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OF MINISTERS RESPONSIBLE FOR MEDIA
AND NEW COMMUNICATION SERVICES**

A new notion of media?

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BACKGROUND TEXT

A new notion of media?

Karol Jakubowicz

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**Media and media-like content and activities
on new communication services
by Dr Karol Jakubowicz**

Media and Information Society Division
Directorate General of Human Rights and Legal Affairs
Council of Europe

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The opinions expressed in this work are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe.

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Executive summary

1. Social and cultural change, as well as technological change (including particularly digitisation and convergence) are fundamentally changing the media. New communication services and new media are in an intermediate phase of their development, where their features and uses, as well as the opportunities and potential dangers associated with them, are not yet fully explored.
2. The Committee of Ministers has in recent years been revising and updating its standard-setting documents which originally applied to “traditional” mass media alone. This will inevitably be a long-term effort, potentially requiring successive revisions of the standards or ways of applying them, as the new media reach maturity.
3. Three new notions of media may be distinguished:
 - a) All media are new-media-to-be: traditional media are being changed into digital, convergent media that can incorporate all forms of media existing so far and potentially may assimilate them into a variety of media forms existing alongside one another on broadband networks; combine all levels and patterns of social communication and all modes of content delivery; are capable of overcoming constraints of time and space;
 - b) Forms of media created by new actors:
 - i) political, social, economic, sports and other entities to become content providers and disseminators, by-passing traditional media and reaching out directly to the general public;
 - ii) media or media-like content is disseminated either by non-professional content creators (e.g. bloggers);
 - iii) or by new intermediaries (Internet service providers, content aggregators, search engines, etc.).
 - c) Citizen journalism or user-generated content can be a new form of media, if it has all the features of a media organisation, including in particular willingness to abide by normative, ethical, professional and legal standards relevant in the case of media operation.
- d) Media or Media-Like Activities Performed by Non-Media Actors: new intermediaries (mainly ISPs) provide access to content and access by content providers to the public. In many cases, they perform an editorial gate-keeping function, imposing rules, standards and constraints on what may be said and who may have access to particular content. Recognition of this fact may aid efforts to promote the rule of law in the new communication services and exercise of human rights, as well as to eliminate violations of human rights in this domain.
4. There is growing recognition of the need to develop policy and regulatory frameworks for the new media, both to protect their freedom and to prevent the distribution of illegal and harmful content and prevent other forms of harm that can be inflicted by the new communication services.
5. There is a growing array of forms of self- and co-regulation of new communication services, including the Global Network Initiative.
6. There is also a growing body of statutory legislation, or plans to introduce such legislation, at the national and international level concerning forms of regulation and supervision of Internet and other new media content, including the Council of Europe Cybercrime Convention and Additional Protocol; extension of the scope of broadcasting legislation to online audiovisual media services; “war on terror”, security; intellectual property, copyright, piracy, illegal file-sharing; consumer protection; protection of minors and human dignity.
7. One exception is search engines, information services without a place in media law, which create special challenges and pose considerable risks in such areas as access to harmful and/or illegal content; discrimination of content; misleading consumers; influence on opinion makers; exploitation of protected works and of personal data; fragmentation of the public sphere, distortion of competition, including transfer of market power to other markets (e.g. advertising). Despite industry-developed solutions,

like the Global Network Initiative, careful extension of regulatory frameworks to them should be considered in areas where self-regulation cannot suffice.

8. Further efforts are needed to develop appropriate standards of effective self- and co-regulation. Full co-regulatory co-operation and partnership should be pursued, based on a truly multi-stakeholder – and indeed a more democratic – approach than has so far been the case in many national and international contexts.
9. Five main lines of action suggest themselves as far as the future work of the Council of Europe in this area is concerned:
 - a) In-depth analysis of how new forms of media affect democracy, democratic processes and institutions, and the engagement of citizens in democracy and governance, in order to develop or modify policy serving the preservation and enhancement of democracy in the Information Age;
 - b) Continued full analysis of how human rights standards apply to new media and other media-like content providers on the new communication services and of the need, if any, to adapt or develop these standards, or take other measures, to protect freedom of expres-

sion and information and ensure balance with other legitimate rights and interests. More attention should be paid to new forms of online journalism;

- c) Full analysis of how new intermediaries and other stakeholders who may perform media-like activities as part of their operation (ISPs, search engines, access mechanisms), affect freedom of expression and information. This should facilitate consideration of the need, if any, to adapt or develop human rights standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests in this regard.
- d) Consideration of which policy goals and objectives can be achieved through self- and co-regulation, and which go beyond the capacity of market players to regulate or co-regulate themselves and therefore require traditional regulation;
- e) Continued analysis of media self-regulation and co-regulation systems and the development of standard-setting documents, enabling these systems to meet the needs of the Information Society.

Introduction

We are witnessing accelerated evolution of the media, due in part to convergence¹, and the appearance of media as well as “media-like” content coming from a variety of sources on ever new platforms. The whole process and its ramifications require analysis, also in order to establish whether a new look is required at the conceptual, policy and standard-setting approach adopted so far and what changes, if any, are needed for it to keep abreast of, and be adequate to, the new situation.

In the Council of Europe context, this is needed in order fully to understand how Article 10 of the European Convention on Human Rights (ECHR) applies to new communication services and how Council of Europe standards should, if necessary, be adjusted to keep abreast of new circumstances created by changes in societal communication prompted by social and technological change.

There are different scenarios of how electronic media will develop. According to Robin Foster (2007), four possible scenarios for 2016 may be envisaged for the United Kingdom:

- **Scenario 1: Transformation.** In this world, a very fast pace of new technology adoption, supported by new fibre-based broadband access networks, drives a major and radical change in the broadcasting and electronic media sector. There is a dramatic decline in the use of scheduled broadcast TV. Instead, many consumers make extensive use of content delivered on-demand over the open Internet, from home and abroad. There is a significant increase in user-generated content. Distribution platforms are no longer part of vertically integrated media organisations – rather they act as common carriers, linking millions of individual consumers to many thou-

sands of content suppliers. At the consumer interface, the emphasis is on use of search tools, rather than on content aggregation.

- **Scenario 2: Consolidation.** This scenario suggests a market in which technology change advances apace, but in which extensive consolidation has taken place, resulting in only a small number of (largely vertically integrated) main players. Consumers prefer to remain with trusted content packagers and aggregators, who can help them through the complex world. In turn, those aggregators are able to secure a powerful position in the market through control of content rights and of essential gateway facilities.
- **Scenario 3: Extreme fragmentation.** In this scenario, some consumers experience the transformation of Scenario 1, but many are left behind, resulting in a significant digital divide and highly fragmented consumption. The result is an impoverished broadcast sector, a highly fragmented online sector, and a major digital and cultural deficit among those who are unable to participate fully in the new broadband world.
- **Scenario 4: Stagnation.** In this scenario we get much slower than expected growth in demand for new broadband and digital services, and large-scale investment in new technologies is not forthcoming. It suggests a world in which the UK lags significantly behind its main international competitors, and also one in which there is less investment and innovation in new services and content creation.²

For its own purposes, OFCOM (2008a) uses the following scenarios to consider the future of PSM in the context of electronic media evolution.

1. OFCOM (2008b) defines convergence as “The ability of consumers to obtain multiple services on a single platform or device-or obtain any given service on multiple platforms or devices”. “Platforms” are the means of delivering services to consumers and now include digital terrestrial TV, cable, satellite, fixed wireless and fixed and mobile phone lines. “Services” are the products and content that are provided over these platforms. They include TV, radio, mobile TV, Internet, messaging, podcasting, vodcasting, VOIP and many others. On convergence see also European Commission, 1997.

2. Somewhat similar scenarios (“Business as usual”, “Interactivity”, “Personalisation”) were developed some years ago for the European Commission by Arthur Andersen (2002).

Table 1: OFCOM Scenarios

HIGH	<p>CONSOLIDATION</p> <ul style="list-style-type: none"> • Adoption of new technology is relatively high. • Use of linear TV platforms static. • Some viewing migrates to other platforms and Internet content. • Consumers look to trusted content aggregators to navigate market. • Current players respond by acquisition / launch of new linear and on-demand services, retaining viewing across multiple platforms. Existing players consolidate share of the market in response to fragmentation. • Vertical and horizontal integration in industry leads to higher returns for a small number of large content providers and earn returns. • Less incentive for new players to invest in content. 	<p>RADICAL FRAGMENTATION</p> <ul style="list-style-type: none"> • Take-up and usage rates for new technologies are very high. • High fragmentation of viewing by platform and operators. • Consumers divide into niches with divergent media use – blending linear, on-demand, interactive and user-generated. • Audiences for linear broadcasting are mainly old, downmarket. • Advertisers seek affluent targets on other platforms. • Few operators therefore have scale or resources to fund programming. 	
	<p>GRADUAL TRANSFORMATION</p> <ul style="list-style-type: none"> • Steady increase of new technology adoption and usage; incremental rather than substitution. • Continued growth of DTT, and slow growth of Pay TV or IPTV platforms. • Linear TV viewing continues to lead consumption. • Share of viewing to the PSMs declines to DSO, then slows. • Non-PSMs do not develop greater scale to invest. • PSMs leverage scale and investment more effectively. 	<p>STAGNATION</p> <ul style="list-style-type: none"> • Adoption of new technology is relatively high; seen as utilities rather than new services. • Consumption of linear audio-visual material across all platforms wanes. • Freeview via DTT becomes prevalent at the expense of Pay TV. • Free To Air broadcasters retain high share of declining viewing. • Wide availability of free material on broadcast platforms and online, and piracy of digital content, leads to a sharp fall in investment. • Premium on-demand content remains marginal. New media entrants are unable to invest in new content. 	
LOW	LOW	Speed of audience fragmentation	HIGH

The key drivers of differences between the different scenarios presented above appear to be the speed of take up of new platforms and services, the rate of audience fragmentation across these and the ability of industry participants to raise revenues from audiences as they change. However, that is not enough to understand the whole process. Media evolution should be examined in terms of technology, economy, culture and law/politics. From a **technological** point of view, dissatisfaction with existing technology and limits on its usefulness and application lead to the search for new technological solutions and ultimately the emergence of new technology as a new system entity. However, the technologically-deterministic view that it is technological change alone which drives change in the media is far from accurate.³ From an economic point of view, either old business models developed for particular technologies and media become unsatisfactory and new business models are sought, or the emergence of a new technology requires the development of a business model for it that will make it sustainable and profitable. Diffusion of the new business model leads to an increase in competition and a decline of the margin of profit. In the **cultural** realm, social change leads to dissatisfaction with older media and emergence of new needs, stimulating a

search for new opportunities offered by technology, followed by identification and discovery of new uses to which technology can be put. The **political and legal** reaction to new media goes through a cycle: at first, there is no reaction; then there is an attempt to assimilate the new medium under a legal framework developed for older media; this is followed by debates on, and development of, a new legal framework, suited to the new medium; and finally by the enactment of the new framework.

