András Koltay

What is press freedom now?

New media, gatekeepers, and the old principles of the law

The concept of media freedom, in modern European philosophical and legal thinking, is constantly changing. Originally, back in the eighteenth and nineteenth centuries, it did not necessarily mean more than the exclusion of state intervention prior to publication, while still allowing prosecutions to begin after publication. By the twentieth century, in the age of mass media, this narrow definition was no longer sustainable. With the recognition in various jurisdictions of the idea that the media have a fundamental task in the democratic public sphere, these states needed to draw the respective conclusions which, in turn, affected the concept of media freedom. This concept is about to be redefined once again, thanks to new participants that have become active players in transmitting various content to the general public. In this paper we wish to examine whether it is justified to rethink the notion of media freedom, having regard to these new participants. In part 1, we examine the differences between freedom of speech and media freedom (freedom of the press) in order to identify the content of the currently used notion of 'media freedom'. Part 2 provides an overview of the different elements of the legal notion of 'media'. In part 3 we shall reveal who might be the holders of the right to media freedom, which new players might claim protection under this right and the unique tasks they play in the operation of the democratic public sphere. Part 4 discusses the relationship between the internet and the democratic public sphere, and briefly assesses the fading hopes that were present at the dawn of the internet age. In part 5 we briefly draw possible conclusions from the previous parts with respect to the future role of the state. (Hereinafter the notions of 'media freedom' and 'freedom of the press' will be used interchangeably, as synonyms.)

The difference between freedom of speech and media freedom

Differences between the American and European approaches

In order to define what constitutes media freedom and the related constitutional rules, it is first necessary to clarify whether press freedom is different from the fundamental right of freedom of speech. The answer to this question will have serious consequences for defining the tasks of the state related to protecting fundamental rights.

In the past, freedom of speech and the freedom of the press were not typically differentiated within legal doctrines. Even the prominent English constitutional lawyer Albert Dicey used both these terms alternately, as synonyms.[1] They were used with identical meanings in the legal system of the United States, in the rulings and legal literature related to the First Amendment, despite the fact that the freedom of the press is mentioned distinctly, in the form of the Press Clause, in the American Constitution.[2] This lack of distinction is quite evident: not even the Supreme Court of the United States has been able to assign distinct and independent substance to the fundamental right of the freedom of the press.[3] This lack of distinction does not, however, disadvantage the operation of the media, thanks to the extensive protection granted to the freedom of speech. The media are thus not subject to stringent legal restrictions, although neither are they awarded any additional rights.

All this has not, however, dissuaded certain American authors from arguing for the distinction between the freedom of the press and freedom of speech.[4] Justice Potter Stewart argued that the freedom of the press, as opposed to freedom of speech, is not an individual right but is the right of the media as an institution.[5] The media constitute the only type of private enterprise which enjoys specific constitutional protection.[6] The freedom of the press does not protect any individual working for a media outlet but the institution itself and, consequently, it is also the institution that is entitled to any additional rights and should bear any additional obligations attached to this freedom.[7]

Justice William Brennan opined in an address that he did not view the freedom of the press as a right which must be broadly unrestricted, unlike the freedom of speech.

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[1] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885).

[2] Melville B Nimmer, 'Introduction: Is Freedom of the Press a Redundancy. What Does it Add to Freedom of Speech?' (1975) 26 *Hastings Law Journal* 640; David Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 77; William W Van Alstyne, 'The Hazards to the Press of Claiming a "Preferred Position"' (1977) 28 *Hastings Law Journal* 761.

[3] Edwin C Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955–59; Eugene Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today' (2012) 160 *University of Pennsylvania Law Review* 459.

[4] First surely Jerome A Barron, 'Access to the Press: A New First Amendment Right' (1967) 80 *Harvard Law Review* 1641, and Jerome A Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Indiana University Press 1975).

[5] Potter Stewart, '"Or of the Press"' (1975) 26 *Hastings Law Journal* 631.

[6] *Zurcher v Stanford Daily*, 436 US 547, 576 (1978), Justice Stewart's dissenting opinion. See also Keith J Bybee, 'Justice Stewart Meets the Press' (2014) in Helen J Knowles and Steven B Lichtman (eds), *Judging Free Speech: First Amendment Jurisprudence of US Supreme Court Justices* (Palgrave Macmillan, 2015).

[7] Similarly in American legal literature see also Randall P Bezanson, 'Institutional Speech' (1995) 80 *Iowa Law Review* 823; Frederick Schauer, 'Towards an Institutional First Amendment' (2005) 89 *Minnesota Law Review* 1256; Edwin C Baker, *Human Liberty and Freedom of Speech* (OUP 1989) in particular 229 and 233; Edwin C Baker, 'Press Rights and Government Power to Structure the Press' (1980) 34 *University of Miami Law Review* 819; Owen M Fiss, 'Free Speech and Social Structure' (1986) 71 *Iowa Law Review* 1405; Allan C Hutchinson, 'Talking the Good Life: From Free Speech to Democratic Dialogue' (1989) 1 *Yale Journal of Law and Liberation* 17.

He suggested that the media must acknowledge that the nature of their work is such that they have to take multiple, possibly conflicting, interests into consideration, as well as fulfilling certain extra obligations.[8] Brennan, similarly to Stewart, underlines the interests of the community as the basis of freedom of the press, which is what distinguishes it from the freedom of speech.

Although they are yet to feature in the jurisprudence of the Supreme Court, similar views are aired in recent literature on the subject. Lyrissa Lidsky criticised the decisions of the Court (the 'Roberts Court', currently led by Chief Justice Roberts) for failing to recognise freedom of the press as a right distinct from those enjoyed when exercising freedom of speech, with the result that the media cannot be granted additional rights specific to them.[9] Sonja West also argues for the 'separate identity' of the media,[10] suggesting that the freedom of the press should not be restricted to the right of publication and distribution, and that it does not simply protect the free use of certain technologies, but also fulfils a democratic function.[11] According to West, if we grant the protection of the freedom of the press to everyone who exercises their freedom of the speech, and to the same extent, this will paradoxically result in the devaluation of press freedom, since this approach would fail to take the unique social role of the media into consideration.[12] The media and the journalists working in the media not only publish different opinions but, first and foremost, they also act as the main driver, engine and forum of public discourse. The media cannot be treated on the same footing as a group of individuals exercising their right to freedom of speech through loudspeakers, not even if today, thanks to the advent of new technologies, anyone can collect and even publish news.[13] Lidsky and West's arguments today are thus in the tradition of Brennan and Stewart.

Although not even these thoughts can be considered as a majority view in American legal literature, they are even so much 'gentler' than the approach of Edwin Baker, who can be considered as a radical compared to mainstream theoreticians of freedom of the press. Baker viewed the different participants in the media as among the representatives of 'private power' who, based on their economic and political interests, deliberately distort democratic publicity. He therefore not only argued for the separation of the freedom of speech and the freedom of the press, but also for the limitation of media operation.[14]

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[8] William J Brennan, 'Address' (1979) 32 *Rutgers Law Review* 173.

[9] Lyrissa Barnett Lidsky, 'Not a Free Press Court?' (2012) *Brigham Young University Law Review* 1819, in particular 1831–35.

[10] Sonja R West, 'Press Exceptionalism' (2014) 127 *Harvard Law Review* 2434, and Sonja R West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025.

[11] See West (n 10) 2441.

[12] ibid 2442.

[13] ibid 2445.

[14] Edwin C Baker, 'Press Performance, Human Rights, and Private Powers as a Threat' (2011) 5 *Law & Ethics of Human Rights* 217; Edwin C Baker, 'Private Power, the Press and the Constitution' (1993) 10 *Constitutional Commentary* 421; Edwin C Baker, *Media, Markets and Democracy* (CUP 2001); Edwin C Baker, *Advertising and a Democratic Press* (Princeton University Press 1994).

Turning from the American authors and legal system, we find that European constitutions and, based on these, the individual legal systems try to separate freedom of speech from the freedom of the press. There are independent laws governing the media in all of the countries of Europe. The European Union has also drawn up specific regulations on audiovisual media services.[15] This distinction between the two rights is similarly reflected in legal literature.[16] Thomas Gibbons stressed in a recent article that the freedom of speech is a right enjoyed by individuals and not by institutions (media enterprises), whereas the owner's right attached to the media is not unconditional and is not the same as the freedom of speech.[17] At the same time, the recognition of the media as an 'institution' is important, because if it is strong enough it can resist external pressure. That said, it may also be subject to restrictions in the interest of the community.[18]

Although article 10 of the European Convention on Human Rights on freedom of expression does not mention media freedom as a separate right, the recognition of this right is implied by the text when it makes specific reference to the imparting of ideas and the operation of radio and television. Furthermore, the jurisprudence founded on this Convention has been contributing to the body of law dealing with the limits of press freedom for decades. It is also worth noting that paragraph 2 of Article 10 states that 'the exercise of these freedoms . . carries with it duties and responsibilities.' The jurisprudence of the European Court of Human Rights (ECtHR) consistently stresses that the media have a duty, or rather an obligation, to impart information of public interest and ideas related to matters of public interest.[19]

If one recognises freedom of the press as a right which is independent in nature then certain special rights and obligations stem from that recognition. As such, making a distinction between freedom of speech and freedom of the press is not only a matter of principle. If these two rights are considered as distinct then different partial rights and obligations can be attached to them. Obviously, media workers enjoy freedom of speech, but this right can only be exercised within the framework of the special regulations applied to the media as an institution. On the other hand, taking into account

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[15] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (codified version).

[16] For the clarification of theoretical issues, see eg Eric Barendt, 'Inaugural Lecture. Press and Broadcasting Freedom: Does Anyone Have any Rights to Free Speech?' (1991) *Current Legal Problems* 79; Geoffrey Marshall, 'Press Freedom and Free Speech Theory' (1992) *Public Law* 40.

[17] Thomas Gibbons, 'Free Speech, Communication and the State' in Merris Amos – Jackie Harrison – Lorna Woods (eds), *Freedom of Expression and the Media* (Nijhoff 2012) 36.

[18] ibid.

