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Press Regulation in an Era of Convergence An Introduction

Irini Katsirea

University of Sheffield, UK

Abstract

While the transition of traditional newspapers and magazines to the online space is gathering pace, and the literature on multimedia journalism is proliferating, little attention has been paid to date to the implications of convergence for the press in regulatory terms. One such regulatory dilemma arises from the proliferation of video content on newspaper websites. It is this question and others at the juncture of press freedom and the dynamics unleashed by convergence that the papers in this special section seek to shed light upon.

Keywords

Electronic press, press freedom, broadcasting regulation, Audiovisual Media Services Directive, convergence

Media convergence, defined by the European Commission as ‘the progressive merger of traditional broadcast and internet services’, enables citizens to use the same devices to access a diverse range of content that was formerly tied to specific platforms (European Commission, 2013). While such convergence may be welcomed by consumers, it can be perplexing for regulators as they try to accommodate new technological and market realities within existing governance structures. An aspect of convergence that has proved particularly challenging in recent times is that between the audiovisual sector and the press in the online realm. The time has long passed when newspapers were just ‘news’ printed on ‘paper’. They are still that, but also news content available on websites carrying videos that are reminiscent of television. While the transition of traditional newspapers and magazines to the online space is gathering pace, and the literature on multimedia journalism is proliferating, little attention has been paid to date to the implications of convergence for the press in regulatory terms. It is the juncture of press freedom and the dynamics unleashed by convergence that the papers in this special section of *Convergence* seek to shed light upon. These papers emanate from a one-day conference at the Middlesex University School of Law on ‘Press Regulation in an Era of Convergence’ (convened with generous funding by the British Academy and the Leverhulme Trust).

As publishers increasingly focus on the digital space with enhanced audiovisual offers on their newspapers’ websites, the historically disparate regulation of the press and broadcasting sectors has reached a tipping point. The press is free from state regulation, subject only to general laws. Broadcasting, on the other hand, has always had a range of obligations imposed upon it, justified by its use of the scarce radio spectrum and by its alleged unique pervasiveness. Whereas the first, technological argument has run its course, the second one still serves as the rationale for the special treatment of broadcasting. However, there is no evidence that television has greater impact than other media. Besides, even if this was the case, one could question whether more powerful forms of expression should be subject to greater control. Nevertheless, the growing co-existence of the two sectors in the online domain questions their divergent regulation. Lara Fielden, in her contribution to this special section, criticises the inconsistencies and the haphazardness of the current regulatory system, and argues in favour of its replacement by a new system that would not be based on the accidents of delivery. Thomas Gibbons, in his contribution, highlights different conceptions

of the press, the tensions between them and the implications for regulation, the challenges posed by various manifestations of convergence, and a possible constitutional regulatory response to meet these challenges.

The above unsatisfactory justifications for the divergence in the treatment of the two main branches of the mass media barely disguise the fact that this disparity is historically conditioned: the press having been shaped by the market liberal ideology that held sway in the 19th century, while broadcasting was a creature of social liberalism at the turn of the 20th century. This ‘historical accident’ has been extensively discussed in the academic literature (Bollinger, 1976; Barendt, 1995; Vick, 2006). What is intriguing is the fact that the ideologies that moulded the press and broadcast media in their formative years still determine their transition to the digital age, while the clash between these ideologies remains unavowed.

The regulatory disparity between print and broadcasting has not only been a subject for academic debate. The amalgamation of the two media branches’ content in the online realm has also troubled regulators in a number of EU jurisdictions for quite some time. The regulators of Denmark (Machet, 2012, 17), the Flemish Community of Belgium (De Bueger, 2013), Slovakia (Council for Broadcasting and Retransmission, 2012), Sweden (Granskningsnämnden, 2012) and Austria (Bundeskommunikationssenat, 2012) have classified such services as audiovisual media services (AVMS), which fall within the scope of the Audiovisual Media Services Directive (AVMSD), the main EU regulatory instrument for the audiovisual sector (European Parliament and Council 2010). Other regulators such as the Dutch Commissariaat voor de Media have faced considerable resistance from the newspaper industry against the classification of their video sites as on-demand services. The UK communications regulator, Ofcom, **quashed a ruling** of its now defunct co-regulator, the Authority for Television on Demand (ATVOD), that the video section of The Sun newspaper website constituted an on-demand programme service (Ofcom, 2011).

Comment [Office1]: When? A rough date/year would be helpful

Comment [IK2]: Thank you. I added the reference with date.

