechanism, be it through general or targeted advertising, or through revenue-sharing models. Does this make them a "service" for the purposes of regulation? Are all users uploading video content and getting paid for it potentially "broadcasters"? When does user generated content become "professional"? Is there a minimum revenue threshold that determines the economic nature of the service?

In fact, in many of these cases, and even if the service incorporates some economic elements, the video content would not strictly qualify as a TV programme for the purposes of regulation. Also, it seems fairly straightforward that an individual user's videos posted on a video sharing site would be excluded from the scope of regulation not only because of the nature of the content, but also because the entity managing the portal does not exercise prior control over the videos (and therefore does not have editorial responsibility). Nor could we expect the individual users to exercise such editorial control, beyond what is required by the general law. Accordingly, it would seem inappropriate to hold these portals accountable for the content they carry, beyond what is required by the general law.

More difficult are cases of sites that put the emphasis on the "TV-like" characteristics of the service (primarily for marketing purposes). *Veoh Networks*, for example, describes itself as an "internet TV network", and is backed by heavy media names (including *Time Warner* and *Disney*'s ex-CEO Michael Eisner). Similarly, *Gotuit Media*, an established player in on-demand video, has launched a video portal with different components, including user generated material, inside-the-video search features, a blog space as well as direct access for free to a variety of mainstream content (music, news, sports and entertainment) from *Universal Mu-sic, Warner Brothers, Reuters* and the like (*GotuitTV*). What is "the service" here? Is it just *GotuitTV*, or is it the combi-nation of services offered by the portal? *Neave.TV* offers a service fed by *YouTube, Google Video, Blip.tv* and others where clips are played automatically in a TV-like full-screen user experience. Yet, it would be hard to define these as "programmes", or to argue that *Neave.TV* is exercising full editorial responsibility over content linked from other sites.

At the other end of the Internet spectrum, we have ser-vices, often provided by established broadcasters that pro-mise to deliver a full-TV viewing experience on the Internet (e.g., 4oD, *Sky Anytime* or the *BBC iPlayer*). In June 2007, a new British initiative code-named the "Kangaroo project" was announced. It aims to bring the various individual on-demand services together. The idea is to pool TV content from the major UK broadcasters (the BBC, ITV and Channel 4 as well as other players) and deliver it online in one single platform using the same P2P basis currently used by the iPlayer, with the potential to expand into a digital TV service.

Another interesting case is *Joost*, an interactive service that distributes over 20,000 TV programmes over the Internet using P2P technology, with near quality of standard TV resolution. Joost has been launched by Janus Friis and Niklas Zennstrom, the two men behind *Kazaa* and *Skype*, and offers about 20 channels, with content from the likes of *Endemol, September Films Warner Music* and *Viacom*. Viewing is for free with profits coming from advertising. Channels are like playlists of videos, and users can flip between them, or use a programme guide. Viewers can also blog while watching the channels or even create their own. Thus, *Joost* aspires to be a TV network on its own right, while taking full advantage of the interactivity and creativity characteristic of the online environment. Other services such as *Babelgum*, an on-demand video site offering both niche and mainstream content, are following this model,

and it is reasonable to expect more such services to develop in the near future.

What the above highlights is that online video portals are not of one kind, but, rather, there is a *continuum* of content services providing different combinations of linear, non-linear, professional and user generated material. Service providers are exercising different degrees of editorial responsibility, from pure 'blank upload' sites through to fully controlled film download services, with various degrees of production and editorial control, and with very different business models. At some point in this continuum, service providers might come very close to the traditional idea of a broadcaster as a gatekeeper, selector and organiser of content.

However, when audiovisual content is generated not by established media companies or established businesses, but by private individuals, start-up companies and small enterprises, to then be typically distributed via the internet or on open access platforms, shared, and often further modified by other users, it will be difficult to determine who bears the editorial responsibility for the content. In this continuum of services there are differences in the degree of control exercised by the host or service provider. For example, while *YouTube* is primarily an organiser of content, others such as *Gotuit* or *iFilm* are taking greater responsibility, and marketing professional content. The fact that something is described or advertised as 'TV' for marketing purposes, should not (mis)lead regulators into qualifying the service as a television service for the purposes of regulation. If application of the rules is too rigid or strict, there will be incentives for operators to structure their service so as to game the definitional criteria and escape regulation. Furthermore, if regulation is to be effective, the regulability criteria should lead to a coherent application of the rules to the party which is best placed to discharge them. This is a major challenge in an online environment, where, in contrast with the traditional television environment where there is a straightforward locus of regulation (i.e., the channel), it is no longer practical or possible to target a single entity or focus regulation just at one level. Critically, many of these services are aimed at global, not national, audiences, raising questions about the practicability of regulating them on a national basis.