[19] See eg *Observer and Guardian v the United Kingdom* (App no 13585/88, judgment of 26 November 1991), *Sunday Times v the United Kingdom* (App no 13166/87, judgment of 26 November 1991), *Thorgeir Thorgeirsson v Iceland* (App no 13778/88, judgment of 25 June 1992), *MGN Ltd v the United Kingdom* (App no 39401/04, judgment of 18 January 2011), *Uj v Hungary* (App no 23954/10, judgment of 19 July 2011).

the special role of the media in furthering democracy, they are also entitled to additional protection. These extra rights may include the protection of journalists' sources, the partial immunity of editorial offices against searches of their premises by the authorities, special entry and access rights (for example, to the location of otherwise private or restricted access events), the protection of journalists against the owners of the given media outlet and the advertisers, or certain tax benefits provided to the media. At the same time, the media in Europe are subject to special content regulations such as the restriction of hate speech and content harmful to children, the protection of human dignity and the restriction of commercial communications. It is also subject to copyright regulations, limitations on entrance to the market and restrictions on ownership to prevent excessive market influence. Also relevant are the must-carry and must-offer rules whereby the minimum quantity of the broadcast European (and in, certain states, even national) content is defined on the basis of programme quotas and many states require balanced coverage and the right of reply. In consequence of the recognition of the positive character of the media, every state in Europe maintains, operates and finances a system of public service broadcasting (public media services), which is assigned, among others, two important functions: to take into account the needs of the audience not satisfied by the market and to provide an authoritative and comprehensive news service.

The existence of and rationale behind these rights and obligations are rooted in the 'old' media system in which, apart from the printed press, there were no media other than radio and television. However, in 2007 the AVMS Directive also placed certain new services (on-demand media services, most of which are accessible via the Internet) under the scope and effect of a European-level framework of regulations. The High Level Group commissioned by the European Commission to review the situation of media freedom and pluralism in Europe established, in its report dated January 2013, that the proliferation of Internet services results in legal uncertainty, since it is difficult to discern which rules apply to the different services and which state has jurisdiction over any given service. The report found that journalists continue to have rights and duties in the new media landscape, but that new regulations are definitely required.[20]

The negative and positive character of media freedom

If we recognise the independent characteristics of media freedom, we have to deal with a new problem stemming from it. Fundamental rights typically have a negative character, since these oblige the state to respect these rights *vis-á-vis* its citizens, for the

[20] The Report of the High Level Group on Media Freedom and Pluralism (hereinafter referred to as High Level Group) 33 <ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf>.

benefit and protection of those citizens. However, the negative character of media freedom in itself is not sufficient to accommodate the entirety of the important interests related to the operation of the democratic public sphere.

It is thus necessary also to recognise the positive character of freedom of the press. This differentiation between the different fundamental rights has its roots in the theory of Isaiah Berlin.[21] Berlin considered the scope of action provided to an individual, free of external interference, as a negative freedom (freedom *from something or somebody*), whereas he viewed the freedom to decide, ie the individual's freedom of self-mastery, as a positive freedom (freedom *to do something*). John Rawls also stresses that, for most individuals, it is not the civic status of being free that is really important, but the opportunity to enjoy liberty.[22] As far as the freedom of the press is concerned, the negative character means that communication via the media is free from external interference, whereas the positive character means the protection of the interest to ensure that anyone can have free access to media content and that media content is diverse and imparts diverse opinions (the latter might also be called the right to information—or, more simply, the 'right to know'—which, however, has not yet been recognised as a real, independent fundamental right). This means that whereas the negative character (freedom from the interference of external powers, hence primarily from the state) is an actual right of the media, it is in the interest of the media audience (and hence, in a broader sense, of all society) that its positive character be recognised. It also follows from the recognition of this interest that media regulations impose certain public service obligations on the media that serve to satisfy the interest of free access to information. By taking these (seemingly conflicting) positive and negative characters into account jointly, by subjecting them to a single legal regulatory framework and by ensuring a certain balance between rights and obligations, the content and contours of the freedom of the press are defined. It is important to highlight that the recognition of its positive character is not the same as positive media freedom, since the latter means direct access to the different forums of the media. An example of the latter is the recognition of the right of reply in certain legal systems.[23] This entails that the holder of the right of reply is entitled to express their position, even against the will of the given media outlet, following news coverage affecting them. Another good example of this right to access is the mandatory publication of political advertisements in television and radio broadcasts during election periods. The positive character of media freedom —which is distinct from the direct access rights—does not shift the audience out of its passivity. They cannot influence media content actively; nevertheless, their interest in regard to obtaining a wide range of information can be recognised under law.

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[21] Isaiah Berlin, *Four Essays on Liberty* (OUP 1969).

[22] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 204.

[23] András Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54 *Acta Juridica Hungarica* 73.

In the early stages of the discussion of media freedom it was naturally the negative character of press freedom that predominated, and this right was then identified as the prohibition of censorship. Today, external interference in media freedom is possible on a much broader scale than simply by directly restricting the communication of opinions. The media market is much more regulated than other enterprises. The law restricts the ownership of media outlets, defining a limit beyond which the same owner is not permitted to obtain additional rights. The different programme flow structure requirements imposed on radio and television media service providers directly affect the content of the media. Some of these rules stipulate negative requirements (time limitation of advertisements, parental ratings, restriction of pornographic content, etc.), whereas other requirements demand expressly positive, active behaviour from the media outlets (balanced news coverage and programme quotas).

The recognition of the positive character of press freedom (the audience's interests) originates in the acknowledgement of the democratic tasks and duties of the media. These issues had already spawned a substantial body of literature before the spread of the Internet. The notion of the media's social responsibility is not unheard of in the United States either, though it has not appeared in the media regulations. In its report issued in 1947, the Hutchins Commission, entrusted to review and redefine the social role of the media, created a theory of the social responsibility of the media, hitherto unknown in the United States.[24] According to the Commission, the greatest risk to media freedom is that, despite technical developments and the increase in the volume of the press (which, at the same time, made market entry significantly more expensive), access to the media is more restricted, fewer voices may be heard in the media, and for the most part, even those few fail to acknowledge their responsibility towards society.[25]

Some of the American authors expressed ideas which would be familiar to Europeans, notwithstanding the differences between the two legal systems. A frequently cited article by Judith Lichtenberg asserts that the freedom of the press is a tool necessary for the proper operation of democracy, which can obviously be used for economic purposes as well, but which is always subject to certain requirements to serve the public interest.[26] In his book, Cass Sunstein argues for a 'second New Deal', since modern media not only fail to help the operation of democracy but may even hinder it. As the commercial media expand, hope that the training of active citizens will play a crucial role in participatory democracies is waning.[27] Owen Fiss expressly warned the

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[24] Commission on Freedom of the Press, *A Free and Responsible Press. A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (University of Chicago Press 1947); John C Nerone, *Last Rites: Revisiting four Theories of the Press* (University of Illinois Press 1995) 77–100.

[25] Lee C Bollinger, *Images of a Free Press* (University of Chicago Press 1991) 28–34.

[26] Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (CUP 1990) 104–105.

[27] Cass R Sunstein, *Democracy and the Problem of Free Speech* (2nd edn, Free Press 1995). See also Cass R Sunstein, 'A New Deal for Speech' (1994–1995) 17 *Hastings Communications and Entertainment Law Journal* 137; Cass R Sunstein, 'Free Speech Now' (1992) 59 *University of Chicago Law Review* 255.

citizens of the former socialist countries who had just recently regained their liberty of the risk of adopting the media regulatory solutions of the Western world without criticism and proper consideration. He concluded that the media conditions spawned by the 'creative power' of the free market would have many characteristics similar to those of the media conditions of the former, dictatorial regimes.[28] The notion of *equality* appears alongside and supplementary to the democratic concept of media freedom as the justification for state intervention.[29] This equality is formal rather than substantial; it means creating a balance in terms of access.

A portion of the recent legal literature (in Europe, in a fundamentally changed media landscape) acknowledges the differentiation between the positive and negative characters of media freedom. Gibbons stresses that, in respect of the media, private enterprises may also fulfil public functions over and above the service of their private interests. In relation to the media, it is not credible to maintain that private organisations do not have a public function in addition to their private activities.[30] In the interest of ensuring access to the media, privately held media enterprises are also required to take into account the interests of their audiences and to convey different opinions, the materials published by them should not exclusively reflect the tastes and views of their owners or editors.[31]

Arguments against the recognition of the positive character of media freedom usually originate from the United States. According to mainstream US legal literature, anything, including the *laissez-faire* operation of the market is better than state intervention or state regulation: intervention by the state is, at best, unnecessary, or even evil. Andrew Kenyon presents a brief summary of these arguments, on the basis of which media freedom is a right to which everyone is equally entitled, with the implication that everyone may express their opinions freely and may freely use the media to disseminate such opinions without any restrictions from the state. Equality is thus achieved without any state or government intervention (action). According to this model, state intervention inevitably distorts the operation of the media and provides certain actors with advantages over others, thereby encroaching upon the rights stemming from the First Amendment.[32]

European legal thought, conversely, does not have any theoretical objections to state measures intended to ensure fair access to the media and accepts the regulations described above on the duties of the media, the vast majority of which (with the exception of the protection of minors, the limitation of the concentration of ownership

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[28] Owen M Fiss, 'Building a Free Press' in András Sajó and Monroe E Price (eds), *Rights of Access to the Media* (Kluwer Law International 1996).

[29] Kenneth L Karst, 'Equality as a Central Principle in the First Amendment' (1975) 43 *University of Chicago Law Review* 20.

[30] See Gibbons (n 17) 33.

[31] ibid 39.

[32] Andrew T Kenyon, 'Assuming Free Speech' (2014) 77 *The Modern Law Review* 379, 381–85.

and the regulation of commercial communications) would be unacceptable and indeed unconstitutional, under US law, even in principle. In areas where regulation does exist, the intervention is much less robust than that applied under European legal systems.

Eric Barendt argues that the freedom of speech can be subjected to regulation in order 'to make its exercise more effective'.[33] According to Gibbons, 'the state should not avoid responsibility for the protection of the freedom of speech, in particular, access to the audience and fair participation in dialogue.'[34] Kenyon, having analysed the legal literature examining the positive character of media freedom, states that 'debate and diversity of ideas cannot be assumed in market-based mass media; for debate and diversity to flourish requires support beyond markets.'[35]

Kenyon also notes that the jurisprudence of the ECtHR provides no firm foundations for the positive right of press freedom. At the same time, several decisions of the Court make mention of the importance of media pluralism.[36] Although even attempting to define the concept would be a bold undertaking,[37] in essence media pluralism is a value which is served by several rules related to the positive character of media freedom that are intended to ensure access to the media, for example, the requirement of balanced coverage, the right of reply, the must-carry rule and programme quota regulations may be regarded as such. At the same time, media pluralism is supported by not only positive, but also negative provisions such as, for example, the limitations on ownership in the media market. Although the ECtHR has not passed decisions on all of these, the tribunal has, on several occasions, recognised the role of the right of reply in reinforcing the positive character of press freedom.[38] We cannot ignore the importance of the enhancement of media literacy either, as this may contribute to the exercise of media freedom in a positive sense. At the same time, however, media literacy is not primarily a legal issue and, if it is provided with regulatory support, usually no objections made on the basis of constitutional press freedom will be upheld.