Lack of space precludes analysis of all the factors influencing media development and evolution. One thing is certain, however: **change will be all-encompassing and ultimately fundamental in terms of modes of social communication.**

In *Declaration on human rights and the rule of law in the Information Society (CM (2005) 56 final)* of 2005, the Committee of Ministers recognised that “ICTs have the potential to bring about changes to the **social, technological and legal**⁴ environment in which current human rights instruments were originally developed”. Accordingly, the Committee of Ministers has in recent years been revising and updating its standard-setting documents which originally applied to “traditional” mass media alone.

3. This is eloquently stated by Karaganis (2007: 9): “New technologies take hold only in the context of accompanying cultural innovation as their latent possibilities are explored. This interdependence means that technologies are not merely received but, through processes of adoption, socially defined and, eventually, socially embedded in new collective and institutional practices. Social construction, in turn, feeds back into processes of technical innovation, shaping research priorities and design. In the end there is no simple causality: no chickens, no eggs.”

4. Unless otherwise stated, emphasis in bold print is added in quotations by the author.

What makes this endeavour challenging is that new communication services and new media are in what could be described as their “Chrysalis” stage, i.e. in an intermediate phase of their development, when their features and uses, as well as the opportunities and potential dangers associated with them, are not yet fully explored. Therefore, this **will inevitably be a long-term effort, potentially requiring successive revisions of the standards or ways of applying them, as the new media reach maturity.**

The present discussion paper seeks to lay the groundwork for this effort. An attempt will be made to:

1. Examine, however briefly, change unfolding in the media;
2. Establish on this basis whether it is indeed possible to speak of a new notion or notions of media;
3. Provide an overview of the policy and regulatory response as it has developed in Europe and elsewhere so far; and
4. Consider, in this context, what should be done to ensure full effectiveness of Council of Europe standards, as applied to new media and new communication services.

Part I: Emergence of new notions of media

Social communication takes place at different levels (supra-national/global communication; society-wide, e.g. mass communication; institutional/organisational, e.g. political system or business firm; intergroup or association, e.g. local community; intragroup, e.g. family; interpersonal, e.g. dyad, couple) and can be “face-to-face” communication (interpersonal, intragroup, potentially also intergroup), or “mediated”.

Mediation can be analogue or, with convergence, increasingly electronic (e.g. taking the form of computer-mediated communication – CMC – i.e. any communicative transaction which occurs through the use of two or more networked computers). Mediated

communication is conducted with the use of technologies allowing remote synchronous communication (e.g. telephone, traditional radio, television, videoconference) or asynchronous communication (e.g. letters, print media, telegraph, e-mail, fax, voicemail; Whittaker, n.d.). Mediation is common in interpersonal or inter- or intra-group communication (e-mail, video, audio or text chat, bulletin boards, list-servs, etc.), but is of course indispensable when large groups of receivers are involved.

As suggested by their very name, the media of mass communication are an instrument of mediated communication.

Traditional mass media: Selected basic concepts and definitions

As traditionally understood, the mass media include the print media, film, broadcasting, recorded music, etc. Here, we are dealing primarily with “the press” (including print media and broadcasting), or “news media”, regardless of the platform on which they are disseminated, as they are crucial to freedom of expression, exercise of human rights and the operation of democracy, and so attract particular attention in terms of policy, regulation and standard-setting.

The news media, as indeed all mass media, are the organised technologies and organisations/institutions that make mass communication possible. They can be seen as “media organisations” (McQuail, 2005), operating in a field of social forces (social and political pressures, economic pressures, etc.), and performing a sequence of activities to obtain, select and process content, then assemble it into a media product and disseminate it, or have it disseminated, to the audience.

For the purposes of this paper, we could say that the following elements go into such a news media organisation:

1. **Purpose:** to exercise, and enable exercise of, freedom of expression and information, serve the public interest, provide a forum for public debate, influence public opinion, inform, educate, entertain, operate as a business (where appropriate), gain social influence and prestige, maximise the audience (where

appropriate), potentially also serve sectional interests (political, religious, cultural, etc.);

2. **Editorial policy and process:** producing and obtaining content and then selecting, editing, structuring and packaging it to serve the purposes of the given media organisation, and assuming editorial responsibility for it;
3. **Journalists and other content creators:** management and technical sectors of the organisation;
4. **Periodic dissemination;**
5. **Public nature** of communication via different delivery and distribution platforms;
6. **Conformity with normative, ethical, professional and legal standards** relevant in the case of media operation.

A key element of the news media from our point of view is the concept of “journalism” and “the journalist”. McQuail (2008) defines “journalism” as “the publication of accounts of contemporary events, conditions or persons of possible significance or interest to the public, based on information believed to be reliable”. He explains that what counts as journalism need not necessarily be done as work for financial reward, as this would exclude a range of journalistic activities undertaken for non-profit purposes or otherwise in non-institutionalised forms.

Consideration of journalism as a public occupation has led to the following conclusions which are important in terms of our consideration below of “media-like” content disseminated by non-traditional providers of such content:

- Journalism as a paid occupation **cannot claim a monopoly** over the central activity of observing, reporting and publishing about public events. This is open to all citizens in a free society. It is widely accepted that the occupation of journalism should be open to everyone, without artificial legal or other barriers.
- The degree of **freedom** that a journalist may sometimes require to adequately perform the public element of the role is probably not compatible with accepting the institutional restraints that go with professionalism.
- The journalistic **ethic of responsibility to society** is inevitably quite weak, beyond the question of avoiding harm, since the public good to be served is open to quite diverse interpretations and journalists have the right and even obligation to decide this matter for themselves. Most journalists work in situations that recognise and follow codes of norms and ethics (see e.g. Breit, 2008), although procedures for enforcement are not usually very strict and cannot easily be so without endangering autonomy.
- **Professional detachment** is quite firmly embedded in the attitude and work practices of many journalists in observing and reporting as objectively as possible,⁵ but it is also arguable that certain kinds of journalism need at times to be engaged and involved if they are to serve audience and society. Not all journalists can promise to be neutral and balanced on all issues and events. Active involvement may be called for, especially one that is driven by a personal view of the vocation.
- The interests of the client conceived as an audience may not coincide with the interests of society as a whole (McQuail, 2008).

It is significant that, according to the International Federation of Journalists, there is a growing number of “atypical work relationships” in journalism, i.e. types of employment that are not permanent and/or full-time (including short-term rolling contracts; subcontracted work; casual work; temporary work; freelance work) and that these “atypical workers” account for some 34% of the combined memberships of journalistic organisa-

tions affiliated with the IFJ. Freelancers account for the largest proportion (71%) of “atypical workers” (Walters, Warren, Dobbie, 2006).

In view of this, we may say that while “hard”, formal criteria (technology for content dissemination, periodic dissemination, full-time journalists, etc.) are important, what really determines whether we have to do with a media organisation and media or media-like content is “soft” criteria, as identified in items 1, 2 and 6 of the above list of elements of a media organisation:

- (i) **purpose,**
- (ii) **editorial policy and responsibility, finally**
- (iii) **awareness of, and at least attempted conformity with, normative, ethical, professional and legal standards.**⁶

Though insistence on these standards is often a defence tactic employed by professional journalists, one should perhaps agree with the view that “What distinguishes a journalist from the average citizen who records news on his or her cell phone are education, skill, and standards. **Information without journalistic standards is called gossip**” (cited after Cooper, 2008).

According to McQuail (2005):

free media have responsibilities in the form of obligations which can be assigned, contracted, or self-chosen for which they are held accountable to individuals, organisations or society (legally, morally or socially) either in the sense of liability (for harm caused) or answerability (for quality of performance).

The public responsibilities of professional media can, in general terms, be described as follows: support for basic social order; respect public mores; provide picture of social reality; meet informational needs; provide forum for public expression; act as ‘watchdog’ on powerful; promote social cohesion; provide for cultural/entertainment needs; behave ethically; respect individual and human rights.

As noted above, the editorial responsibility and accountability of professional media can be said to take the form of either “answerability” (moral/social basis; voluntary; verbal forms; co-operative; non-material penalty; reference to quality) or “liability” (legal basis; imposed adjudication; adversarial; material penalty; reference to harm).

Several different frames of accountability can be distinguished, as shown in Table 2.

5. However, as pointed out by many authors (Mancini, 2000; Hallin, Papatthanasopoulos, 2002; Hallin, Mancini, 2004), in many countries there is strong “political parallelism” in the media (i.e. they reflect, also in their content, political divisions in society and may represent one or another side of those divisions), and journalists are politically engaged, rather than detached and objective.

6. According to the American Electronic Frontier Foundation (EFF), the question whether bloggers are journalists should be answered in the following way: “Sometimes ... You can use blogging software for journalism ... [but also] for other purposes. What makes a journalist a journalist is whether s/he is gathering news for dissemination to the public, not the method or medium she uses to publish ... If you are engaged in journalism, your chosen medium of expression should not make a difference. The freedom of the press applies to every sort of publication that affords a vehicle of information and opinion, whether online or offline” (Bloggers’ FAQ – the Reporter’s Privilege, n.d.). This descriptive definition includes the element of purpose and editorial policy, but leaves out the elements of responsibility and awareness of, and at least attempted conformity with, normative, ethical, professional and legal standards. In our view, therefore, it is incomplete as such, though, as we will see below, EFF attaches considerable importance also to some legal and professional standards as applied to bloggers.

Table 2: Frames of Media Accountability

	FRAME OF ACCOUNTABILITY			
	Legal/regulatory	Financial/ market	Public	Professional
Main issues	Media structure Harm caused to individuals Other interests Property Freedom	Product quality Service	Public good and/or harm Conduct and performance quality	Quality of conduct and performance
Main values	Order Justice	Freedom Choice/diversity Profitability Volume/scale	Social responsibility Diversity Quality Order Mores Solidarity	Skill or craft Professional autonomy Duty
Logic	Administrative, legal	Commercial Calculative Populist	Normative	Contractual Ethical Technical
Procedure	Formal, adjudicatory	Market forces	Public debate Self-regulation Inquiries	Voluntary Internal hearings Self-managed adjudications Ombudsmen
Instruments	Texts Codes Schedules	Sales Financial accounts Ratings	Policies Public opinion Publicity Pressure Public ownership	Codes of professional ethics and conduct
Currency of account	Material penalty	Money Fame/popularity	Esteem or lack of it	Praise or blame Apology, correction

Source: McQuail, 2005.