In the new media environment, carriers, Internet service providers, content providers, access providers and users of online services all have different roles, degrees of influence and responsibilities. For this reason, any regulatory solution must incorporate incentives for all of these players to cooperate in delivering public policy goals, even if, strictly speaking, only one or none of these is identified as having "editorial responsibility" in the regulatory sense of the word.

Open and closed models

It is worth at this stage to differentiate between closed and open business models. In closed or 'walled garden' models there is control over content delivery and presentation, which is not dissimilar to that in the broadcasting industry. Cable, satellite and IPTV platform operators such as *Virgin Media, Sky* or *Telefonica* offer services over closed proprietary networks, manage the interface with the consumer, and, in doing so, have control over the presentation and navigation of content. Accordingly, it does not seem unreasonable to ask them to exercise control over how the content is presented and made available to consumers. Crucially, platform operators are typically located within jurisdictional reach of regulatory authorities.

By contrast, in open Internet models, there is a major challenge which relates to the fundamental disconnect between that single entity always within the jurisdiction of the regulator (the ISP) and the provider of the content who can be located virtually anywhere in the planet. This raises the question of the role of intermediaries, primarily ISPs, in carrying out some control or oversight over legal content that may be harmful for certain users. Even if, often, these intermediaries will have little or no oversight or control over the content that they carry or make available, public authorities might be inclined to focus on ISPs and other intermediaries.

However, content regulation should not (and in many occasions could not) involve extending responsibilities for the monitoring of content, nor could it require the imposition of sanctions for harm and offence at the ISP level. ISPs cannot be required to monitor content exante, nor to make judgements about the "context" of content consumption. This is an extremely hazardous path to go down, and bound to raise serious accountability and legitimacy concerns. Yet, this is precisely where the new AVMS Directive, if taken to its ultimate consequences, might lead.

Platform neutrality: a utopia?

An important challenge in this context has been the identification of the principle of technological neutrality (similar services should be regulated in a similar manner, regardless of the technology that is used to deliver them –cable, satellite, terrestrial, wireless or IP networks) with the principle of "platform neutrality".

The principle of technological neutrality reflects the ambition that regulation should neither impose nor discriminate in favour of the use of a particular type of technology, and is central to the model established by the Regulatory Framework for Electronic Communications and Services,[9] and at the heart of the EU's horizontal approach to communications regulation. Regulation is thus structured along activity lines as opposed to industries. This notion of regulating in a completely technology-neutral fashion is attractive and has proved vital to the success of the European regulatory model for electronic networks and services.

When translated into the broadcasting environment, the principle would suggest that a TV channel should be regulated in a similar manner regardless of whether it is delivered over a cable network, or through the Internet. This is the approach taken in the new AVMS Directive. The aim is to deliver a level playing field between incumbents and innovators, and to reduce the opportunities for regulatory arbitrage. However, if strictly applied to the content world, the concept of platform neutrality implies that the same piece of content or service should be regulated in a similar manner, regardless of the platform or device through which it is consumed or the conditions under which consumption takes place. This idea does not sit well with the basic principle that content rules need to be applied *in context*, and that the level of protection (and by extension regulation) that might be required critically depends on the conditions of access and use of the content service (for example whether the content is offered after the watershed, or whether there were pin protection systems in place). Already today, the same single piece of content is subject to a wide range of different regu-latory controls depending on whether it is broadcast on a free-to-air or pay-TV, delivered as video-on-demand, sold at a DVD store or shown in a cinema. Accordingly, restrictions (including advertising restrictions) that are suitable in a free-to-air television broadcasting platforms might not be appro-priate for on-demand, platforms (online, mobile, etc.) where the consumer experience is inherently different. Indeed, it is already the case that consumer expectations of protection differ depending on the platform that they are using to access the content.