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33 Eric Barendt, *Freedom of Speech* (2nd ed, OUP 2005) 69.

34 See Gibbons (n 17) 42.

35 See Kenyon (n 32) 398.

36 ibid 393–95. These decisions are as follows: *Informationsverein Lentia v Austria* (App nos 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, judgment of 24 November 1993), *Tele 1 Privatfernsehgesellschaft mbH v Austria* (App no 32240/96, judgment of 21 September 2000), *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App no 38433/09, judgment of 7 June 2012), *Manole v Moldova* (App no 13936/02, judgment of 17 September 2009).

37 Peggy Valcke et al, 'The European Media Pluralism Monitor: Bridging Law, Economics and Media Studies as a First Step towards Risk-Based Regulation in Media Markets' (2010) 2(1) *Journal of Media Law* 85.

38 *Ediciones Tiempo SA v Spain* (App no 13010/87, judgment of 12 July 1989); *Melnychuk v Ukraine* (App no 28743/03, judgment of 5 July 2005); *Vitrenko and others v Ukraine* (App no 23510/02, judgment of 16 December 2008); *Kaperzynski v Poland* (App no 43206/07, judgment of 3 April 2012).

The concept of 'media'

Having come closer to identifying the concept of the 'freedom of the press', the next step is to examine who and which entities may be subject to or hold this right.

Despite the fact that newer and newer forms of media have evolved, for a long time the substance of the concept remained uncontroversial. The classification of the printed press, as well as radio and television, under the concept of 'media' was beyond dispute. It is also beyond dispute that films shown in cinemas, books and flyers distributed on the streets cannot be regarded as media (ie as belonging under the scope of media regulation), nor can the products of organisations also involved in the collection and publication of data, such as credit agencies, financial service providers, travel agencies and meteorological institutions.[39]

The previous, 'traditional' concept defines which activities are relevant to it on the basis of the various forms (publication and distribution methods) of the media. Technology has now reached a stage of development, however, where this in itself cannot provide sufficient guidance. As a result of the phenomenon of media convergence, the relationship between the various types of content and the forms of publication of the media that carry them has weakened: today, printed newspapers can be read on the Internet and we can watch television on our mobiles. Furthermore, the newly evolving forms of communication (blogs, comments, private websites and social media) can be classified in the earlier categories only with great difficulty and at the cost of major inconsistencies.

To define the concept of the media, the notion of 'audiovisual media service' provided by the AVMS Directive may be of help,[40] according to which the Directive applies to services that are:

a) offered as a commercial service,
b) offered under the editorial responsibility of the service provider,
c) offered with a purpose to inform, entertain or educate,
d) offered with the purpose of reaching the general public.

In principle, the concept may be extended to include other media, such as radio and the press, too, although this is not present in the Directive. It is important to note that, since the primary goal of the EU in respect of the Directive was to regulate the single market, it only deals with for-profit services (ie those that are provided commercially, with the objective of achieving a financial profit and are operated at a financial risk; including public service media and community media). This is a major restriction in comparison with the 'traditional' substance of the concept of the media. If we were to adapt this concept to the press, for example, this would result in the exclusion of student or local government newspapers and any other publications in which the

[39] David A Anderson, 'Freedom of the Press' (2002) 80 *Texas Law Review* 442–44.
[40] AVMS Directive, art 1(1)a).

publisher has no major commercial interest. This is also an acceptable approach; for example, Hungarian media regulation extends the concept of the Directive over both radio stations and the press.[41]

The other three conceptual elements (editorial responsibility, informative, educational or entertainment purpose and provision to the general public) conform to the 'traditional' concept of the media; however, it is questionable whether they are sufficient to cover everything that may be regarded as 'media' today and, conversely, that it would exclude everything that should not be regarded as such.

However strong the role of the press may be in this area, the debates of public life are not limited to the forums provided by the press: discussions between friends are probably more effective in shaping the views of their participants than the nightly news programmes. At the same time, not all media players wish to act as a forum for the community's disputes: nowadays, the vast majority of the content available in the media has absolutely no relevance to public life. It is for just this reason that David Anderson argues in a paper that, since the concept of the media cannot be circumscribed precisely on the basis of the form of its publication, and since the operation of a substantial part of the traditional media is not directed at performing the task expected of it in the interest of the community, it would therefore make more sense to redefine the concept on the basis of its function.[42] That is, if a given newspaper, television station, or website operates in such a way as to ensure conformity with its traditional media role, it is to be regarded as 'media' in the legal sense, too. According to the European concept, this traditional role is the service and operation of the democratic public sphere. All polemical papers, expert materials and recommendations dealing with the new concept of the media emphasise the media's democratic tasks.[43]

A paper by Jan Oster presents arguments that are similar to those of Anderson. Examining the issue from the perspective of the democratic tasks of the media, he recommends a new, functional approach, on the basis of which only such individuals or undertakings may be regarded as media who are involved in the 'gathering and disseminating to a mass audience information and ideas pertaining to matters of public interest on a periodical basis and according to certain standards of conduct governing the news-gathering and editorial process.'[44]

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[41] Article 1 of the Press Freedom Act (Act no CIV of 2010). See András Koltay (ed), *Hungarian Media Law* (CompLex 2012) ch 3.

[42] See Anderson (n 39).

[43] See also, among others, High Level Group (n 20) ch 1, and European Broadcasting Union, 'On the Road to a Hybrid World of TV and Web Thoughts for the Future of Connected TV by the EBU' (background paper) <www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Initiatives%20-%20Policy/Topical%20Issues/Hybrid/2012%20EBU%20Background%20Paper%20on%20Connected%20TV.pdf>; Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (hereinafter referred to as Recommendation), para 2 <https://wcd.coe.int/ViewDoc.jsp?id=1835645>.

[44] Jan Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5(1) *Journal of Media Law* 74.

Oster's argument is logical and well-structured. It proceeds from the proposition that the media constitute a legally recognised institution with specific rights and duties.[45] The protection granted to the media is not identical to the protection of the freedom of speech, because the role of the media is indispensable for the operation of democracy and the informing of citizens.[46] (Section 1 of the present paper has also touched upon these notions.) This responsibility calls for media that are actors in the marketplace of ideas[47], serving the operation of this marketplace in a regular, responsible and professional manner according to the appropriate professional and ethical norms.[48] This concept of Oster's, then, does not include those actors—whether bloggers or traditional journalists—who, although they regularly communicate to broad audiences, do so without the intention of serving the cause of the democratic public sphere as described above.[49]

Within the context of the decisions of the US Supreme Court, Sonja West also stresses that the undue extension of the concept of media to include the new services carries the risk of imperilling the extra protection awarded to the media, and that members of the press must be differentiated from 'occasional public commentators'.[50] The function of the media is to oversee and collect information about the social and political elites and to safeguard democracy. The mere intention or the actual opportunity or exercise of public expression is not sufficient to fulfil these criteria. The blogger peering at the computer screen and the media as an institution that is granted constitutional protection must be differentiated in the interest of the society.[51] This does not mean, however, that the former is to be left without protection: bloggers remain protected by the right of freedom of speech and are, in a certain respect, in a better position than the media—although they enjoy no extra rights, while unlike the media they are not burdened with extra obligations, either.

In a paper prepared for the Council of Europe, Karol Jakubowicz examined the possible elements of the new concept of the media. Rather than providing a definition, he outlined new approaches to its examination and some possible further categories within the new media. He pointed out that all 'old' media (the press, television, radio) become 'new' media as well, once they become accessible online. Furthermore, he

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45 ibid 59−62, 64−68.

46 ibid 68−74.

47 See the dissenting opinion of Justice Holmes, *Abrams v the United States*, 250 US 616 (1919).

48 See also the British test of 'responsible journalism', the cases of *Reynolds v Times Newspapers* ([2001] 2 AC 127) and *Flood v Times Newspapers* ([2012] 2 WLR 760), the Defamation Act of 2013, and the report closing the Leveson Inquiry (An Inquiry into the Culture, Practices and Ethics of the Press) <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>. See also the decisions of the ECtHR, eg *White v Sweden* (App no 42435/02, judgment of 19 September 2006); *Flux and Samson v Moldova* (App no 28700/03, judgment of 23 October 2007).

49 See Oster (n 44) 78.

50 See West (n 10) 1070.

51 ibid 2451−57.

distinguished between content created by users but published in the institutional media (*user generated content*) and content created by users that is published outside of the institutional media (*user created content*).[52]

The report of the High Level Group on Media Freedom and Pluralism also states that, in the interest of granting their rights effective protection and, in parallel with this, defining their duties and liabilities, journalists need first to be identified.[53] Although the report does make mention of certain such identification criteria—participation in organised journalism training, membership of mandatory journalists' chambers and professional organisations, full-time journalistic employment—in the end it rejects them one by one, leaving the issue open.

The 2011 recommendation of the Council of Europe also calls for the definition of a new concept of the media.[54] The recommendation takes off from the premise that the 'new ecosystem' of the media includes all those actors who participate in the process of the generation and distribution of content, transmitting such content to a potentially large number of people (content aggregators, application developers, users who create content, enterprises responsible for the operation of the infrastructure), on condition that such actors possess editorial control or oversight over the given content.[55] The decisive element here, then, is the existence of editorial responsibility.

The annex of the Recommendation sets forth six criteria that a service should fulfil in order to be regarded as media. These are:

(1) Intent to act as media,

(2) Purpose and underlying objectives of media—to produce, aggregate or disseminate media content,

(3) Editorial control,

(4) Professional standards,

(5) Outreach and dissemination,

(6) Compliance with public expectations, such as accessibility, diversity, reliability, transparency, etc.

This recommendation by the Council of Europe suggests points of comparison rather than providing a solid concept for the definition of the media. Its weakness is that these criteria throw up a multitude of problematic details (just what are the professional standards and who should define them? What are the expectations of the community and whose task is it to identify them?). While Oster's definition of 'media' also leaves a number of issues unresolved it is much narrower and thus more 'manageable', although it clearly poses a number of risks. If legal regulation is to decide what qualifies as media

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[52] Karol Jakubowicz, *A new Notion of Media? Media and Media-like Content and Activities on new Communication Services* (background text, Council of Europe, 2009). <www.coe.int/t/dghl/standardsetting/media/doc/New_Notion_Media_en.pdf>.