Transformation of mass media

Evolution or transformation of the media, or the need to develop new media, are driven by situations when:

- Existing media no longer deliver a satisfactory service, for technological, social or cultural reasons;
- Technological innovation has resulted in such change in old forms of media that old notions no longer apply, or need to be revised or reformulated;
- New forms of media have emerged, calling for new notions and new concepts.
- The legal and regulatory framework applying to the media has lagged behind change and new developments, requiring its adjustment and modernisation.

According to Stöber (2004), the evolution of media proceeds in three stages:

- the original **invention** of a new medium (mainly of a technical nature),

- followed by **innovation** (involving changes needed to introduce the new medium into social use and develop an economic model),
- and then **diffusion**, when the new medium becomes a new cultural technology for users, audiences and consumers.

Innovation, says Stöber, may involve two kinds of improvements: **adaptation** – the improvement of a feature for the sake of its original purpose, or **exaptation** – a second-stage improvement, serving to perform new functions which may not have been envisaged at the time of invention.

It is usually during the phase of innovation and particularly exaptation that a truly new medium is born, as shown in Table 3.

Table 3: Media emergence and evolution

	Invention's first function: improvement on an old medium	Innovation, the second function: emergence of a new medium
Printing	Improvement on writing	Development of serial (and quasi-serial) press
Electrical telegraphy	Improvement on optical telegraphy for political and military purposes	News agencies, stock market information

Source: Stöber, 2004.

Table 3: Media emergence and evolution

	Invention's first function: improvement on an old medium	Innovation, the second function: emergence of a new medium
Telephony	Improvement on telegraphy	One-to-one medium for business and private purposes
Film	Vaudeville and variety amusement	Programme medium with newsreels and films
Wireless telegraphy/radio	Improvement on wire-based telegraphy	Broadcasting with entertainment and information programmes
Television	Improvement on telephony	Broadcasting combined with film
Computing/Multimedia	Improvement on arithmetic	Multipurpose devices
<i>Source: Stöber, 2004.</i>		

One more case which Stöber does not discuss is the following:

Mobile telephony	Improvement on fixed telephony as a means of verbal communication	A major medium of text communication (Short Message Service – SMS) ^a and, increasingly, of audiovisual communication – Multimedia Message Service (MMS) and Mobile TV
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a. According to a Nielsen Mobile survey, American cell phone users are sending more text messages than they are making phone calls. For the second quarter of 2008, US mobile subscribers sent and received on average 357 text messages per month, compared with making and receiving 204 phone calls a month, according to Nielsen. The surge in text messaging is being driven by teens 13 to 17 years old, who on average send and receive about 1 742 text messages a month. Teens also talk on the phone, but at a much lower rate, only making and receiving about 231 calls per month. The report suggests that children under the age of 12 are also heavy text users, averaging about 428.

In this context, we could also mention the French *Minitel*, which was originally conceived as a “one-to-many” information medium, but was turned by consumers into a “many-to-many” communication space through the emergence and growth of its popular messaging systems (Boczkowski, 1999).

From a technological point of view, convergence has changed traditional mass media and has driven the emergence of new forms and modes of communication. The main features of **fully developed convergent digital communication**, which most likely will be the prevalent (though not the only) mode of communication in the Information Society, include: multimedia communication; non-linear, on-demand delivery of content; interactivity; asynchronous communication; individualisation/personalisation (customisation); portability of receivers and mobile reception; disintermediation (elimination of intermediaries, e.g. media organisations, as anyone can offer information and other content to be directly accessed by users and receivers); and “neo-intermediation” (emergence of new intermediaries, especially on the Internet, capable of offering new services or aggregating and packaging content in new ways).

Convergent digital communication blurs old divisions between types of communication. In terms of medium and content, the following could be distinguished:

- Private/direct: face-to-face, birthday party, pub;
- Public/direct (communal): election meetings, business talks, classroom discussions;
- Mediated/private: letter, phone, e-mail, cellphone;
- Mediated/public: group e-mail, discussion forum, television.

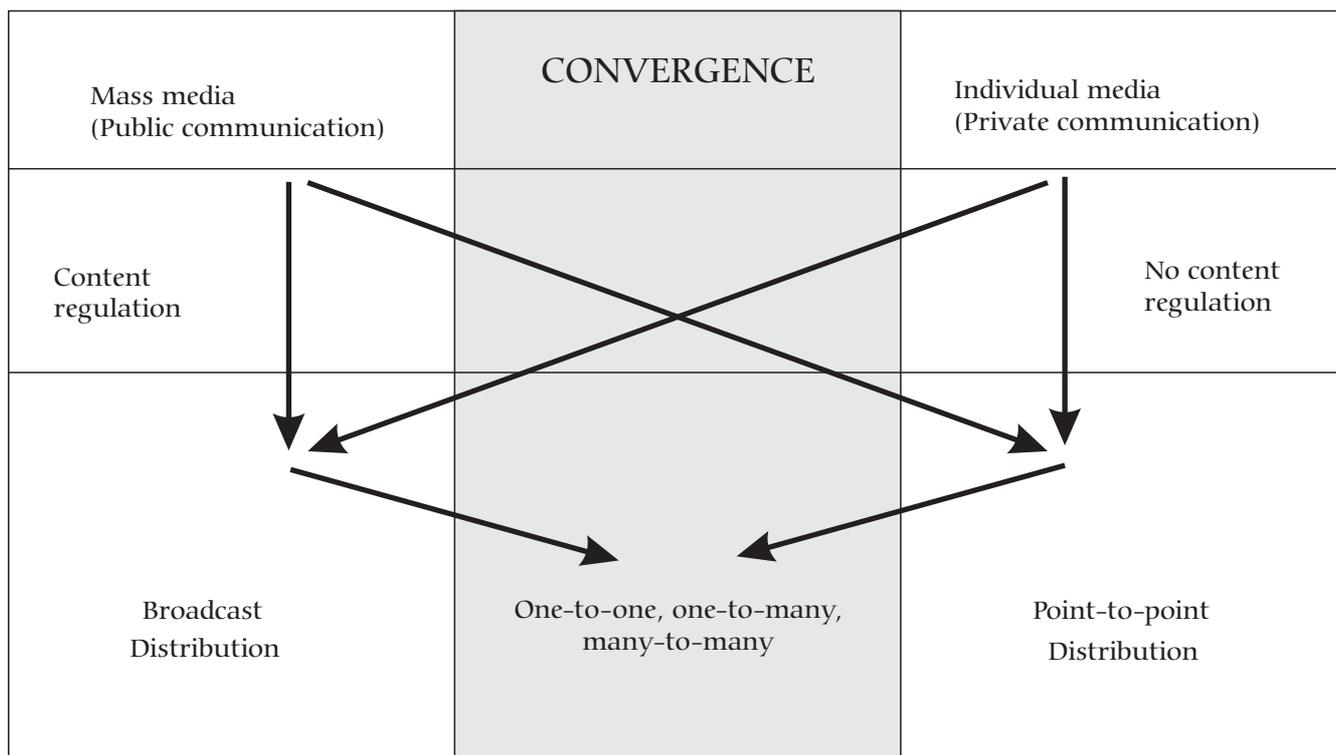
In turn, the criteria of medium and access help distinguish the following types of communication:

- Non-public/direct: face-to-face;
- Non-public/mediated: letter, phone call, fax, personal e-mail, video conference;
- Public/direct: general assembly, street demonstration;
- Public/mediated: television, radio, press.

As noted by Heller (2006), each of these types of communication has traditionally come with its own set of cultural norms and expectations as to appropriate content, language, etc., but, in the case of public communication, also different regulatory standards. These old distinctions are being undermined by media evolution.

Figure 1 illustrates the effects of convergence on traditional divisions in social communication and the regulatory systems that apply to different forms of communication.

Figure 1: Effects of convergence



Adapted from: Østergaard, 1998: 96.

In the 1980s, the term “new media” was used to denote cable and satellite television, the VCR, as well as teletext and videotext. Today, it is sometimes applied to “blogs, social networking sites, cell phone messaging, and other relatively new technology applications” (Khalil, 2008). These applications do serve as media of communication, but it is doubtful they can all be classified as news media (as defined above). In general, the term “new media” applies precisely to digital and convergent media:

new media: all those means of communication, representation and knowledge (i.e. media), in which we find the digitalisation of the signal and its content, that possess dimensions of multimodality and interactivity. This definition [is] comprehensive [and] inclusive of everything from the mobile phone to digital television and also embracing game consoles and the Internet ... The new media may be termed thus because they are mediators of communication, because they introduce the novelty of incorporating new technological dimensions, because they combine interpersonal communication and mass media dimensions on one and the same platform, because they induce organisational change and new forms of time management and because they seek the synthesis of the textual and visual rhetoric, thus promoting new audiences and social reconstruction tools (Cardoso, 2006: 123-124; see also Rice, 1999).

What this means in practice is that **all media** will one day turn into **new media**, so **the distinction between “old” and “new” media is only temporary**. We may use the example of television to examine the transformation of an “old” medium into a “new” one.

The following stages of television’s evolution may be distinguished:

- “Paleo-television” – the initial age of public or state monopoly;
- “Neo-television” – the second stage after the dismantling of monopoly, when the public and commercial sector compete, and “broadcasting” coexisted with “narrowcasting”, i.e. thematic channels;
- “Post-television”, resulting from digital technology consolidation and continuous innovation, and characterised by multiplication and personalisation of programme offers, as non-linear delivery and individualised TV gain in prominence, while users are able to use time- and place-shifting technologies to receive content of their choice, also via alternative distribution platforms – mobile telephony, PDA or the Internet (Roel, 2008).

A similar trajectory has been followed by the print media which have embraced the Internet, for example, and established online newspapers in one of three main versions: either an exact electronic copy of the newspaper as appearing in print, or a reduced version of the original, or indeed “virtual newspapers” – a much extended version of the original, offering more content (thanks to potentially unlimited “space” on the Internet); more up-to-date content (often foreshadowing news and articles to appear in print the next day); links to related content and information sources; specialised newsletters; ability to engage in e-mail correspondence with the editorial staff or other users, express oneself in a public forum, or take part in some sort of electronic community (Migaczewska, 2006).