The regulatory authorities claim that they reach their rulings only by applying ‘the statutory scheme’ (Ofcom, 2011; Granskningsnämnden för radio och tv, 2015). By doing so, however, they consciously or unconsciously shroud ideological positions in a veil of objectivity. They thus allow little insight into the underlying rationales and concerns such as the protection of minors, protection from hate speech, as well as from harmful or misleading commercial communication. They focus on technical questions about the existence of a separate homepage providing access to the audiovisual material in question, about the length of the videos and their prominence compared to the written text. Ofcom, in particular, has gone to great lengths to establish a meticulous list of criteria that would help to draw regulatory boundaries, while giving short shrift to the argument that users might expect regulatory protection when accessing the video section of an electronic newspaper (Katsirea, 2015). The press, for its part, resents any type of statutory regulation, waiving the banner of press freedom (VDZ and BDZV, 2013). **They** argue that notification requirements such as those UK on demand services need to comply with so as to be regulated by Ofcom (Ofcom 2016) ‘derive from a completely different way of consuming the content and the (former) spectrum scarcity and thus cannot be applied to free services in open networks such as the digital offers of publishers containing merely incidental audiovisual content’ (EMMA and ENPA, 2015: 9).

Comment [Office3]: Does ‘They’ refer to the press?

Comment [IK4]: Yes, I mean the press. Should I rather say ‘It argues’?

The positions of both the regulatory authorities and the press are unsatisfactory. Less emphasis on technical details and greater openness about the reasons why newspapers’ video content would need to be brought within the AVMSD’s regulatory ambit would facilitate a

more principled policy debate about the future media framework. The insistence of the press on an unqualified notion of ‘press freedom’ similarly masks the real issues at stake. The increased production of audiovisual content across the media spectrum, propelled by its especially lucrative nature in terms of the advertising revenue it attracts (Reuters, 2014: 13), calls for greater regulatory consistency and clarity. Video content is increasingly short-form given that viewers use their mobile phones more and more as their first screen, rendering comparisons with television and the AVMSD notion of ‘TV likeness’ irrelevant. Moreover, there is evidence that the greatest level of misattribution by users as to the existence of regulatory protection is for video on news websites (BDRC Continental, 2015). Users tend to believe that such content is regulated in the same way as audiovisual content provided by professional TV providers. This suggests that television and the press are in a competitive relationship as regards video content, and that users might have a legitimate expectation of regulatory protection.

The proposal for an updated AVMSD places press video content including user-generated content under the umbrella of AVMSD regulation under the condition that such content is dissociable from the main activity of the online newspaper (European Commission, 2016). The existence of links between such audiovisual material and the written content of the online newspaper would render it indissociable and refute its characterisation as AVMS. An objection against the extension of the Directive’s regulatory remit could be that the press often violates individual interests, such as the right to privacy, while it rarely poses a threat to those general interests which are protected under AVMSD rules on the protection of minors or on incitement to hatred. However, it is necessary to bear in mind that there is a growing tendency to define the notions of the ‘press’ and ‘journalism’ expansively, and to include a wider range of actors, not necessarily limited to institutionalised media activities. This trend, coupled with the increased interpenetration between professional and user-generated content, opens the spectre of possible general interest violations. The ‘anything goes’ ethos of social media, every so often pushing the boundaries with violent or profane video content, sets a dangerous paradigm for a press in crisis and desperate for online users’ attention. Oliver Füg discusses the challenges of digitisation for the press and publishing sectors and the opportunities presented by the European Commission’s Digital Single Market Strategy. Further risks loom over the public watchdog function of the digital press due to possible changes of ISPs’ conditions of carriage. Bernd Holznagel and Sarah Hartmann evaluate the likely impact of the new ‘Open Internet Access Regulation’ in this respect.

Comment [FM5]: So, is this something that has been proposed, or a possible way forward? We need a little context here, I think.

Finally, a further consideration in favour of an extension of the AVMSD’s scope to cover the digital press is that it might provide a useful starting point from which to regulate the liberal mingling between editorial content and commercial communication (also in the form of video advertorials) which is so prevalent online. The proposed draft AVMSD has been inspired by the judgement of the European Court of Justice in Case C-347/14, *New Media Online GmbH* of 21 October 2015 (European Court of Justice, 2015). This Case dealt with the very question, posed by an Austrian court, of whether a newspaper website containing audiovisual content could fall within the AVMSD’s scope. The implications of this judgement are discussed in Michael Kogler’s opening contribution to this special section.

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