[53] See High Level Group (n 20) s 4(3), 34.

[54] See Recommendation (n 43).

[55] ibid, paras 6–7.

and, within that, what falls within the scope of 'public affairs' and what information it is in the public interest to publish, this will lead to difficulties of codification and the resulting definition may easily be off the mark, missing certain important media while unnecessarily including others. At any rate, emphasising the professional nature of the media is no longer just a theoretical issue of media law: the Internet has transformed the previous forms of news service and news consumption to such an extent that the economic foundations of traditional media (both in print and online) are in jeopardy. Today, the redefinition of the concept of the media is, first and foremost, a fundamental concern of journalists and the media themselves.

The report of the High Level Group dealing with media freedom and pluralism also substantiates this when it emphasises the importance of the 'quality of sources' and defines the task of the media as delivering high quality journalism.[56] Apart from this, the issue is also important for legal regulation and for the state that is required to represent the interests of the community, since the scope of media regulation is obviously limited to the media, and the existence of free, open, diverse but responsible media can only be supported by regulatory methods once such media have been properly identified. We must not believe, however, that a unified media concept will be a panacea to treat the problems noted: the different types of media services are subject to different regulatory burdens (even today, in respect of the 'traditional' media) and their roles in democratic public life may only be identified individually, taking their different functions, tasks and scopes of editorial responsibility into account.

To whom does media freedom belong?

The increasingly crowded 'media ecosystem'

If we are unable to define, with absolute certainty, what the concept of the 'media' is, can we at least state who holds the right of media freedom? Who are the actors whose rights should be recognised by the state via the instruments of the law?

It would seem reasonable to nominate the owners of the media as holders of the right of media freedom. On the basis of their property right they are entitled to pass decisions on the affairs of their enterprises, to employ or dismiss journalists and editors and they are free to define the political stance and cultural level of their media. Yet, when we speak of media freedom, it is not the owner that first comes to mind when we seek the holder of the right. In the media it is the journalists and the presenters and, indirectly, the editors who communicate information to us; it is they who have their say, while the owners usually remain silent.

[56] See High Level Group (n 20) ch 3, 26, 29.

If, in keeping with what we have said previously, we look upon the media as an institution, and media freedom as a right held by this institution, then we have to conclude that all 'constituents' of this institution are entitled to media freedom. An entirely different issue is that of the protection of journalists and editors from the owners ('inner press freedom'), a task that is not easy to resolve by legal means, although it can be easily stated in terms of media ethics.[57]

At the same time, however, in discussing the media the issue of the rights of the audience, or, in a broader sense, the rights of society as a whole should also be raised. Media freedom is a right which is still held by the media, albeit with the qualification that its exercise must be in the interest of society (democracy). Following my earlier line of reasoning, at this point the recognition of public interest is not a limitation of media freedom—on the contrary, it is the very essence of that freedom.

In parallel with the development of technology, new actors may appear who also claim to be the holders of the right of media freedom. The ecosystem of the media comprises those actors, too, who play a role in transmitting the content to the user. Would they, too, be subjects of media freedom (and, at the same time, subject to the obligations prescribed by law)? According to the German Constitutional Court, media freedom is a fundamental right of all actors in the media market whose activities include the delivery of content published via the media to the audience.[58] Although they produce no content, media service distributors do perform a certain editorial activity by selecting the services they transmit to the audience; in the interest of the public this is limited by the must-carry and must-offer rules.

Today, however, we have to reckon with newer and newer actors in the media market value chain than previously. This phenomenon has been brought about by the proliferation of services that are accessible online. These actors may be involved in a certain type of editorial activity without generating content (content aggregators, search engines, social media, Internet service providers, the content providers of websites that support user comments) or may generate material, such as user generated content or comments, that finds its way into the mainstream media, but without being subject to 'traditional' editorial responsibility. They can also deliver audiovisual content to viewers in a radically different manner than previously in the form of over-the-top[59] services, multi-screen content deployment and so on. It is not clear which of these may be regarded as subjects of media freedom, bearing at least a part of the related responsibilities.

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[57] See *Royal Commission on the Press 1974−1977, Final Report* (HMSO, 1977). Hungarian media regulations made an attempt (so far not yet applied in practice) to regulate this issue under law, see Article 7 of Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content.

[58] BVerfGE 77, 346, 354 (Beschluß des Ersten Senats vom 13 January 1988).

[59] If we wish to provide a general definition of over-the-top services, we can say that OTT services are those where the service provider providing the service over the Internet is not responsible for the signal transmission; it is accessed by the user over the open Internet and is independent from and in no contractual relationship with the Internet access provider.

Several actors have vested interests in the media market and these interests may collide with each other. When all is said and done, all these parties have the ability to facilitate the access of their users or audiences to the democratic public sphere. A paper prepared by the European Parliament,[60] describes these interested parties as including device manufacturers (producers of television sets, computers, tablets, smartphones, set-top boxes, game consoles and media players), Internet service providers, 'traditional' media service providers (mainstream, free-to-air and pay-tv service providers), over-the-top service providers and content producers, social media sites and software developers. These actors are both allies and competitors of each other, and for each of them the question arises as to what extent it is worthwhile or necessary to regulate them.

The phenomenon of media convergence has brought about a curious development: as the means used for the publication of media content, along with the content that was previously bound to a single mode of transmission, have begun to converge and overlap, convergence has also appeared among the producers and editors of that content. It is now clear that editing is not exclusively performed by the producer of the media content and that media content is not only produced by the professionals charged with this task. From the previously cited Recommendation of the Council of Europe, we may even infer that content aggregators, application developers and operators of smart platforms and operating systems, as well as Internet service providers, are themselves subjects of media freedom if they bear 'editorial responsibility'. These mediators appear between the reader / viewer and the media in ever-increasing numbers and different forms, and have an increasing capability to influence or distort the flow of information between the communicator and the recipient. Nevertheless it would not be justified to apply the same (legal) assessment to these actors as to the actors of the 'traditional' media, ie the subjects of media freedom. Their activities are different in the important regard that these mediators do not produce content, but merely facilitate the transmission to the audience of content produced by others. Since, however, their activity can nevertheless qualify as a sort of 'editing', as they are able to define or at least influence the scope of the transmitted content, certain obligations derived from the positive character of media freedom are applicable to them and should actually be applied in the public interest.

In respect of media service distributors, such a legal obligation (must-carry) has long been in existence; in the future, obligations intended to promote access may be prescribed for the operators of smart platforms, and search engines and Internet service providers may also be regulated. This does not mean that these carrier agents become

[60] Directorate-General for Internal Policies, European Parliament, *The Challenges of Connected TV. Note* (2013) <www.europarl.europa.eu/RegData/etudes/note/join/2013/513976/IPOL-CULT_NT%282013%29513976_EN.pdf>.

'full-fledged' subjects of media freedom, and thus the related obligations may not be applied to them in full (eg compliance with the requirement of the right of reply); rather, they will assume the role of holders of a certain 'limited scope' right of media freedom.

On the other hand, these agents must respect the right of others to media freedom, and must ensure the free distribution of content and opinions in the course of their activities. Today, the 'traditional' subjects of media freedom need not only be wary of the state when striving to safeguard their freedom from external intervention, but also of these agents. Dawn Nunziato presents a host of concrete examples to illustrate how such agents interfere with the free flow of opinions. According to her, contrary to popular belief, the major American Internet enterprises do this not only on the basis of their business interests, with the intention of increasing their revenues, but also in respect of political opinions, applying a sort of private censorship. Examples include Internet service providers, who are able to restrict the sending of emails or public access to certain content; for news aggregators who are in a position to omit certain, otherwise important, news items; and for search engines that can restrict access to certain types of content.[61] The task of the state in these cases is not only to refrain from intervening in the exercise of media freedom (apart from defining and operating the necessary legal framework), but also to eliminate, or at least minimise, the possibility of intervention by private parties.

As the majority of the new types of services lack exact and detailed regulation, they give rise to several novel issues and questions. Although within the EU the single market provides all European service providers with protection and opportunity (although the service providers of an economically weaker Member State will never compete on an equal footing with British, German or French enterprises), it is unable to provide protection against enterprises outside the Union (which usually come from the USA). Surveys of the Hungarian media market indicate that content aggregators (eg Google) and social media (eg Facebook) pose a threat to the existence of national content producers by siphoning off their vital resource, advertising revenues, while over-the-top services (eg Netflix) that are also mainly American make market entry *ab ovo* difficult for the media market actors of the Member States. Moreover, these services do not necessarily belong under European jurisdiction and so the scope of their legal obligations may be more limited, and, even if they are established in an EU Member State (as, for example, Netflix in Belgium), the media regulations of other Member States do not apply to them.

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[61] Dawn C Nunziato, *Virtual Freedom. Net Neutrality and Free Speech in the Internet Age* (Stanford University Press 2009) 5−17, 110−14. Although the book was published in 2009, the examples are numerous and impressive, ranging from blocking the non-governmental initiative, AfterDowningStreet.org through the censorship of the onslaught of the singer from Pearl Jam on GW Bush to the lopsided treatment of the issue of abortion.

New editors and new media service providers

Over-the-top services and smart platforms

Over-the-top (OTT) media services are those media services that are accessed by users through the open Internet, the providers of which bear no responsibility for signal transmission, ie the user's Internet service provider is independent of the OTT service provider. While the range of OTT services is not limited to media services we shall not discuss the other types of services (eg speech and messaging) here. OTT is not, then, a service but a method of reaching the user / audience. This new type of service may offer both linear and on-demand audiovisual content, and the various service providers can aggregate the content of different media services on their pages or can produce their own content.[62]

OTT media services pose several legal questions related to the definition of media freedom discussed above. First of all, it is questionable how these services should be defined on the basis of the current legal regulations (as media services, as media service distribution, as electronic communications services or, perhaps, as something entirely different). OTT service providers that publish individually downloadable content probably qualify as on-demand media services, while those OTT services that provide 'live' broadcasts (streams) of the programmes of other media service providers probably do not fit into either category. It is this uncertainty that raises doubts surrounding the question of just what regulatory burdens apply to them. A further question is what can be done with the American OTT service providers that are present in the European media market or have strong aspirations for entry: is there any chance that they could be forced to respect, if not the national media regulations then at least the provisions of the AVMS Directive? (Obviously the answer is yes, if they are considered as entities established in any of the member states of the European Union but, even in that situation, the specific regulations of the other member states do not oblige them to do so.)