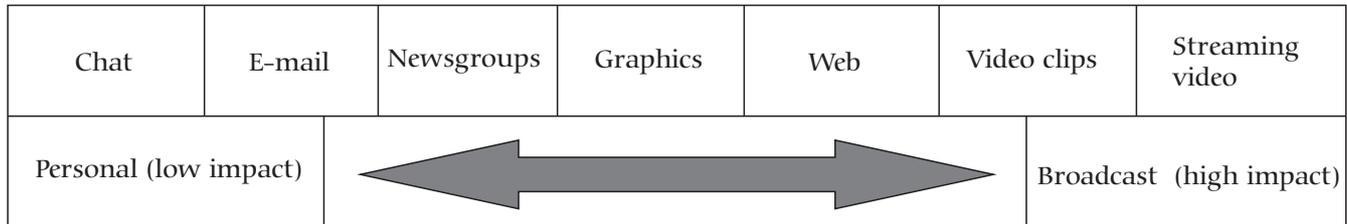
The archetypal “new medium” is the Internet – at the same time a mass medium and a medium of interpersonal communication. As a technological base, the

Internet serves both those dimensions and for that reason the market and the state have adopted it as the new central element in the media system.

As illustrated in Figure 2, at one end of the spectrum of modes of communication available via the Internet there are various forms of interpersonal (private) communication which are not subject to any content regulation. At the other end, there is the potential for anyone

with enough money and bandwidth (not to mention communication competence) to run the equivalent of a television station via the Internet, via streaming video, i.e. engage in public communication. In the middle between the two extremes, there is the current Web, and future Web-like services, which increasingly offer more broadcast-like services.

Figure 2: Range of material and modes of communication available on the Internet



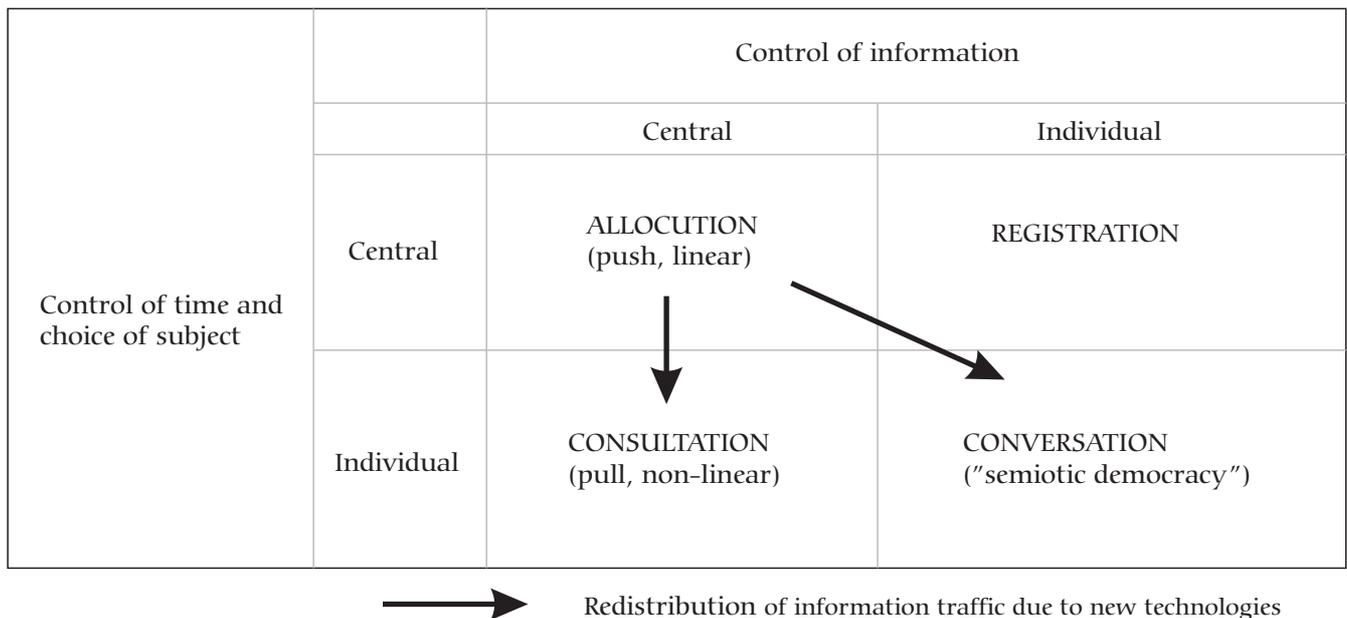
Source: Mitchell, Armstrong, 2001.

One consequence of the emergence of “new media” in this sense is that all the levels of communication process and all the communication patterns involved, can now be conducted with the use of the new technologies – from interpersonal to

mass communication, all on one and the same platform.

The emergence and societal assimilation of the new media in this meaning is promoting a fundamental change in patterns of mediated communication, as shown in Figure 3.

Figure 3: Changing modes and patterns of social communication due to new technologies



Adapted from McQuail, 2005: 146.

Allocation (one-way, top-down, one-to-many communication) is losing its dominance in mass communication, with “consultation” and interactive “conversation” gaining in importance. Registration is the collection of information available to, or about, individual participants, according to a centrally determined choice of subject and time in a central storage area. This is a long-established element in many organisations for record-keeping, control, and – potentially – surveillance. According to van Dijk (2006), contemporary **new media** can be classified as such if they incorporate and make possible all four modes of social communication.

The emergence of “consultation” and “conversation” as important modes of mediated communication is aided by a new stage in the development of the Internet, known as Web 2.0, based on an implicit “architecture of participation”, a built-in ethic of co-operation, in which the service acts primarily as an intelligent broker, connecting the edges to each other and harnessing the power of the users themselves (O’Reilly, 2005). All this, says Stark (2006), amounts to a revolution based on a simple concept: semiotic democracy, or the ability of users to produce and disseminate new creations and to take part in public cultural discourse. Users are by and

large developing and posting their own original creations. Anyone can now – with access to the right technology and appropriate communication and information literacy – become a creator, a publisher, an author via this new form of cultural discourse, a platform to publish to the world at large that grants near instant publication and access. The publisher-centric business models of the 20th century will not last, says Stark. We will see massive disintermediation in the next decade or so. More artists, creators, citizen journalists (see Kim, Hamilton, 2006, on “*OhmyNews*”) and others will self-publish, and they will find ways to do so in a sustainable way, perhaps by selling mp3s on their website, opportunities for production work, or touring to a greater number of fans.

Whether or not these predictions will all come true, we are indeed seeing the emergence of “a digital commons”, also known under other names, e.g. “information commons” (Kranich, 2004).

The emergence of “conversation” on a societal scale in mediated electronic communication marks a new stage of social communication. The nature of this new stage is summed up by Küng’s (2002) comments on “old” versus “new” assumptions about the nature and strategic significance of content. According to old assumptions, content is the product of scarce creative skills and trained discriminating minds. Now, anything can be content and content does not have to be produced by experts. In fact, many users are happiest producing their own content. Küng’s (2002) comparison of old and new media content takes the form of Table 4.

Table 4: “Old” and “new” media content

Characteristic	“Old” Media Content	“New” Media Content
Core customer proposition	Information, education, entertainment	Synthesis of information, communication and service
Basic communication paradigm	One-to-many, mass	Two-way, personalised, interactive, on-demand
What is quality?	“Quality” content fulfils exalted goals and has intellectual and artistic merits	“Quality” content keeps users on the site and is constantly refreshed and updated
Who produces content?	Experts dictate Content-generation relies on artistic expertise and discriminating minds	Customer in the driving seat: decides what, when, and in which form; the end of “journalist knows best”; successful content often generated by users
Relationship with commercial elements	Content and commerce strictly separated and clearly labelled	Content and commerce inextricably linked

All this has produced greater engagement by large numbers of individuals in social networking, in forms of public communication via the Internet (blogs, etc.), and generally in the public debate. This process of collaborative content creation in environments, from open source through blogs and Wikipedia to Second Life, amounting to continuous creation and extension of knowledge and art by collaborative communities, has been called “produsage”. This is why “mass media” are sometimes described as being transformed into “media of the masses”.⁷

The scale of this phenomenon is difficult to gauge precisely (see Table 1 in Appendix 1, p. 39). However, as shown by American research, the proportion of active creators of user-generated content is clearly higher among the teen population (12-17). In 2006 64% of Internet users among them (i.e. 59% of all teens) participated in one or more content-creating activities, compared to 57% in 2004. Thus, the proportion of content-creating users is rising over time, as shown in Table 5.

Table 5: Share of content-creators among American Internet users

Type of UGC	Adult users 2006	Teen users	
		2004	2006
	% of Internet users		
Share something online that you created yourself, such as your own artwork, photos, stories, or videos	19	33	39
Post comments to an online news group or website	18	n.d.	n.d.
Create or work on your own webpage	12	22	27
<i>Sources: For adults: Pew Internet & American Life Project April 2006 Survey. N=2 882 for Internet users. Margin of error is ±2%; For teen users: Pew Internet & American Life Project Survey of Parents and Teens, October–November 2006. Margin of error for teens is ±4%.</i>			

7. *AgoraVox*, a website that describes itself as “The first online newspaper in Europe written by citizens”, explains why it is “the medium of the masses”: “Whereas traditional media bring down the information from the top to the bottom (“one-to-many” principle), *AgoraVox* makes it move along in a transversal way (“many-to-many” principle). This is thanks to a very motley team of citizen authors, constituted with very various profiles.”

Table 5: Share of content-creators among American Internet users

Type of UGC	Adult users 2006	Teen users	
		2004	2006
% of Internet users			
Create on webpages or blogs for others, including friends, groups you belong to, or for work/friends, school assignments	11	32	33
Take material you find online – like songs, text, or images – and remix it into your own artistic creation	9	19	26
Create or work on your own online journal or weblog	8	19	28

Sources: For adults: Pew Internet & American Life Project April 2006 Survey, N=2 882 for Internet users. Margin of error is ±2%.; For teen users: Pew Internet & American Life Project Survey of Parents and Teens, October–November 2006. Margin of error for teens is ±4%.

While it is no doubt difficult to generalise these figures and in many countries these proportions are certainly much lower, one can most probably expect that in developed societies a large section of the population will in the future be engaged in content creation and distribution via the new technologies, either regularly or occasionally, probably with varying intensity over the course of their lives.

If it is true, for example, that “blogs are pervasive and part of our daily lives” (Technorati, 2008), then it is clear that the new communicators and the content they distribute will continue to be a significant feature of social life and social communication.