This urges for a reconcilation of the principle of technological neutrality, with the principle of regulation "in context", and might require a certain degree of discretion for the regulator depending on the *platform* that is used. More generally, the principle of technological neutrality should not be regarded as an absolute, but rather act as a guiding principle, since there are still differences in technologies that need to be recognised by regulators (e.g., specific multiplex licensing, the use of specific spectrum). Regulating for convergence should not mean the replacement of a rigid vertical structure with a rigid horizontal framework. Principles of horizontality and technological neutrality should not encourage regulators to ignore the differences between networks and platforms, particularly in relation to their social impact.

Back to basics: Why regulate?

Traditionally, the case for regulating television broadcasting to a much stricter and higher standard than other media such as the printed press or other forms of artistic expression rested on two grounds. Firstly, there was a technological rationale: the spectrum needed for terrestrial distribution was both a public resource and a scarce commodity, and this justified public intervention designed to achieve an efficient distribution of frequencies. In addition, in order to avoid signal interference and chaos it was deemed necessary to put in place some regulation or organisation of the airwaves. Secondly, there was a public interest rationale linked to the immediacy and pervasiveness of the audiovisual medium (Feintuck, 1999; Tambini et al. 2001). Television was regarded as a powerful medium with a privileged

9 <http://europa.eu.int/information_society/policy/ecomm/todays_framework/overview/index_en.htm>

position in terms of access to mass audiences, and with a recognised capacity to influence the public debate and thereby directly affect political and democratic processes (Barendt, 1995). It is also argued that television coverage can cause direct harm to individuals (and particularly minors) through, for instance, unfair representation of views, depictions of extreme violent or sexual material and intrusion of privacy.

Whether these arguments can (or should) be transposed to the new convergent media environment remains an open and highly controversial question. The AVMS Directive starts from the premise that as television moves to other plat-forms, television regulation should follow. Though appealing as an argument, the reality is much more complex. I have argued that television is not simply moving to other platforms, it is also *changing* along the way, and converging with other media. The question is therefore, whether regulatory approaches designed for the traditional television environment are appropriate or should take priority over other regulatory approaches that might be better designed to address the challenges posed by new convergent technologies.

As digitalisation removes capacity constraints, the pervasiveness, impact and influence of the television medium becomes the most significant regulatory rationale. However, the critical –and yet unanswered– question is whether new audiovisual media services, particularly those delivered over the Internet, are of a similar kind from the point of view of their impact and influence in society. A comparison with the press helps to illustrate this point. The original justification for the lack of regulation of the press had to do with the idea that a relatively large number of independent publications co-existed and covered a broad range of political and ideological views and that entry and competition in the 'marketplace of ideas' was possible. It was argued that as newspapers were commercially competitive, other voices and other interests could counter biases. The task of governments in the print media was therefore limited to, on the one hand, allowing the free expression of opposing views (rather than providing a single platform that would convey a national consensus) and, on the other hand, avoiding excessive concentration of power. In contrast, there were only a limited number of television stations, and it was physically impossible to transmit more than one message on the same broadcast frequency without interference. Another reason for this differential (and deferential) treatment of the press related precisely to the immediacy and pervasiveness of the audiovisual medium. While readers, who are aware that newspapers carry politically relevant and biased information, actively seek printed content, television is readily available at the switch of a button.

It can be argued that, except for a minimum set of audiovisual services which are identical to television broadcasting but delivered using IP technology, most of the materials currently available on Internet platforms, are actually consumed and perceived by users in a way which reminds us more of the press than the television medium. When surfing the web and downloading content, users are actively pulling content, and, in the great majority of the cases, are not surprised or shocked by the content they come across. This consideration, at a minimum, challenges the assumption that new Internet services need to be subject to the highly strict regulatory controls traditionally imposed on television broadcasts. It rather makes the case for a reconsideration of how to best regulate broadcasting, given some enduring objectives such as the protection of minors or qualitative advertising controls. In the not so distant future, viewer behaviour will inevitably disrupt the TV hegemony (except possibly in the case of live events). Viewers might continue to consume the same content, just like they do with the cinema or the newspaper, but they will do so at different times, and from different sources. In this context, navigation tools, as well as personalisation and recommendation technologies that allow users to make some sense of the content maze become a vital element of the media consumption experience.