Several further important issues arise in relation to access. The menu, or the 'application environment' of smart devices used for the consumption of media content plays an increasingly important role in the ecosystem of digital content deployment. The operators of these menu systems or application environments, play an editorial role similar to that of the media service distributors: it is they who decide which service providers' applications are included in the menu and in what position. This could result in a violation of the principle of equal access, nor is there even any guarantee of at least the transparency of inequality.[63] At present, however, by contrast with 'traditional' media service distributors, they are not bound by either the must-carry or the must-offer rules.

In addition, several further issues related to content regulation (advertisements, protection of minors, media pluralism), competition law, copyright law, privacy and consumer protection arise, as does the question of what will happen to the privileged

[62] See Directorate-General for Internal Policies (n 60) 11−22.
[63] See Directorate-General for Internal Policies (n 60) 33–35.

status of public service media in the future (eg the adaptation of their must-carry rights to the new environment).[64] It is likely that Europe (the EU) will not easily give up the objective of passing on the values and considerations supporting media regulation to the new services.[65]

Internet service providers

The dispute over net neutrality (or 'Internet neutrality', or the 'open Internet') has already built up considerable traditions.[66] According to this principle, Internet service providers may not discriminate between the data and content transmitted via their networks, and the practice of traffic management must be independent of the content forwarded, the application, the end device connected to the network and the IP addresses of the sender and the recipient.[67] The principle of net neutrality demands that Internet service providers provide their service to users according to transparent principles, that they refrain from blocking any—not illegal—content, and do not limit access to such content, and that they do not apply unreasonable discrimination to the range of content, but provide equal access to it[68] in the interest of achieving the goal of 'the operation of the Internet as an open platform that is of fundamental importance from the aspect of the freedom of expression.'[69] Several actors have also emerged on the Internet who are independent of the state and who are capable of restricting the freedom of speech. In the case of Internet service providers this can be achieved indirectly, by restricting access to the various opinions. At the same time it should be noted that—at least at present—most often their motivation is not to exert an influence on disputes of public life and politics, but to promote their economic interests,[70] for example by realising revenues from the content providers they advantage.

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64 ibid 31−33, 35−36, European Broadcasting Union (n 43) 15−19.

65 The Green Paper of the European Commission opening the debate points in this direction, see Preparing of a Fully Converged Audiovisual World: Growth, Creation and Values. Green Paper of the European Commission (2013) <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

66 The debate is still going on both in the EU and in the United States. About its current standing see Balázs Bartóki-Gönczy, 'Attempts at the Regulation of Network Neutrality in the United States and in the European Union: The Route Towards the "Two-speed" Internet' in András Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer 2014).

67 Body of European Regulators of Electronic Communications, 'Response to the European Commission's consultation on the open Internet and net neutrality in Europe' 30 September 2010, BoR (10) 42, summarised in Bartóki-Gönczy (n 66) 117. <www.irg.eu/streaming/BoR%20%2810%29%2042%20BEREC%20response_ECconsultation_Net%20neutrality_final.pdf?contentId=546969&field=ATTACHED_FILE>.

68 FCC Guide (Open Internet) <www.fcc.gov/guides/open-internet>. It should be noted that according to the position of the US communications authority, therefore, 'reasonable' discrimination is admissible, and may even be based on the economic interest of the Internet service provider; this is something that is unacceptable to the proponents of net neutrality.

69 See Bartóki-Gönczy (n 66) 118.

70 ibid.

As such, Internet service providers can become gatekeepers, whose role is, on the one hand, to provide the infrastructure for accessing online content and, on the other hand, to perform certain editorial tasks.[71] This latter activity is analogous in one respect to that of media service distributors operating cable networks, as they, too, are able to influence what content can potentially reach the audience, as well as its chances of actually doing so. At the same time, the capacity of the Internet is much less limited than that of the analogue cable network; users are much better able to control what contents they 'consume' than is the case with cable television;[72] and the type of contractual relationship they are in—economic co-dependency, that is characteristic of the relationship between media service distributors and media service providers—does not exist between Internet service providers and content providers.

According to a view that is gaining ground in the United States, Internet service providers also enjoy the protection granted by the First Amendment, ie the protection of the freedom of speech and media freedom.[73] If this is accepted, they may also be entitled to discriminate between the various contents, because—irrespective of the reasons for it—this sort of 'editorial' activity also qualifies as a certain form of expression. This notion, however, is in sharp contrast with the interests related to the unrestricted, open Internet.[74] In the United States, this is one of the central issues of the debates surrounding the freedom of speech, and strong objections have been formulated against the notions of the Federal Communications Commission that are made public from time to time.[75] To return to Potter Stewart's observation, according to which the media are the only private enterprises which enjoy constitutional protection (see section 1.1 above), McChesney and Foster object that since at a previous stage of technical development the publicly owned communications networks became the private property of the communications service providers, which now also enjoy constitutional protection, in the future these private enterprises may assume the role of censors (ie may discriminate between opinions by defining the conditions of access), yet they do not take on the responsibilities that go hand in hand with media freedom according to American legal thinking.[76]

If, however, Internet service providers do have a right to media freedom—and this is a question that may already be raised in Europe too—and thereby the law does not

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[71] Amit M Schejter and Moran Yemini, '"Justice, and Only Justice Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice' (2007) 14 *Michigan Telecommunications and Technology Law Review* 167.

[72] ibid.

[73] ibid, and Nicholas Bramble, 'Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection' (2010) 17(1) *Michigan Telecommunications and Technology Law Review* 109.

[74] See Schejter–Yemini (n 71) 173.

[75] Most recently see, for example, the position statement of Freedom House: 'The United States Must Lead in Upholding Net Neutrality' <www.freedomhouse.org/blog/united-states-must-lead-upholding-net-neutrality#.U_70O6NqMik>.

[76] John B Foster and Robert W McChesney, 'The Internet's Unholy Marriage to Capitalism' (2011) 62(10) *The Monthly Review*.

support the principle of net neutrality in its entirety, exactly what it is that media freedom includes with regard to these particular services should be clarified, as well as the restrictions and liabilities that accompany it.

Search engines

According to Jakubowicz, search engines are 'information services' and as such cannot be considered media (this is also supported by the 2011 Recommendation of the Council of Europe, which does not make mention of them), but they 'create special challenges and pose considerable risks' to a number of values important in the context of press freedom, as well as to the effective application of regulations such as those for the exclusion of access to infringing contents, discrimination between various types of content and influencing the exercise of the freedom of opinion and for preventing the fragmentation of public life and the distortion of market competition.[77]

Several legal issues have arisen in connection with Google, the largest enterprise in the online world. A number of these relate to the unique editorial role played by Google and by search engines in general.[78] The search engine is only one of Google's services, albeit the most used one, which is indispensable to Internet usage and which has several magnitudes more users than its competitors combined. Rather than producing content itself, Google's search engine service publishes the contents of others in the order dictated by the company's algorithms. At the same time, the search engine is involved in 'editing', since it ranks content, which is something that could lead to or further aggravate legal infringements.[79] The personality rights-infringing nature of the system of autocomplete suggestions that record frequent searches and provide recommendations on the basis of them has also been pointed out.[80] Furthermore, in respect of the 'right to be forgotten' (whereby Google is obliged to remove from the search results certain content that does not serve the public interest and is injurious to the applicant), the enterprise performs direct editorial tasks which may even extend over opinions of

[77] See Jakubowicz (n 52) 3, 34–35.

[78] The scope of the present paper, however, does not include the issues raised by search engines and, in particular, by Google, unless those issues are directly related to the fundamentals of the freedom of the press. Such, for example, are the alleged antitrust violations committed by Google (see European Commission, 'Antitrust: Commission probes Allegations of Antitrust Violations by Google' Press release, 30 November 2010; European Commission, 'Statement on the Google Investigation' Press release, 5 February 2014). For a comprehensive review of the legal issues related to search engines, see James Grimmelmann, 'The Structure of Search Engine Law' (2007) 93 *Iowa Law Review* 1.

[79] The order of the search results and the prominent ranking of infringing content among them may contribute to and strengthen the effect of acts violating honour and reputation (see 'French blogger fined over review's Google search placing' BBC News, 16 July 2014 <www.bbc.com/news/technology-28331598>).

[80] Corinna Coors, 'Reputations at Stake: The German Federal Court's Decision concerning Google's Liability for Autocomplete Suggestions in the International Context' (2013) 5 *Journal of Media Law* 322.

politics and public life.[81] Let us not dwell upon the criticism of the decision of the European Court of Justice on this issue or the fact that the decision can hardly be regarded as the final solution to it: suffice it to say that, in the wake of this decision, Google clearly, and in a legally mandatory manner, became an 'editor'—albeit against its will and only in a certain regard—while the company had previously been engaged in such editing according to its own priorities and interests, too.

The algorithm which Google uses to rank search results is not public. What we do know about it is that Google's business interests influence the search results, ie companies pay Google to ensure that their websites end up at the top of the list (in principle, this is only true for the first three places in the ranking of search results on the basis of Google's AdWords service; however, the listing system is not entirely transparent). At the same time, the service provided by search engines may not only serve business, but political interests as well. The most popular, state-owned, Chinese search engine, for example, does not list websites that stand for the creation of democracy in China. According to the US Manhattan District Court, by acting in this way, the search engine is simply exercising its right protected by the First Amendment, ie such peculiar 'editing' enjoys the protection of the freedom of speech and media freedom.[82] Co-authors Volokh and Falk take a similar position, saying that the activities of search engines assume editorial decision-making roles similar to those of press publishers.[83]

In a somewhat similar case, Google took action against advertisements by US health institutions that reject abortion. Using one of Google's methods, if one searches for a given term ('abortion clinic' in the present case), then, on the page listing results, paid advertisements will also appear alongside the 'genuine' results (in the present case, the websites of institutions that reject abortion and offer alternative solutions). According to the complaint from 'genuine' abortion clinics, such advertisements mislead the users of the search engine. Accepting the complaint, Google deleted the ads in question.