Thus, the traditional features of mass communication have changed substantially, as shown in Tables 6 and 7.

Table 6: The mass communication process

Old	New
Large scale distribution and reception	Distribution at once global and personalised
One-directional flow	Two-way flow: the audience can respond or provide content to be disseminated by the medium
Asymmetrical relation	User can respond, offer feedback, engage in dialogue
Impersonal and anonymous	Affected by individualisation and personalisation
Calculative or market relationship	UCG and new communicators change that
Standardised content	Highly diversified content

Adapted from McQuail, 2005.

Table 7: The mass audience

Old	New
Large numbers	Full range – from global to individual reception
Widely dispersed	Addressability and localisation permit reaching clearly identifiable audiences
Non-interactive and anonymous	Interactive and potentially personalised
Heterogeneous	Potentially homogenous
Not organised or self-acting	Capable of organisation, reaction, response
An object of management or manipulation	More media literate, resistance to propaganda or manipulation

Adapted from McQuail, 2005.

In view of this, we should look again at the features of a news media organisation identified at the outset, to see whether they retain their relevance, or need to be revised.

Purpose remains largely the same, whether in traditional or alternative new media. An example of the latter is provided by *Indymedia*, an “Internet media offshoot of social movements”, such as the anti-

globalisation movement, and relying on “volunteer journalists”. In 2006 this “Internet-based alternative to corporate mass media in the United States” (Garcelon, 2006) included 42 websites in 54 countries and territories. As one example, *Istanbul Indymedia* (“a non-commercial, democratic collective of Istanbul independent media makers and media outlets”) seeks to “encourage a world where globalisation is not about

homogeneity and exploitation, but rather, about diversity and co-operation; provide edited audio, video, and print stories of the above on the Internet for independent media outlets and the general public; offer community classes for training in Internet and media skills; encourage, facilitate, and support the creation of independent news gathering and organisations" (Kejanlioglu (2008: 151).

Editorial policy and especially the **editorial process** take different forms in mainstream and alternative media, and especially in "media-like" activities of new intermediaries, disseminating user-generated content, for example. In the latter two cases, there is much less selection and editing of content. Also **editorial responsibility** takes different, often very limited, forms. All this will be discussed in more detail below.

Journalists and other content creators are, in the case of alternative media, mostly "volunteer" "citizen" or "amateur" content providers. This need not detract from their ability to perform a journalistic role and for their activities to approximate the operation of news media if, as already suggested, they are aware of, and prepared to comply with, normative, ethical, professional and legal standards relevant in the case of media operation, and with "the same standards of veracity, the same expertise and experience that are part and parcel of professional journalism" (Fioretti, 2008). The degree of this compliance may, however, be different in different cases.

Periodic dissemination naturally retains its relevance as a criterion of whether content provision can be classified as "media", but in practical terms may mean something very different. Whereas a daily newspaper may at best bring out one or more "extras" a day,⁸ an Internet publication can update or revise news items or stories countless times a day, as new information comes in. Archived webpages, such as citation index databases, online archives and postings in discussion groups, usually remain static over time. At the other end of the spectrum, Google News is updated every 15 minutes (Carlson, 2007), news article headlines are sometimes updated hourly. In between there is a wide scale of updating frequency (Hellsten, Leydesdorff, Wouters, 2006). This complicates the application of this criterion, but naturally static websites can hardly qualify as media.

Public nature of communication clearly retains its relevance, with some of the new platforms (e.g. the Internet) potentially offering global reach. However, while traditional media usually operated as "push" communication (allocution), many new services operate as "pull" communication (consultation). Communication is still public, in the sense that everyone with the right equipment and communication competence can

access it, but the receiver's control over the act of content consumption is greatly enhanced and personalisation functionalities may potentially diversify the exact contents reaching particular receivers/users.

Conformity with normative, ethical, professional and legal standards relevant in the case of media operation is seen here as an important criterion whether "alternative" or "civic" forms of communication can be classified as "media". This will be discussed below.

The image and role most often associated with the traditional concept of the journalist, and even more the editor, is that of the "gate-keeper". The gate-keeper role is maintained and enforced by a set of professional routines and conventions that are said to constitute a sort of quality control mechanism in institutional journalism. To some degree that also extends to the role of the publisher/broadcaster. The journalist may be assigned a story, but often decides what to report on, or what to write about. The editor selects news and other journalistic and editorial content for publication. The publisher or broadcaster determines the general editorial policy, influencing the work of the journalist and editor, as well as news values and other criteria for selecting editorial content. The publisher or broadcaster, by choosing a target audience and potentially restricting access to content by way of price, distribution or conditional access technologies in broadcasting, influences not only what content is disseminated, but partly also who has access to it.

Today, in times of disintermediation, the gate-keeper role is much reduced. A special case of gate-keeping is represented by Google News which in the case of the English-language version describes itself as

a computer-generated news site that aggregates headlines from more than 4 500 English-language news sources worldwide, groups similar stories together and displays them according to each reader's personalised interests...[our goal is to offer] our readers more personalised options and a wider variety of perspectives from which to choose. On Google News we offer links to several articles on every story, so you can first decide what subject interests you and then select which publishers' accounts of each story you'd like to read. Click on the headline that interests you and you'll go directly to the site which published that story. Our articles are selected and ranked by computers that **evaluate, among other things, how often and on what sites a story appears online. We also rank based on certain characteristics of news content such as freshness, location, relevance and diversity. As a result, stories are sorted without regard to political viewpoint or ideology and you can choose from a wide variety of perspectives on any given story** (see also Carlson, 2007).

Where elements of a gate-keeping role persist in new communication services, this might indicate that we have to do with media or media-like activities.

8. A rare example of the high number of such "extras" is provided by *The New York Herald*, which put out six editions the morning after Lincoln was shot.

Defining “media” today

As noted above, the new media and new communication services are in their interim “Chrysalis” stage of development: they have not matured enough to have developed their own mature public definitions, or for their users and the public in general to know where to place them in the system and how to approach them, or indeed what effects their use will bring.⁹

Nevertheless, on a conceptual level, this evolution of the media has prompted the development of new technology-neutral definitions of the media of (mass) communication.

One example is Recommendation CM/Rec (2007) 15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns. It states in the preamble that “the constant development of information and communication technology and the evolving media landscape [...] necessitates the revision of Recommendation No. R (99) 15 of the Committee of Ministers on measures concerning media coverage of election campaigns”. The difference between the concept of “media” in the two Recommendations on the same subject, adopted eight years one after the other, can be seen in Table 8.

Table 8: The concept of “media” in two CM Recommendations

R (99) 15	CM/Rec (2007) 15
“Print and broadcast media”	“The term ‘media’ refers to those responsible for the periodic creation of information and content and its dissemination over which there is editorial responsibility, irrespective of the means and technology used for delivery, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. This could, <i>inter alia</i> , include print media (newspapers, periodicals) and media disseminated over electronic communication networks, such as broadcast media (radio, television and other linear audiovisual media services), online news-services (such as online editions of newspapers and newsletters) and non-linear audiovisual media services (such as on-demand television).”

Another well-known recent example of this search for a new, technology-neutral definition of the “media”, is the EU’s Audiovisual Media Services Directive (AVMSD). The definition of “audiovisual media service” is explained at length in recitals 16 to 25 of the preamble and is set out in Article 1 (a). It is composed of six cumulative criteria:

- 1) It must be a **service** thus requiring an **economic activity** (hence excluding private websites, services consisting of the provision or distribution of user generated audiovisual content for the purposes of sharing and exchange within communities of interest);
- 2) **mass media character** (i.e. intended for reception by, and which could have a clear impact on, a significant proportion of the general public);
- 3) The function of the services is to **inform, entertain and educate** the general public. It presupposes an “impact of these services on the way people form their opinions”, as emphasised by recital 43;
- 4) The **principal purpose** should be the provision of programmes (as opposed to cases where audiovisual content is merely incidental), as emphasised by recital 18;

- 5) **A service with audiovisual character** (does not cover audio transmission or radio services or electronic versions of newspapers or magazines);
- 6) A service provided by **electronic communications networks** (e.g. excluding cinema, DVD).

The directive is helpful in our search for a new notion of media, especially in that it unpacks the concepts of linear and non-linear audiovisual media services and defines their particular elements. Nevertheless, it is clearly designed primarily for specific regulatory purposes, to provide legal certainty as to the scope of application of this particular directive. Therefore, a number of traditional media (radio, electronic versions of newspapers or magazines, cinema, DVD) are excluded from this definition. The same is true of new borderline cases which under some circumstances potentially could be classified as media, e.g. private websites; blogs; services consisting of the provision or distribution of user generated audiovisual content for the purposes of sharing and exchange within communities of interest. This limits its usefulness for our purposes, as it leaves out of consideration forms and modes of communication which require close analysis precisely in order to establish whether they should, or should not, be classified as media – in general, or in some aspects of their operation.

9. One unexpected consequence of the arrival of new communication services is described as “egocasting”, a situation when technologies potentially offering an infinite variety of content are actually used to reduce the range and variety of content received: “With the advent of TiVo and iPod, however, we have moved beyond narrowcasting into ‘egocasting’ – a world where we exercise an unparalleled degree of control over what we watch and what we hear. We can consciously avoid ideas, sounds, and images that we don’t agree with or don’t enjoy ... The more control we can exercise over what we see and hear, the less prepared we are to be surprised. ... TiVo, iPod, and other technologies of personalisation are conditioning us to be the kind of consumers who are, as Joseph Wood Krutch warned long ago, ‘incapable of anything except habit and prejudice,’ with our needs always pre-emptively satisfied” (Rosen, 2005).

Another reason is the requirement that only services based on “economic activity” and competing for the same audience as television broadcasts can be covered by this definition (recital 17), while “activities which are primarily non-economic and which are not in competition with television broadcasting” should not be covered by the directive and its definition of audiovisual media services (recital 16).

Moreover, the directive defines “editorial responsibility” in Article 1 (c) in the following way:

“editorial responsibility” means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.¹⁰

As is clear from the foregoing, this concept leaves out of consideration a large area of what is generally recognised as editorial accountability and answerability/liability for the contents of communication, but also a

broader understanding of editorial responsibility as editorial policy.

This is another reason why we need to go beyond the AVMSD definition of audiovisual media services in search of new notions of media.

The evolution of media has blurred distinctions between previously clearly demarcated fields:

- mass and public communication vs. interpersonal and private communication;
- media outlets and individual communicators;
- professional and amateur journalists and communicators.