More fundamentally, when considering the extension of regulation to additional forms of media, it should not be forgotten that any intervention in this sector constitutes a restriction of the fundamental right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR).[10] Any restrictions to this fundamental right

10 Rome 4 November 1950.

need to be convincingly established, proportionate to the aim and strictly supervised. From this perspective, self and co-regulation would seem to provide not just for a more efficient way to deliver a high level of consumer protection (see below), but also for a more adequate and proportionate regulatory alternative.

Regulate yourself

The above does not mean that those entities that are not primary responsible for content regulation (for example because they fall outside the scope of the Directive) do not have a role to play in delivering protection to consumers. As far as illegal material is concerned the E-Commerce Directive requires intermediaries to take down material hosted in their servers when alerted to it, although they are not expected to monitor the content in advance.[11] Once content is ascertained to be illegal, authorised hotlines (such as the Internet Watch Foundation in the UK) will issue 'take down' notices to hosting service providers requiring them to remove the illegal content from their servers. In addition, ISPs can voluntarily block illegal sites hosted outside.[12] At the EU level, Inhope (International Association of Internet Hotlines) aims to eliminate child pornography from the Internet and protect young people from harmful and illegal uses, and to facilitate discussion between hotline providers to share expertise and develop effective common procedures for receiving and processing reports.

Industry also plays an important role in protecting users from "harmful and offensive" content and has been generally proactive in developing tools to enable the filtering of content deemed inappropriate for minors. Content creators producing material can label and insert metatags[13] that can then be used to filter the content downstream. Search engines such as *Google*, have developed "safe search" options with which users can set their preferences in order to block certain results, such as explicitly adult content, from being returned. In addition, some ISPs offer web filtering as a value added service, with individual subscribers able to choose their own settings (e.g., AOL's three settings or parental controls: kids only, young teens, mature teens). Finally, individual users can install software on their com-puters to help them filter content.

Industry action has been supplemented and encouraged by EU and national institutions. In 1999, the EU launched the Safer Internet Action plan, and its successor, the Safer Internet Plus Action Plan, in 2005. Its aim is to promote safer use of the Internet by combating illegal and harmful content on global networks. The plan promotes industry content-monitoring schemes, especially dealing with content such as child pornography and hate speech, and encourages development of filtering tools and rating mechanisms. So far, it has played a very important role in fostering international cooperation on the issue of illegal and inappropriate content.

There is increasing recognition that any regulatory ecology will necessarily need to rely, to a significant degree, on self and co-regulatory initiatives combined with media literacy schemes to empower end-users, rather than on primary legislation. The debate today is not on the merits of self and co-regulation for new media, but rather on how to best design self and co-regulatory regimes that successfully deliver on public policy aims. As mentioned above, the new AVMS Directive encourages the use of self and co-regulation as a means of implementation, with nevertheless some degree of involvement of public authorities. This is part of wider EU efforts in recent years to encourage cooperation by the industry, particularly as regards services on the Internet and mobile phones. It should be welcome since it gives a political signal as to the importance of such mechanisms not just for on-demand television services, but also more widely.

11 Articles 14 and 15 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

12 In the UK, the IWF has been immensely successful, with reportedly less than 1% of identified illegal content being hosted in the UK today, down from 18% in 1997.

13 Metatags are text-based information tags which contain information about, among other things, the content type, copyright and ownership.

Conclusion. The regulator 2.0

As put by David Bell in 1967: "the future […] begins in the present". Today's regulatory choices, will largely determine our digital future, our degree of digital freedom, the scope of our media access and its potential uses. For better or worse.

The advent of the global Internet and its enormous potential in terms of the creation and distribution of content, as exemplified by recent web 2.0 developments, is testing many of the assumptions and premises under which content regulation currently operates. Digitisation and convergence have resulted in fundamental changes both in market structures and in consumers' attitudes towards their media, while the internet has entirely removed historical constraints on the number of players that can potentially operate in the communications environment, breaking not only traditional market divides, but also geographical boundaries.

The delivery of audiovisual content, and the case of online video portals in particular, presents itself at the heart of the convergence process, and consequently at the heart of current regulatory debates around convergence. This creates three distinct challenges for regulators.