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[81] See the judgment of the European Court of Justice in case no C-131/12. *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González.* In connection with the problem of 'disabling the searchability of political opinions', see 'Google reverses decision to delete British newspaper links' Reuters.com, 3 July 2014 <www.reuters.com/article/2014/07/03/us-google-searches-idUSKBN0F82L920140703>, and 'Google removing BBC link was "not a good judgement"' BBC News, 3 July 2014 <www.bbc.co.uk/news/technology-28144406>. For an extensive analysis see David Lindsay, 'The "Right to be Forgotten" by Search Engines under Data Privacy Law: A Legal Analysis of the Costeja Ruling' (2014) 6 *Journal of Media Law* 159.

[82] *Jian Zhang et al v Baidu.com, Inc*., United States District Court Southern District of New York, 11 Civ. 3388 (27 March 2014). See also 'China's Baidu Defeats US Lawsuit over Censored Search Results' Reuters.com <www.reuters.com/article/2014/03/27/us-baidu-china-lawsuit-idUSBREA2Q1VS20140327>. For another decision that affirmed the search engine providers' right to free speech, see *S Louis Martin v Google, Inc.,* CGC-14-539972 (Cal. Sup. Ct. 13 November 2014).

[83] Eugene Volokh and Donald M Falk, 'First Amendment Protection for Search Engine Search Results' <papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364>. About a contrary position, see Oren Bracha, 'The Folklore of Informationalism: The Case of Search Engine Law' (2014) 82 *Fordham Law Review* 1629.

Although indirectly, it thereby took a certain stand on an important public issue. Even if we accept that the basis for deleting the ads was to combat deceptive advertising, the restriction of the exercise of the freedom of speech is clear.[84]

Matthew Hindman concludes that the operation of search engines is not democratic, since they direct attention to a mere fraction of the existing content. This, of course, is inherent in the concept of any kind of 'listing', but the publication and transparency of the listing criteria and the requirement to take democratic considerations within those criteria into account—such as diversity, or at least similar chances for different opinions to make their way to the public—are reasonable demands. Another contributing factor is the typical behaviour of users, as users searching for information are usually satisfied with the content preferred by the search engine. Accordingly, the number of public affairs websites with a measurable number of visitors is surprisingly low, even in the United States (ie the market shows strong concentration on the Internet, too), and the most effective opinion leaders on the Internet are the same major media enterprises which play a key role in the offline world as well, or those bloggers whose qualifications, background and social position would grant them a prominent place in the offline media, too.[85]

Similarly to the paradigm of net neutrality, the concept of search engine neutrality also exists. According to James Grimmelmann, these principles include equality between the various websites, the production of results that objectively conform to the search terms entered, restraint from bias, the suspension of the self-interest of the search engines and the transparency of the search algorithms.[86] At the same time, Grimmelmann points out that, although apparently intended to achieve equality between the various contents, in actual fact full search neutrality actually contributes to the maintenance of inequalities caused by financial, technical and other differences; that is, although Google's methods distort the public sphere, even a principled solution to the problem would not be sufficient to eliminate distortion.[87]

Social media

One of the consequences of the spread of social media services was that the market positions of the printed and online press products deteriorated even further with the widespread use of these services, thereby transforming reading (consumption) habits.[88]

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[84] 'Google Removes Anti-Abortion Ads Deemed Deceptive' Wall Street Journal blogs <blogs.wsj.com/digits/2014/04/29/google-removes-anti-abortion-ads-deemed-deceptive/>.

[85] Matthew Hindman, *The Myth of Digital Democracy* (Princeton University Press 2008).

[86] James Grimmelmann, 'Some Scepticism About Search Neutrality' in Berin Szoka and Adam Marcus (eds), *The Next Digital Decade: Essays on the Future of the Internet. Is Search Now an 'Essential Facility'?* (TechFreedom 2010) 438.

[87] ibid 459.

[88] Lili Levi, 'Social Media and the Press' (2012) 90 *North Carolina Law Review* 1531, 1537–39; Emily Bell, 'What's the Right Relationship Between Technology Companies and Journalism?' *The Guardian,* 23 November 2014 <http://www.theguardian.com/media/media-blog/2014/nov/23/silicon-valley-companies-journalism-news>.

The youngest generations have long forgotten what it is to hold the printed press in their hands. Moreover, even on the Internet they tend to look for brief and quickly digestible content (of a few lines) with eye-catching titles, and not to click on the website of the online press product originally publishing that content. Hence, Facebook or Google News, for example, can generate substantial revenue for themselves without producing any of their own online content. These services simply collect the content of others. All this would seem to foreshadow the decline of investigative journalism, which is an extremely expensive genre.[89]

Basically, social media cannot be considered as a subject of media freedom, for two reasons. On the one hand, social media services cannot be considered as press products or media services and hence do not fall under the scope of media regulations. On the other hand, they do not produce or edit their 'own' content. What they are doing (collecting user content and providing a platform for it) does not resemble the 'traditional' activity of media.

Social media themselves therefore cannot be considered, from the perspective of legal regulations, as 'media' since they do not carry out any editorial activity, at least not in the traditional sense. They do not make a selection of content prepared by the journalists working according to their instructions, as an editor-in-chief of a newspaper would normally do, but rather they offer, or present, lists of different content for their users, according to pre-defined algorithms. However, the content itself is always produced independently from the social media platform (eg Facebook). Furthermore, it is fundamentally the user's decision (by defining their friends and the content which they follow) that determines the scope of content displayed for them, and the operation of social media sites lacking 'editing' algorithms (Instagram, Twitter) is based even more on the user's decision. Although the collection and delivery or presentation of content by social media can also be considered as a kind of editing, it is not, however, the kind which meets the criteria of 'editorial responsibility' defined under media regulations.

While social media do not produce professional media content they can widely popularise and share the online press's own content. Nevertheless, users often settle for the leads of the articles accessible directly from social media or the short comments of their friends sharing the article and do not click on the website of the press product where they originated. Media consumption via social media also has an impact on the advertising revenues of the press. As such, although in principle social media can help

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[89] See also, among others, Robert W McChesney and John Nichols, *The Death and Life of American Journalism*: *The Media Revolution that Will Begin the World Again* (Nation Books 2011); Robert W McChesney and Victor Pickard (eds), *Will the Last Reporter Please Turn out the Lights: The Collapse of Journalism and What Can Be Done To Fix It* (New Press 2011); Dean Starkman, *The Watchdog That Didn't Bark: The Financial Crisis and the Disappearance of Investigative Journalism* (Columbia Journalism Review Books 2014). How Facebook and Google Now Dominate Media Distribution. Monday Note, 19 October 2014 <http://www.mondaynote.com/2014/10/19/how-facebook-and-google-now-dominate-media-distribution/>.

the press to reach their audience as a unique distributor or intermediary, in practice the relationship between social media and the online press also involves many disadvantages for the latter.

News service in transition

Not only those who envisage the death of old-fashioned journalism and investigative journalism, but also less pessimistic observers have pointed out numerous problems caused by the spread of the Internet. Robin Foster examined the options for news diversity in the digital era in a paper published in 2012. His starting point was that although the Internet seemingly contributes a great deal to the distribution, and increase in diversity (the number of sources) of news, it still entails new risks. These risks arise from the activities of 'digital intermediaries'. According to Foster, these intermediaries (news aggregators such as Yahoo, search engines such as Google, social media sites such as Facebook and online stores and devices such as Apple) can control the news available on the Internet to a great extent, as (1) they represent bottlenecks, through which the users get their news; (2) they make editorial-type decisions about which news items to transmit or make available; (3) they shape the future business models of news services; and (4) they are inclined and able to influence political agendas.[90] Accordingly, the activities of these intermediaries need to be regulated for the purpose of ensuring democratic publicity, or more precisely, to ensure the right of citizens to have access to the news.[91]

Independently from this, the Internet has started to erode the obstacles standing between professional journalists and independent opinion leaders and has contributed to the democratisation of journalism, at least in a sense that it has made possible the emergence of more voices in the public space. How the Internet will influence the future of journalism, however, is at least open to question. First, the Internet news services and social networking websites have greatly transformed the former reader / user habits and turned a considerable public away from professional media products, thereby undermining the economic foundations of the latter.[92] Second, the news aggregator sites and social networking websites profit (also) from the content produced by professional journalists, without any real performance on their part (i.e. content production), thereby disrupting the earlier business models.[93] Third, the change in user habits does not affect certain key characteristics of the former *status quo*: even these days, the most important medium (the one generating the most advertising revenues) in the media market is

[90] Robin Foster, *News Plurality in a Digital World* (Reuters Institute for the Study of Journalism 2012) 25–42.

[91] Foster proposes that the intermediaries should transmit a predefined amount of news of public interest through all means, coming from different sources, and an independent body should be established which would analyse the practice of access and would receive related complaints. ibid 43−52.

[92] ibid 16–24.

[93] The impact of the operation of online aggregators. ibid.

television, the number one source of news,[94] whereas the blogs, regarded as independent forums, do not attract great masses at all,[95] and for the most part, the most dominant offline media can boast of the strongest and most popular online versions on their websites. Hence, in this respect, market conditions have not been drastically rearranged as a result of the spread of the Internet.[96]

The world of news services is thus changing, but not necessarily in the way one could have hoped for. The biggest loser in the market restructuring is the primary 'home' of serious journalism, the printed press. Though the voices replacing the printed press are indeed numerous, their power is negligible and their function is not the same as that of professional journalism. The breed of spare-time writers or (on the contrary) elite opinion leaders disguised as 'independent bloggers', incapable of investigative journalism due to their obvious financial constraints, and the mainstream media products adapted to the Internet do not especially contribute to the growth of the diversity of content and opinions.

Besides these issues, it is almost only a matter of detail to decide what we should do about the obligation of balanced coverage (impartiality) imposed on 'traditional' television and radio in most European states. A possible answer is that, since the former scarcity of access has been eliminated and hence, in this new media world, everyone can obtain information from countless sources, the former solutions of regulation therefore have become redundant, or one could say anachronistic.[97] By contrast, Steven Barnett and Mike Feintuck argue for the maintenance of balanced (impartial) coverage, emphasising the importance of reliable media operating under ethical standards which are taken seriously, even in the new media environment.[98] As Barnett notes, as long as television journalism can be differentiated from Internet journalism, there is no reason to stop having media-specific rules.[99] Feintuck argues that the former assumption, suggesting that, in a free and unrestricted media market, a diversity of opinions would automatically appear and hence impartiality would be created, proved to be false.[100] As Richard Sambrook argues: 'if the words "impartiality" and 'objectivity' have lost their meanings, we need to reinvent them or find alternative norms to ground journalism and help it serve its public purpose—providing people with the information they need to be free and self-governing.'[101]

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[94] James Curran, 'Reinterpreting the Internet' in James Curran – Natalie Fenton – Des Freedman (eds), *Misunderstanding the Internet* (Routledge 2012) 18−19.