Therefore, as we search for new notions of media, we should seek to understand:

- whether a notion of media results from changes in traditional media;
- and whether new forms of media, or media-like activity have appeared.

On this basis, several new notions of media may tentatively be identified.

New notion of media (1): All media are new-media-to-be

So far, media development has been cumulative rather than substitutive: newly emerging media did not replace older media, though they may have modified their functions and content. Digitalisation and convergence can potentially change this. The Internet, for example, is both a new medium, and a technology with which all the other media and modes of communication seem to want to interact through the establishment of digital or analogue links. With the **digitisation of all media, they may all be transformed into convergent media distributed on broadband networks. Older media will not be substituted for and disappear, but may re-emerge in changed form, as another source**

of content available on broadband Internet and other broadband networks.

On this basis we may conclude that one element of the new notion of media is that traditional media are being changed into digital, convergent media that:

- can incorporate all forms of media existing so far and potentially may assimilate them into a variety of media forms existing alongside one another on broadband networks;
- combine all levels and patterns of social communication and all modes of content delivery;
- are capable of overcoming constraints of time and space.

New notion of media (2): Forms of media created by new actors

So far, we have been on relatively familiar territory. However, as we have seen, the contemporary communication landscape has seen the emergence of new types of communicators, capable, thanks to the Internet, of engaging in public communication on a global scale. The moot question is whether this produces new forms of news media, or of news media-like activity. We should therefore seek to establish whether, and to what extent, these new types of communicators and the content they distribute satisfy the “hard” and “soft” criteria identified above, enabling them to be recognised as “media”.

One may identify three possible cases:

- Disintermediation (see above) allows political, social, economic, sports and other entities to become content providers and disseminators, bypassing traditional media and reaching out directly to the general public;

- media or media-like content is disseminated either by non-professional content creators (e.g. bloggers);
- or by new intermediaries (Internet service providers, content aggregators, search engines, etc.).

The first case involves international organisations (like the European Union, the European Parliament, NATO, etc.), government agencies and all kinds of other institutional actors (e.g. sports clubs) that establish television channels or content services on the Internet.

This may be significant in terms of the democratic process in that the media have so far been the primary actors in holding political power to account by virtue of the public nature of their work, testing and challenging and inquiring into government decisions, actions and arguments. They play this part by virtue of the privileges of the “fourth estate”, meaning access to politicians and public figures and the wide public acceptance that this challenging role is their duty and their very

10. For detailed consideration of the concept of “editorial responsibility”, as defined in AVMSD, and its application under the directive, see Schulz, Heilman, 2008.

identity. This function is unique to traditional and mass media, by virtue of their large audience, reach and public recognition of their role. Without that force, backed by public consent in the public interest, it may be all too easy for political forces to distort the debate, exclude critical voices and conceal important facts from the public. Even without that, this may accelerate transition towards the “post-objectivity” period in media evolution (see footnote 12, p. 23), producing disorientation among the public as impartial information and

analysis are replaced by advocacy and persuasion/propaganda.

Special attention should be paid to new content providers whose output goes under the name of “user-generated content” (UGC), or “user-created content” (UCC). Examples of both new content providers and intermediaries are provided in Table 9.

Table 9: Forms of user-generated content and platforms for its distribution

Type of Platform	Description	Examples
Blogs	Webpages containing user-created entries updated at regular intervals and/or user-submitted content that was investigated outside of traditional media	Popular blogs such as Boing Boing and Engadget; Blogs on sites such as LiveJournal; MSN Spaces; CyWorld; Skyblog
Wikis and other text-based collaboration formats	A wiki is a website that allows users to add, remove, or otherwise edit and change content collectively. Other sites allow users to log in and co-operate on the editing of particular documents	Wikipedia; Sites providing wikis such as PBWiki, JotSpot, SocialText; Writing collaboration sites such as Writely
Sites allowing feedback on written works	Sites which allow writers and readers with a place to post and read stories, review stories and to communicate with other authors and readers through forums and chat rooms	FanFiction.Net
Group-based aggregation	Collecting links of online content and rating, tagging, and otherwise aggregating them collaboratively	Sites where users contribute links and rate them such as Digg; Sites where users post tagged bookmarks such as del.icio.us
Podcasting	A podcast is a multimedia file distributed over the Internet using syndication feeds, for playback on mobile devices and personal computers	iTunes, FeedBurner, iPodderX, Winamp, @Podder
Social Network Sites	Sites allowing the creation of personal profiles	MySpace, Facebook, Friendster, Bebo, Orkut, Cyworld
Virtual Worlds	Online virtual environment	Second Life, Active Worlds, Entropia Universe, and Dotsoul Cyberpark
Content or Filesharing sites	Legitimate sites that help share content between users and artists	Digital Media Project

Source: Wunsch-Vincent, Vickery, 2007.

It has been noted that podcasting, blogs and related technologies are also increasingly used in the professional context (Wunsch-Vincent, Vickery, 2007), and indeed, many professional news organisations host UGCs on their websites.¹¹ Indeed precisely these two forms of UGC may – under many conditions – come to approximate news media. Social networking sites can also be used as disseminators of information and mobilising tools, but they may lack the element of periodic dissemination of structured content. In many other cases, we may have to do with “personal publishing”, or

intra- and inter-group communication, but not with media, or “media-like” activities.

Deuze (2003) distinguished four distinct “online journalismisms”:

1. **Mainstream news sites:** operated by professional media organisations and generally offering a selection of editorial content and a minimal, generally filtered or moderated form of participatory communication. As the author describes it, this type of content is distinctive in that it can be characterised as *originated* (produced originally for the Web) or aggregated (shovelled from a linked parent medium,

11. In 2005 ten mainstream UK news websites used seven major UGC formats “Polls”, “Have your says”, “Chat rooms”, “Q&As”, “Blogs with comments enabled”, “Pre-moderated message boards”, and “Post-moderated message boards, together with a number of additional formats. “Q&As” – interviews with journalists or invited guests, the questions for which are submitted by readers – were the most popular format (used by 70% of publications), followed by “Polls” (50%), “Have your says” – in which journalists post topical questions to which readers send written replies (40%), “Post-moderated message boards” (30%), and “Pre-moderated message boards” (20%). “Blogs with comments enabled”, “Chat rooms” and the nine “other” formats were each used by a single publication (Thurman, 2005).

“framed” or “deep-linked” from an external source – not in the least done by so-called artificial market actors such as searchbots and spiders, i.e. software that automatically enables Internet searches). Examples of the “originator” type of mainstream news sites are the much-visited sites of CNN, BBC and MSNBC. Most online newspapers can be located in this category, as well as several “Net-native” news sources;

2. **Index and category sites:** this type of online journalism is often attributed to certain search engines (such as Yahoo), marketing research firms (such as Moreover) or agencies (Newsindex), and sometimes even enterprising individuals (Paperboy). Here, online journalists offer (deep-) links to existing news sites elsewhere on the Web. Those hyperlinks are sometimes categorised and even annotated by editorial teams, thus generally featuring more or less contextualised (or contextually presented), aggregated content. These index and category sites generally do not offer much “original” editorial content (cf. content produced exclusively or specifically for web publication), but do at times offer areas for chat or exchanging news, tips and links by the general public. Most search engines offer an option to “add a site”, which will then be subjected to editorial scrutiny. Sites offering some editorial content and furthermore providing annotated links to content elsewhere on the Web (similar to so-called “portal” sites), such as the Australian *Arts and Letters Daily*, Bosnian *Mario Profaca’s Cyberspace Station* or the US-based *Drudge Report* by Matt Drudge, fall into this category.
3. **Meta- and comment sites:** sites about newsmedia and media issues in general, sometimes intended as media watchdogs (for US examples: *Mediachannel*, *Freedomforum*, *Poynter’s Medianews*, *E&P’s E-Media Tidbits*), sometimes intended as an extended index and category site (European Journalism Centre’s *Medianews*, *Europemedia*). They and other sites serve as a meta- and comment type of online journalism in terms of media criticism or “alternative” media voices; examples of which are *Mediekritik.nu* in Sweden, *Extra!* in the Netherlands, *dotJournalism* in the UK and *OnlineJournalismus* in Germany. Editorial content is often produced by a variety of journalists and basically discusses content found elsewhere on the Internet. An important factor for coining and including this category is the widespread emergence of so-called “alternative” news sites. Alternative news sites tend to define themselves in terms of what they consider the mainstream (corporate, commercial) news organisations not to be. Such sites – notably the Guerilla News Network and the Independent Media Centers in various places across the globe – offer not only their own news online, but tend to critically comment upon the news offered by existing media networks, guiding users to places outside of the mainstream news offerings on the web. Many of these sites exist as online journalisms in that they collect, annotate and comment upon

sources of news all over the web, focusing explicitly on issues and angles that they feel the “mainstream” journalists have not covered (well or sufficiently). As most of these sites also tend to allow individuals to upload and contribute their own stories in an open publishing environment, they can be seen to act as more or less “participatory” metasites.

4. **Share and discussion sites:** these are platforms for the exchange of ideas, stories and so forth, often centred around a specific theme such as worldwide anti-globalisation activism (the aforementioned *Independent Media Centers*, generally known as *Indymedia*) or computer news (*Slashdot*, featuring a tagline reading: “News for Nerds, Stuff that Matters”). Several sites have opted to commercially exploit this public demand for connectivity, by organising more or less edited platforms for discussion of content elsewhere on the Net. This type of online journalism has also been described as “group weblogs”, offering personal accounts of individuals about their experiences on the Internet.

Deuze adds that what is sometimes labelled as “new” online journalism is the phenomenon of the **weblog or blog**, an often highly personal online periodical diary by an individual, not in the least by a journalist, telling stories about experiences online and offering readers links with comments to content found while surfing the web. These types of individual journalism (“user-generated content sites”) can, in his view, be located somewhere between index and comment sites, as they tend to offer limited participatory communication (being usually just one person speaking his or her mind about certain issues and offering links), but present plenty of content — and comment on content.

The question from our point of view is which of these types of “online journalism” – when not created and maintained by professional news organisations or journalists – can be classified as news media. We will consider this on the example of citizen journalism, also known as public/civic/communitarian, people’s, open source, or participatory journalism (see Deuze, 2008).