Firstly, in respect to the licensing of traditional TV channels, regulators need to decide what criteria should apply to television services made available on the open Internet. This issue has not been at the centre of the debates so far because the majority of TV channels available on the Internet are anyway available on other platforms and, therefore, already subject to traditional forms of regulation. However, as demonstrated by cases such as *Joost* or *Babelgum*, the technology to convey quality video content over the internet is developing rapidly. Critically, many of these services will be offered from outside the jurisdiction of EU regulators.

Secondly, in transposing the new AVMS Directive into national law, Member States will need to make critical choices about both the types of services that will be covered by the new rules, and also the institutional regulatory model under which video-on-demand service providers will operate. This is will be particularly challenge in countries with a multi-level system of governance, such as Spain, Germany and Belgium, since choices will also have to be made about the appropriate share and distribution of competences at the State and at the regional level. As argued above, not only does self and co-regulation appear to be a superior alternative, but, crucially, a distinction will need to be made between closed and open models of content delivery, and a different solution for each might be required.

Thirdly, there is a fundamental challenge as regards services which are at the margins or which fall outside the scope of the Directive (for reasons of substance or jurisdiction), but that could nonetheless cause harm and offence and create public concern. Consumers will not necessarily be aware of where the content is coming from, nor should they be expected to make subtle, and often fairly arbitrary, regulatory distinctions. A false promise of effective regulatory control might discourage them from taking greater responsibility, creating an "illusion of protection" on which not even the most illuminated regulator can reasonably deliver.

As the analysis above highlights, the ambiguity over the eligibility for regulation remains the biggest challenge. As useful and as clear as the Directive's criteria may be, there will still be some scope for ambiguities at the margins, and it might not be possible to clearly identify the outer boundaries of the scope (i.e., what is an AVMS?), nor the inner boundaries (when does linear become non-linear?). The boundaries of what is inside and what is outside are likely to remain porous by necessity, as any attempt to clearly define a subset of services could have unintended and negative effects, leaving open the possibility for operators and providers to game the criteria, the regulator, and consumers.

Accordingly, regulators need to recognise the limits of what they can achieve through traditional top down regulation. They cannot recreate a system which relies primarily on ex-ante control by a licensed broadcaster and it would not be possible, nor desirable, to attempt to guarantee a tightly circumscribed expression of broadcasting regulation. Further, in the online content environment there are a number of issues (privacy, safety, copyright) that go beyond what is currently under most regulators' remit.

Above all, the focus must be on the consumer. From a consumer perspective, the boundaries of regulatory protection need to be as clear as possible. In a world of pure statutory regulation it was possible for the regulator to establish clear and well-defined limits beyond which the responsibility lies with the consumer. An example of this is

the watershed: consumers know that after the watershed there is an increased likelihood of content which might be harmful to minors and parents need to take responsibility for their children's viewing. In the new media environment, it will be much more difficult for consumers to know where the boundaries of protection are, and for them to understand when they are expected to take more responsibility.

In this context, regulators should induce behaviour rather than try to create a "journey to certainty" for the user. Their role might require them to progressively evolve from a pure regulator to an "educator" or a "facilitator" of an environment where there is certainty for industry and protection for consumers, without directly attempting to create it. This is why a greater focus on media literacy becomes a key imperative.

"In the age of consumption, control was what media were about. In the age of creation, they should be about enabling".[14] The same holds true for media regulators.

Bibliography

BELL, D. "The year 2000: the trajectory of an idea". *Daedalus: Journal of the American Academy of Arts and Sciences*, 96, 1967, pp. 639–51.

BARENDT, E. *Broadcasting law. A comparative study*. Oxford: Clarendon Press, 1995.

FEINTUCK, M. *Media regulation, public interest and the law*. Edimburg: Edinburgh University Press, 1999.

NAUGHTON, J. "Our changing media ecosystem". In: *Communications – The Next Decade*. London.

PALZER, C. "European Provisions for the Establish-ment of Co-Regulation Frameworks". In: *IRIS Special, Co-Regulation of the Media in Europe*. European Audiovisual Observatory, Strasbourg.

SCHULZ, W.; SCHEUER, A. *Media System of Germany. Report for the Study on Co-Regulation Measures in the Media Sector*. Hamburg: Hans-Bredow Institute, 2004.

TAMBINI, D. [et al.] *Communications revolution and reform*. IPPR, London.

14 JARVIS, J. "YouTube is good for TV". A: *The Guardian*, Monday February 19, 2007.