[95] ibid 18−20; Hindman (n 85).

[96] Curran (n 94) 19.

[97] A good summary of this issue is provided by Mike Feintuck who takes an opposing standpoint in 'Impartiality in News Coverage: The Present and the Future' in Merris Amos – Jackie Harrison – Lorna Woods (eds), *Freedom of Expression and the Media* (Nijhoff 2012) 88.

[98] ibid, and Steven Barnett, 'Imposition or Empowerment? Freedom of Speech, Broadcasting and Impartiality' in Amos–Harrison–Woods (n 97).

[99] Barnett (n 98) 58.

[100] Feintuck (n 97) 88.

[101] Richard Sambrook, *Delivering Trust: Impartiality and Objectivity in the Digital Age* (Reuters Institute for the Study of Journalism 2012) 39.

New content producers—old and new holders of responsibility

There are several issues surrounding user-generated content but we shall only dwell on those that relate to the field of the media (understanding 'media' as a professional activity of a commercial nature). One approach holds that if users produce content they shall qualify as journalists, just as professional journalists do and therefore they are entitled to equal rights, bear equal responsibilities and are subject to the same ethical rules as apply to professional journalists.[102] However, it is clear from our previous reasoning that the interpretation of the concept of media freedom we have arrived at necessitates a distinction between 'media' and 'non-media' (professional journalists and occasional commentators) precisely in order to avoid the devaluation of the concepts of the media and of media freedom. Accepting this, we have to take a position on the question of whether the media bear responsibility if they include such content among their own content (if the statuses of professional journalists and users were identical, this question would not arise at all).

With regard to user generated content, therefore, it is not clear who is liable for any infringing nature of the content. Although the earlier responses offered by legal systems prior to the emergence of the online world seemed to favour the position that it is the adopting medium that is responsible for the adopted content, the court decisions arrived at according to this logic are generating widespread and strong protest.[103]

Although the ECtHR has taken no universal position on this issue, it did indicate in two decisions that the unsatisfactory resolution of this question within the legal systems of the Member States may lead to infringements of the rights provided for by the ECtHR. In the *Editorial Board of Pravoye Delo and Shtekel v Ukraine* case[104] the sanction against the applicant newspaper for publishing libellous user content qualified as infringing, due to a lack of clear provisions on liability in Ukrainian law. In the *KU v Finland* case[105] it qualified as an infringement of the right to a private life that no effective remedy existed under Finnish law to reveal the identity of the person who had posted an erotic ad on the Internet in the name of the complainant minor. In another case, a German court decision held the web encyclopaedia Wikipedia liable for the libellous content inserted into an article by one of the authors of the encyclopaedia,

[102] Tarlach McGonagle, 'User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship' *Open Journalism. IRIS plus*, 2013-2, 13.

[103] 'European Court strikes serious blow to free speech online' Statement of Article 19, 14 October 2013 <http://www.article19.org/resources.php/resource/37287/en/european-court-strikes-serious-blow-to-free-speech-online>; 'Ruling of Hungarian Constitutional Court can further curb freedom of expression, warns OSCE media freedom representative' Vienna, 29 May 2014 <http://www.osce.org/fom/119216>.

[104] *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (App no 33014/05, judgment of 5 May 2011).

[105] *KU v Finland* (App no 2872/02, judgment of 2 December 2008).

even though, according to the editorial principles of Wikipedia, anyone may freely write articles or amend or correct existing ones and the operator of the site is not aware of the identities of its authors.[106]

At the same time, Tarlach McGonagle points out that the editorial method or control employed may also affect the extent of liability, as the various forms of moderation—preliminary / posterior, active / reactive—allow, in principle, the application of different rules related to liability.[107] (Accordingly, in principle, the stronger the editorial control is, the greater the liability could be. In practice, this would mean that the existence or non-existence of moderation of Internet forums would be a decisive factor in deciding whether or not the service provider of the given forum is at the same time the 'editor' of the given forum, and hence moderated forums would become closer to the traditional concept of media.)

Jackie Harrison highlights the quality problems of user generated content as regards accuracy, informedness and comprehensiveness.[108] In this respect Lorna Woods declares that 'the issue is more complex than simply that of more speech equals more freedom.'[109] Media freedom is intended to protect content produced by high quality, systematic and reliable work; this, however, cannot prevent users from producing content, nor can adherence to the relevant professional-ethical standards be expected from them. However, this is precisely why appropriate balance is required from the professional media, and prudent decisions need to be made at times about publishing a piece of potentially infringing user-generated content.[110]

The issue of online comments (ie anonymous commentaries attached to an article produced by the professional media or published in a private blog or on a private website) is worthy of separate consideration. To date, no general and mature answer has been provided, even to the question of whether the content service provider of the website, unaware of the identity of the commenter, may be held responsible for the infringing nature of the comment, even though it was not they themselves who published it (but only provided a space for its publication). The answers to the question provided from the legal perspective usually do not preclude the liability of the content service provider. This is demonstrated by both the only decision of this kind from the ECtHR, which decided against the website in question,[111] and by a decision of the

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[106] OLG Stuttgart Urteil vom 2.10.2013, 4 U 78/13 <lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=17388>. Wikimedia is liable for contents of Wikipedia articles, German court rules. *PC World*, 27 November 2013 <www.pcworld.com/article/2067460/wikimedia-is-liable-for-contents-of-wikipedia-articles-german-court-rules.html>.

[107] See McGonagle (n 88) 18.

[108] Jackie Harrison, 'Freedom of Expression: The BBC and User Generated Content' in Amos–Harrison–Woods (n 97).

[109] Lorna Woods, 'User Generated Content: Freedom of Expression and the Role of the Media in a Digital Age' in Amos–Harrison–Woods (n 97) 168.

[110] ibid.

[111] *Delfi AS v Estonia* (App no 64569/09, judgment of 10 October 2013). The Grand Chamber later affirmed the decision of the First Section, see its decision taken on 16 June 2015.

Hungarian Constitutional Court.[112] The arguments of the proponents of the freedom (ie the illimitable status) of comments are manifold; however, what is important from the perspective of the conceptual elements of media freedom is that all such arguments either deny or disregard the connection between the comment and the content service provider (the 'media', if you like) enabling its publication. This means not only that, in most cases, the two parties are not acquainted with each other, but also that, according to the proponents of these arguments, there is no overlap between their interests. Yet, in the *Delfi* case, it was just such interests that one of the arguments of the ECtHR was built upon, namely that 'making public the readers' comments on these articles was part of the applicant company's professional activity'. The news portal had a vested interest in increasing the number of its readers and comments, as their advertising revenues depended on this.[113] The comments, argued the ECtHR, although not authored by employees of the news portal, nevertheless became part of its content.

Internet and democratic publicity

On the regulation of the Internet

Some of the content made available via the Internet is certainly considered as 'media,' even if we are not quite sure where its borders lie. Hence, based on the reasoning given above, the Internet, as a medium, could be made subject to legal regulation. However, the issue of regulating the Internet generates a great deal of uncertainty right from the starting line. Before turning to the various questions of detail, we must first examine whether the Internet, as a medium, can be the subject of a distinct, special set of regulations or not.

In the past, every time a new medium became widespread, sooner or later a distinct set of regulations was adopted to govern it (press law, radio law or later the regulations governing electronic media). However, no such special set of rules has been created in the Western world regarding the Internet in the last two decades and more that have passed since the dawn of the World Wide Web. One academic view which became popular from the 1980s onwards proclaimed that the nature of a (media) technology defines the legal form of its regulation, and hence the law adapts itself to the technology.[114] It follows from this approach that, since the Internet is so hard to regulate (due to issues of jurisdiction, implementation and enforcement and problems related to liability), it does not need to be regulated at all. We wish to highlight here that the Internet is not as 'new' as it is often held to be, in the sense that it has inherited, or to

[112] Resolution No 19/2014. (V. 30.) AB of the Hungarian Constitutional Court.

[113] *Delfi* case (n 111) [89]—we shall not dwell upon the complex arguments of the court and the criticism thereof, as they are not closely related to our subject matter.

[114] First see Ithiel de Sola Pool, *Technologies of Freedom* (Harvard University Press 1983).

put it more precisely, respawned numerous problems of the 'traditional' media, reproduced them in the new environment, and in certain regards magnified these problems, including the spectre of arbitrary state intervention, inequalities in the efficiency of expression of opinions and in the access to opinions, as well as commercialisation. Beyond these, the Internet has also generated new, unforeseen problems, as the new modes of private restrictions jeopardise the diversity of opinions, offer greater scope for the violation of privacy and frustrate the economic foundations of quality journalism. The Internet is far from being lawless. The content available on the Internet is subject to general legislation (civil law, criminal law, etc.) and numerous Internet-specific sub-issues are legally well regulated, mainly at the EU level (electronic commerce, electronic communications, on-demand media services, right of reply, copyright issues, etc.). If truth be told, however, there is no separate 'Internet Act' and the application of the existing legislation is far from being as effective as it is in the 'traditional' world.

Tambini, Leonardi and Marsden call 'the ideal of a pristine Internet, free from regulation', a myth, since it cannot be detached from social life, and hence from all the responsibilities, legal and ethical rules, disputes and harms that come with it.[115] Des Freedman reminds us that it is a misconception to regard anything related to the Internet as being 'inherently subordinated' to technology.[116] According to Freedman, the Internet is a technological system that serves private and public interests at exactly the same time, and as such, it is not the first in history.[117] In line with this approach, it is a totally legitimate proposal that democratic states (and also the representatives not of 'outsourced' private interests, authoritarian regimes or non-transparent supranational organisations), recognising the public interest, apply regulations to the Internet in order to ensure both greater access for their citizens and accountability.[118]

The technical difficulties of regulation are not an argument against regulation *per se*, or at least not a convincing one. Instead, the key question is what we want from the Internet. If we want it to make the greatest possible contribution to the operation of democratic publicity, the diversity of opinions, the democratisation of access to these, and elimination of the economic and political inequalities present in the offline media world then the question arises of whether legal regulation will be able to facilitate the implementation of these objectives. If we feel that certain phenomena related to the Internet expressly jeopardise these objectives then we may well consider trying to eliminate these harms by legal means. However, before inspecting the nature and content of the possible regulations (which topic is not covered by this paper), the current status of the Internet should be assessed—or more precisely the current status of the

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115 Damian Tambini – Danilo Leonardi – Chris Marsden, *Codifying Cyberspace. Communications Self-regulations in the Age of Internet Convergence* (Routledge 2007) 294.