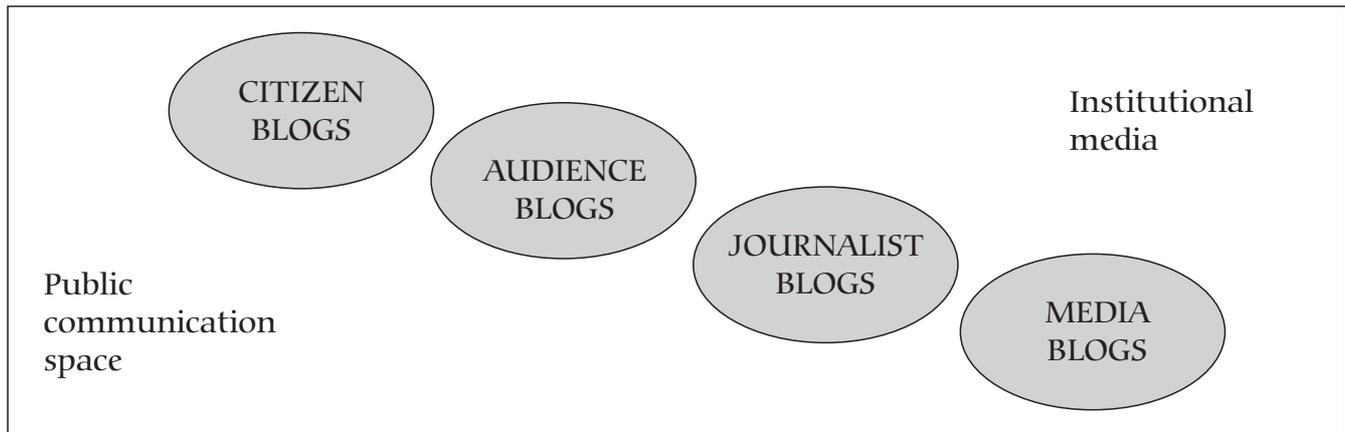
In addition to e-zines, the best known form of this type of journalism are weblogs (blogs). As noted by Domingo and Heinonen (2008), not all weblogs pretend to be journalistic or related to current events in the sense shared by institutional media. In fact, most blogs are mainly personal and revolve around the feelings and experiences of the author. Many serve the purpose of political organisation and civil involvement (see e.g. Kerbel, Bloom, 2005). Only 34% of US bloggers surveyed by PEW Internet considered their blogs a form of journalism. However, “any blogger can ‘commit journalism’ when describing or analysing an event he/she has witnessed”. In the authors’ view:

this heterogeneous group of weblogs, some made by the public, some by journalism practitioners, and some by media houses, have something in common that justifies the label “journalistic weblog”: Although they may not strictly follow traditional journalistic routines and conventions, these weblogs have a clear intention to collect, analyse, interpret or comment on current events to wide

audiences and in this way perform the very same social function usually associated with institutionalised media.

Domingo and Heinonen (2008) propose the following typology of journalistic blogs:

Figure 4: Typology of journalistic weblogs



These types of blogs are described in the following way:

1. **Citizen Blogs:** *Journalistic weblogs written by the public outside the media.* Such bloggers may adopt different roles: media commentators, specialised writers, amateur reporters. Media commentary is one of the most popular activities in the journalistic blogosphere. Such blogs, often called watchblogs, monitor the work of professional media online and offline to highlight under-covered stories, expose errors or bias in reporting, and to criticise poor arguments in editorials and columns. In some citizen weblogs, authors actually take the role of a reporter, even when the publisher him-/herself would not purposefully pretend to be substituting a journalist. In many cases, a personal weblog turns into first-hand reporting of an event that the blogger has accidentally witnessed.
2. **Audience Blogs:** *Journalistic weblogs written by the public within the media.* Media companies sometimes incorporate public weblogs into their websites as one of a range of actions to promote a more reciprocal relationship with their audiences. Depending on the case, they may be closely linked to the newsroom work, but most are just spaces for personal blogs that have nothing to do with current events and public debate.
3. **Journalist Blogs:** *Journalistic weblogs written by journalists outside media institutions.* This offers uncontrolled self-publishing space in which journalists can expand on issues and points of view that do not get into the media journalists work for. Weblogs allow complete editorial freedom and enable the journalist to adopt a much more interpretative or even opinionated position in comparison to the standards of mainstream media.
4. **Media Blogs:** *Journalistic weblogs written by journalists within media institutions.* Some media companies set up weblogs for their journalists inside their media news websites. In this case, editorial control and stylistic requirements may not be as strict as in the news, but editors usually oversee the weblog

entries as they are posted. There are three different approaches to weblog use within the media:

- i. Special events coverage. These blogs are born and die with the newsworthiness of the event. Electoral campaigns, major sports events and big impact breaking news stories are usual issues for these weblogs, but online media are starting to be active even in starting weblogs for unanticipated events such as terrorist attacks.
- ii. Opinion columns. This way, media can offer more permanent featured writers online than they can offline.
- iii. News commentary. In these blogs, correspondents or specialised journalists elaborate on the stories they produce for the main outlet, and publish notes and reflections that would not have room in the paper or the broadcast. In some cases, blog writers are hired specifically for the website.

From our point of view, types 1 and 2 represent a new form of media activity. These bloggers question the “ownership” of journalism, traditionally tied to certain organisational forms, whereby journalism is what the media publish: “Exclusive rights to both gate-keeping and dedicated working practices are being taken away from professionalists and unashamedly adopted by weblog publishers” (Domingo, Heinonen, 2008: 12-13).

There is no question that blogs can be highly popular and influential. In terms of Internet traffic figures the highest score was achieved in the United States by *HuffingtonPost.com*, a stand-alone political blogs and news site, with 4.5 million visitors in September, 2008. It was followed by *Politico.com* with 2.4 million visitors and *DrudgeReport.com* with 2.1 million. Thus, according to some view:

Blogging has certainly “arrived”. **Blogs are media.** That is the difference now. They are as relevant as the *New York Times* or the *Wall Street Journal*. The blogger with 5 000 readers may be just as credible a source of information for those 5 000 people as anyone else (*Technorati’s* chief executive Richard Jalichandra, via *VentureBeat*, cited after Leggatt, 2008).

Also Kalathil (2008: 11) regards blogging as news media: “Blogs have become much more than just personal observations. News-oriented bloggers can create their own news brand, hiring their own staff, breaking investigative stories, and pushing their own point of view”.¹² In any case, bloggers can also influence wider media networks, provide them with material, and potentially set the agenda for them (Morozov, 2008).

This is confirmed by Robert Cox, co-founder and president of the American Media Bloggers Association (MBA): “From a handful of bloggers in 2000, to tens of millions today, **bloggers have been granted full press credentials**, broken major news stories, and dethroned high-profile politicians and media figures.” In the US and elsewhere, bloggers’ right to protect their sources and not to disclose unpublished information (a privilege of professional journalists) is recognised in some cases by courts and/or legislation. For example, in November 2008, the Dutch government published a draft law on the protection of sources of journalists, bloggers and “other opinion-makers”. The California reporter’s shield protects all persons “connected with ... a newspaper, magazines, or **other periodical publication**”, without limitation. In September 2008 a court in Montana also ruled that a newspaper does not have to reveal the identity of those who posted comments on its website, meaning that anonymous web comments are protected like journalists’ sources. The judge ruled that the anonymous commenters were protected by the Montana shield law, the Media Confidentiality Act, which protects news organisations, as well as “any person connected with or employed by [a news organisation] for the purpose of gathering, writing, editing, or disseminating news”.

Assuming that what we regard as formal criteria distinguishing news media are met, what about the “soft” criteria: purpose, editorial policy and responsibility and awareness of, and at least attempted conformity with, normative, ethical, professional and legal standards?

One example in the area of citizen journalism is *AgoraVox* which admits to performing editorial functions in the full sense of the word. *AgoraVox* speaks of its “never-seen-before editorial policy and editorial committee”, describing their role thus:

Generally speaking, the objective of the *AgoraVox* **editorial policy** is to publish verifiable news related to objective events or facts, as far as possible unpublished ones. We are

indeed convinced that each Internet user is capable of identifying first unpublished information, accessible with difficulty or purposely hidden ... We are fully conscious that an initiative such as *AgoraVox*’s raises the risks of disinformation, destabilisation, manipulation or rumour propagation. For this reason, we believe it is essential to put in place a new type of **editorial committee** that can act as a ‘filter’. The submitted information is thus **moderated** to avoid any political or ideological drift. ... Each moderator has to vote individually on the articles based on their relevancy to the news and their originality.

But beyond **verifications** made by authors and watchmen, *AgoraVox* glorifies a collective intelligence process to enhance the reliability of the online information. This process is based on readers comments. As soon as a story is published, any reader can freely comment it, criticise it, complete it, enrich it or denounce it. **The author and the committee can interact with the readers to complete and improve the story** ... Sometimes the editorial committee decides to **delete** a story after comments by readers (especially in case of obvious plagiarism) (*AgoraVox*, n.d.).

AgoraVox publishes around 75% of all submitted articles. It specifies the following reasons why it may refuse publication: “copyrighted content; delivers a personal opinion while lacking documentation; not recent / does not cover news; not exclusive; describes misleading or non-checkable facts; too short; too long; unclear, imprecise; content may be libellous; features pornographic content; features commercial content; encourages hatred, racism, sexism, homophobia; already submitted item.” This is clearly a gate-keeping role.

There is also growing evidence that in some cases at least the blogging community is developing forms of training, self-regulation, editorial responsibility and accountability serving precisely this purpose. The MBA, for example, believes that blogger access to education, training, legal advisory services and liability insurance is critical to the sustainability of a strong and vibrant citizen media. Hence MBA’s efforts to provide legal protection for bloggers.¹³

Similar action has been launched by the American Electronic Frontier Foundation to help bloggers deal with legal liability issues.¹⁴

Also the ethical obligations of bloggers seem to be accepted by at least a part of the online journalism community itself, as shown by the following introduction to a model Bloggers’ Code of Ethics, developed by *Cyber-Journalist.net* (2003):

12. Kalathil (2008: 11) confirms what has been called a process of the media moving into a “post-objectivity period”: “As technology helps blur the line between straight news reporting and advocacy, there has been a shift toward more ‘opinion’-centric news media, away from more traditional norms of impartiality and objectivity.” The tendency for highly polarised views to be disseminated on the Internet (see e.g. Atton, 2006) has prompted the Dutch public service broadcaster VARA to seek to redress balance by launching a debate website intended to encourage “progressive” views.

13. The MBA has launched a scheme to give bloggers the same access to legal support as traditional media organisations. It includes BlogInsure, a form of liability insurance for bloggers, which will cover parties against defamation claims, allegations of copyright infringement and invasion of privacy “arising out of blogging activities”, MBA said in an announcement. The insurance package is available through Media/Professional Insurance and will cover cost and damages incurred from such claims.