116 Des Freedman, 'Outsourcing Internet Regulation' in James Curran – Natalie Fenton – Des Freedman (eds), *Misunderstanding the Internet* (Routledge 2012) 116.

117 ibid.

118 ibid 98.

online publicity defined by the entirety of services made available on the Internet, which, based on their function and purpose, qualify as 'media'. It is also worth examining how the free market of the Internet operates, without its own proper, 'sectoral' Act, with numerous options for circumventing the applicable general legislation, and hence to an extent unconcerned by the law. Obviously, this paper cannot strive to make a thorough and complete assessment. It only aims to indicate possible starting points and aspects of such a study.

Nunziato talks about the need to apply the 'public forum doctrine', developed in American constitutional law, to the Internet as well. This doctrine stipulates that public spaces (parks, streets, etc.) are legitimate venues for the expression of opinion and hence can only be restricted for good reason.[119] Nunziato argues that the Internet should be considered as a public forum, despite the fact that most of the assets operating its infrastructure are owned by private parties.[120] This is also corroborated by the train of thought put forward by Robert McChesney and John Foster. They argue that the deregulation and privatisation implemented in the field of telecommunication are primarily responsible for the concentration of ownership found on the Internet and hence for dimming our hopes of a better Internet.[121]

Equal opportunities—new democracy

According to a widespread view, the Internet can serve to renew the democratic social structure; moreover, it can help societies in authoritarian states to bring about a grassroots democratisation. Russell Weaver raises many examples of both of these processes in his book (most typically in the connection between the 'Arab Spring' and Twitter use).[122] At the same time, James Curran emphasises that, in those societies wishing to embark on the road to democratisation, it was not the Internet or the social networking websites made available via the Internet that generated social change, but rather already existing processes which these only amplified and boosted.[123] Without doubt, the Internet is an extremely effective means for activists to connect with each other, exchange opinions and organise different events. However, the increased

[119] For the first time in the jurisprudence of the Supreme Court see *Hague v CIO*, 307 US 494 (1939); Nunziato (n 61) 42−48, 70−87.

[120] At the same time, based on this doctrine, the right to the freedom of expression can also be exercised freely, subject to certain restrictions, in private institutions open to the general public, see *Pruneyard Shopping Center v Robins*, 447 US 74 (1980), and *International Society for Krishna Consciousness v Lee*, 505 US 672 (1992).

[121] John B Foster and Robert W McChesney, 'The Internet's Unholy Marriage to Capitalism' (2011) 62(10) *The Monthly Review* <http://monthlyreview.org/2011/03/01/the-internets-unholy-marriage-to-capitalism/>.

[122] Russell L Weaver, *From Gutenberg to the Internet: Free Speech, Advancing Technology, and the Implications for Democracy* (Carolina Academic Press 2013) 73−142.

[123] James Curran, 'Rethinking Internet History' in Curran–Fenton–Freedman (n 116) 45.

communicational ability should not be confused with the actual impact of such a communication.[124] At any rate, the contribution that Internet usage has made to the development of democracy in the Western countries is unclear at best.[125] It seems that the political relations of the real world are more or less reproduced on the Internet. The strongest voices on the Internet are actually the duplicated voices of the mainstream media in the offline world, while the independent opinion leaders, if any, are forced to stay in the background.[126] Jerome Barron's remark from the 1960s is still valid: 'The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact.'[127]

What is more, no one can say that states which wish to stand up against freedom of speech are without measures against the Internet. States such as Iran or China 'successfully protect' their political structure. Furthermore, the Internet lends them a helping hand in suppressing the private sector and in the constant surveillance of their citizens. As such, it seems that the statement that the Internet simply cannot do any harm to demands for democratisation, and the movements fighting for it, is simply false.[128]

Equal opportunities—commercialisation

Early expectations of the Internet were that the new medium could have been the catalyst of a democratisation process of a different nature, meaning that it could have shaken the market positions taken by certain entities in the mainstream media. It was hoped that, since the Internet can be used to express opinions freely and without considerable expense and, since the storage capacity is available for storing a theoretically unlimited amount of content, the Internet could therefore accommodate many more voices and more diverse opinions and the 'barrier to entry' (meaning the serious costs required for printed press, radio, television), which so far had crippled the expression of independent opinions, would actually be eliminated. All these would benefit the audience too, as they could choose the voice they wanted from a wide range of voices. No external player could restrict access and access would have no significant costs for the audience, either.

In reality, however, the economic differences did not vanish on the Internet at all. The costs of successful content services are also huge, and hence market scarcity remained - in a different way, but with similar results.[129] Everyone else, the many

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[124] Curran (n 94) 7.

[125] Jacob Rowbottom, *Democracy Distorted. Wealth, Influence and Democratic Politics* (CUP 2010) 243.

[126] Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era' (2006) 69(4) *The Modern Law Review* 489.

[127] Barron (n 4) 1653.

[128] See Evgeny Morozov, *The Net Delusion. The Dark Side of Internet Freedom* (Public Affairs Publishing 2011).

[129] Kenyon (n 32) 403.

independent bloggers and opinion leaders, are invisible to the general public. Their content is sought after and read by only a few. Not even the Internet is free from corporate dominance, market concentration, gatekeepers controlling content and economics-based exclusion.[130] Eli Noam goes so far as to say that the 'fundamental economic characteristics of the Internet' suggest that 'when it comes to media pluralism, the Internet is not the solution, but it is actually becoming the problem.'[131] It may seem to be an exaggeration, but there is no doubt that the Internet has failed to bring about a more balanced playing field for small and large companies alike.[132] Large Internet companies have 'colonised' cyberspace.[133] The most visited websites are owned, without exception, by those companies that have strong market positions in the offline world and that are interested in business success.

Nevertheless, it is undisputed that the Internet actually has increased the latitude for democratic publicity and that this kind of commercialisation contributed to the rapid spread and popularity of the Internet and to the continuous development of technology. However, the Internet turned out to be less capable of fulfilling the initial hopes invested in it, as 'profit conquers principles'.[134]

Where is the regulation of media freedom heading, and what is the role of the state?

The Internet has enriched our lives and has contributed to the diversity of the media but simultaneously it has not only reproduced the problems of the 'traditional' world of the media but also raised new issues. But the desire for regulation should be carefully kept within the appropriate limits. On the one hand, the legal solution is by no means a panacea but, at best, merely a useful prop for achieving the objectives of public interest and, on the other hand, state intervention in the still fluid, never predictable, continuously changing Internet is an inherently risky venture, since its effectiveness is doubtful and it may even do greater damage than it was intended to avert. Moreover, due to the very nature of the Internet, its regulation can hardly be the task of individual states; if such regulation is to be effective, it should operate on a European or even on a 'universal' level.

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130 James Curran – Natalie Fenton – Des Freedman, 'Conclusion' in Curran–Fenton–Freedman (n 116) 180.

131 Philip M Napoli and Kari Karppinen, 'Translating Diversity to Internet Governance' *First Monday*, 2 December 2013 <http://firstmonday.org/ojs/index.php/fm/article/view/4307/3799>, cited by Kenyon (n 32) 404.

132 Curran (n 94) 14.

133 Curran (n 123) 54.

134 Sandor Vegh, 'Profit over Principles: The Commercialization of the Democratic Potentials of the Internet' in Katharine Sariakis and Daya K Thussu (eds), *Ideologies of the Internet* (Hampton 2006) 63−78.

The tasks of (EU and Member State level) media regulation will not be limited to defining the concept of the media and the holders of the right of media freedom, but will also include the creation of truly equal conditions for the media services accessible in Europe (and for the other actors within the value chain of the media market), and the definition of the various levels of regulation as they relate to the different types of services. We have to accept that providers of several new types of services now belong among the stakeholders of media freedom. If we are to uphold our earlier principles related to the democratic tasks of the media then besides providing them with rights we may also prescribe duties for them. Several regulatory burdens and solutions could be realistically implemented, even in the near future, such as obliging Internet service providers to refrain from discriminating between content, prescribing transparent operation for search engines, settlement of the issues of copyright with regard to content aggregation and sharing, reinterpretation of the must-carry rules and state support for the 'quality press'. However, the extent to which these measures would actually contribute to the operation of the democratic public sphere, and what other possible avenues exist for the state to act in the interest of the media are questions for the future.

Although it would be tempting to say that the first step towards equal market conditions, and one that requires no external approval or consent, would be a dramatic liberalisation of the regulatory environment, in actual fact this would undermine the common foundations of European media regulations. These are the foundations which underpin the protection of the democratic public sphere and the recognition of the public interest vested in it. At present neither the EU, nor the various NGOs and interest bodies holding membership in international organisations envisage the elimination of these regulations, and consequently the protection of minors, the right of reply and the prohibition of hate speech, defamation and violation of privacy, as well as the various access rights, the must-carry and must-offer rules, media pluralism and cultural diversity, the regulation of competition, the European programme quotas and publicly funded public service media must remain in place.[135] It is an entirely different question, of course, whether the rules may change or may not apply in the same way to each and every service.

It is clear, then, that European states face numerous tasks. On the one hand, they have to reach agreement on the details of the new, common European media regulations, defining a uniform regulatory framework. A solution enabling action against services originating from outside of Europe, in the interest of European audiences, must be a part of this. Furthermore, they will have to do something about media regulations in their own Member States. In this respect, ironing out the various national (regulatory) peculiarities is the easier, but by no means necessarily the more expedient option: national media regulations may, conversely, be regarded as the 'cultural products' of the

[135] See Directorate-General for Internal Policies (n 60); European Broadcasting Union (n 42).

individual states and thus the values (or, from the aspect of the single market, the necessary nuisances) of a Europe of diversity, just like many other characteristics worthy of preservation.

By this logic, the state exercises self-restraint *vis-á-vis* freedom of speech and the freedom of the press and at the same time it tries to protect these rights against those private interests that are actually capable of restricting them. Clearly, regulation has to live up to its name to accomplish this twofold task. Hence, the state and the system of regulation we are talking about here 'may not be the state we have and therefore not the regulations to which we are currently exposed, but it is certainly those to which we should aspire.'[136]

[136] Freedman (n 116) 117.