14. The American Electronic Frontier Foundation has accordingly published a number of documents helping raise the professional and legal competence and protection of bloggers: *The Overview of Legal Liability Issues FAQ*; *The Bloggers’ FAQ on Intellectual Property*; *The Bloggers’ FAQ on Online Defamation Law*; *The Bloggers’ FAQ on Section 230 Protections* (concerning a law that gives the blogger, as a web host, protection against legal claims arising from hosting information written by third parties); *The Bloggers’ FAQ on Privacy*; *The Bloggers’ FAQ on the Reporter’s Privilege*; *The Bloggers’ FAQ on Media Access*; *The Bloggers’ FAQ on the Freedom of Information Act*. Other EFF documents dealing with legal issues for bloggers concern, among other things, the legal issues bloggers may face blogging about political campaigns; legal issues with workplace blogging, including union organising, protections for political blogging away from the workplace, and whistle blowing; finally legal issues arising from publishing risqué adult-orientated content, including obscenity law, community standards on the Internet, etc.

Some bloggers recently have been debating what, if any, ethics the weblog community should follow. Since not all bloggers are journalists and the weblog form is more casual, they argue they shouldn't be expected to follow the same ethics codes journalists are. But **responsible bloggers should recognise that they are publishing words publicly, and therefore have certain ethical obligations to their readers, the people they write about, and society in general (...)** Integrity is the cornerstone of credibility. Bloggers who adopt this code of principles and these standards of practice not only practice ethical

publishing, but convey to their readers that they can be trusted.

On this basis, we may perhaps conclude that the second element of the new notion of media is citizen journalism or user-generated content, provided it has all the features of a media organisation listed at the outset of this paper, including in particular awareness of, and willingness to abide by normative, ethical, professional and legal standards relevant in the case of media operation.

New notion of media (3): Media or media-like activities performed by non-media actors

When user-generated content is not disseminated by professional media, it is distributed by various new intermediaries (providing an example of "neo-intermediation"), i.e. Internet service providers, dedicated sites and content aggregators. They may disseminate or facilitate access to media or media-like content. They can become a vehicle for communication by users and non-professional content creators, as in the case of "citizen journalists", with professional editors and journalists performing the role of gate-keepers and guardians of professional and ethical standards.

The question here is not whether these intermediaries can themselves be classified as media (as defined above), but whether some of the functions they perform can be described as being media-like or editorial in nature. If the intermediaries did indeed perform editorial and regulatory functions vis-à-vis both suppliers and users of content, this would make them mediators and bring their operation closer to that of the media, implying a degree of editorial responsibility and accountability for the content being distributed.

On the face of it, many intermediaries perform no media or editorial functions. Therefore, Article 12 of the EU Electronic Commerce Directive refers to a "mere conduit", stating that:

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, member states shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

In turn, recital 19 of the AVMS Directive excludes from the definition of media service provider "natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties". Of course, as we have already seen, "editorial responsibility" is used here very narrowly to refer only to selection and organisation of content.

However, in many cases the intermediaries do go beyond the role of a "mere conduit" and do perform a gate-keeping role. A simple example is provided by Reuters which imposes the following "House Rules" when it encourages users of its website to post comments:

We moderate all comments and will publish everything that advances the post directly or with relevant tangential; We try not to publish comments that we think are offensive or appear to pass you off as another person, and we will be conservative if comments may be considered libellous information.

Such moderation requires **editorial judgment based on a number of criteria and may lead to rejection of a comment, depriving its author of a chance to reach an audience, and the audience of access to the contents of the comment. Even on this small scale, this is therefore highly relevant in terms of freedom of expression.**

We saw above that *AgoraVox* applies a fairly elaborate system of editorial policy and editorial process. Other UGC sites are less active and intrusive editorially. Many make it clear that they do not police content or that they do not assume editorial responsibility for the content

created. Nevertheless, some still perform certain editorial functions, as show in Table 10.

Table 10: Content and conduct provisions in terms of service of UCC sites

Content regulation and editorial responsibility	Most sites specify that users are solely responsible for the content that they publish or display on the website, or transmit to other members. The sites specify that they have no obligation to modify or remove any inappropriate member content, and no responsibility for the conduct of the member submitting any such content.
	The sites reserve the right to review and delete or remove any member content which does not correspond to defined standards.
	Some sites use age and content ratings or have areas for content which is rated mature.
Community standards	Most sites have community standards on intolerance (derogatory or demeaning language as to race, ethnicity, gender, religion, or sexual orientation), harassment, assault, the disclosure of information of third parties and other users (e.g. posting conversations), indecency, etc.
Actions to enforce standards	Sites specify penalties when users infringe community standards. They range from warnings, to suspensions, to banishment from the service. The creation of alternative accounts to circumvent these rules is being tracked.
<i>Source: Wunsch-Vincent, Vickery, 2007.</i>	

Procedures used by these sites include:

- **Pre-production moderation:** Content submitted by users is not posted until reviewed by an expert or a person controlling for exactness and quality;
- **Post-production moderation:** Content submitted by users is accessible by everybody immediately but moderation may opt to review, make changes or delete the content after it being posted;
- **Peer-based moderation:** Content submitted by users is available immediately, but can be edited, reviewed or even deleted by certain or all users of the same UCC platform. New governance schemes have also emerged which allow for rating and recommendation (i.e. social filtration and accreditation).

Also age limits and warnings can be found in terms of service of UGC sites. Most sites require users either to be 13-14 years old or 18 years. Some put the bar at 16 years. Some have special sub-sites or parts of virtual worlds which are reserved for teenagers.

One special example of self-regulation and gate-keeping is contracts – Terms of Service (TOS) and Acceptable Use Policies (AUPs) – between Internet Service Providers and users. They introduce a vast array of rules pertaining to content and expression on the Internet.¹⁵ This invests ISPs with a “regulatory” function and give ISP rules a “media law-like effect”. A comparison of US-based vs. non-US-based ISPs shows that non-US-based ISPs provide less detail in the areas of intellectual

property rights and privacy, but tend to restrict more areas of content and behaviour that are legal in the USA and to forbid anonymity. An important feature is what Braman and Roberts (2003) call **disregard for constitutional standards**:

Agreements drafted by ISPs show disregard for constitutional standards regarding restrictions on speech such as the narrow tailoring of problem-driven constraints, establishment of criteria to be met before restrictions can be deemed acceptable, and avoidance of vagueness and overbreadth. The result is creation of a **speech environment significantly more restrictive than that developed through two centuries of judicial consideration of the type of communications environment intended by the US Constitution**.

Braman and Roberts (2003) conclude that:

ISPs do not want to be content providers but do want to **control all content**. This contradiction has not yet received analysis in the courts because liability issues have been treated distinctly from intellectual property issues, but inclusion of the latter in analyses of the former should be expected in coming years. **For the moment, however, ISPs have control without liability.**¹⁶

Both self-regulation (Tambini, Leonardi, Marsden, 2008) and co-regulation (Hans Bredow Institut, EMR, 2006) help further with “codifying cyberspace” and establishing rules for expression via the new communication services.

15. Based on an analysis of such contracts used by ISPs around the world in 2002, Braman and Roberts (2003) identify a number of areas covered by these contracts (policies, service limits, identity, liability, privacy, intellectual property, behaviour, security). As far as content is concerned, contracts specify illegal contents (no unlawful content, no defamation/libel/slander, no incitement to violence, no obscenity) and other content restrictions. (On non-personal objectionable content: no inappropriate content; use filters; no indecency/pornography; no material violating Internet norms; no objectionable content; no posting off-topic (newsgroups); no profanity; On personal abuse: no harmful content; no abuse of others; no contesting crimes against humanity; no hate speech; no flaming (newsgroups); no threat to person/property).

16. Frydman and Rorive (2002) explain that in some cases transatlantic ISPs have been put under pressure to take down racist material because of the enforcement by European courts of domestic law online. This, they say, may potentially lead to massive (and, let us add, uncontrolled) private censorship.

As shown on the example of ISPs, but also on the example of other intermediaries, this is not without dangers to freedom of expression. Rorive (2004) has drawn attention to the problem of “hidden censorship” by Internet search engines, and pointed to the possibility of “private censorship”:

This system of conditional exemption of liability constitutes a considerable economic incentive for **private censorship**. In practice, it is in the interest of a hosting provider who has been notified of the presence of illegal content to **remove this content from its server, whether the content is ultimately illegal or not**.

Also Tambini, Leonardi, Marsden (2008: 282) point out that systems of self-regulation and self-regulatory bodies may impose limits upon freedom of expression and that this may amount to the “**privatisation of censorship**”, **potentially involving “a clash between freedom-of-expression rights such as they are laid out in Article 10 of the ECHR, and the limitations on speech imposed by self-regulatory bodies”**.

All this suggests that some of the intermediaries certainly may and do perform editorial functions, as one

aspect of their activities, **potentially with serious consequences for the content of communication and the exercise of freedom of expression**, not least because of the lack of legal certainty caused by their manner of their operation.

On this basis, we may perhaps conclude that the third element of the new notion of media is the activity of the new intermediaries providing access to content, and by the same token access by content providers to the public. In many cases, they perform an editorial gate-keeping function, imposing rules, standards and constraints on what may be said and who may have access to particular content – usually to protect minors and human dignity and to prevent dissemination of illegal or harmful content (O’Connell, 2005). This does not turn the intermediaries into media organisations, but does allow them to perform certain media functions. Recognition of this fact may aid efforts to promote rule of law in the new communication services and exercise of human rights, as well as to eliminate violations of human rights in this domain.

Part II: Emergence of a new regulatory framework for the new media

In general terms, different types of control and supervision are exercised over the media: of content for political reasons; of content for cultural and/or moral reasons; of infrastructures for technical reasons or for economic reasons. Features of the media, and media content, that may be used to justify imposing controls include: more political influence or politically subversive potential;¹⁷ more moral, cultural and emotional impact; more feasibility of applying control; more economic incentive to regulate.

As noted above, the political and legal reaction to new media goes through a cycle:

- (1) at first, there is no reaction;
- (2) then there is an attempt to assimilate the new medium under a legal framework developed for older media;
- (3) this is followed by debates on, and development of, a new legal framework, suited to the new medium;
- (4) and finally by the enactment of the new framework.

As we will see below, we are past stages 1 and 2 in developing the legal reaction to the new media and in the middle of stages 3 and 4.

Elements of the debate

An example of debates regarding a legal framework for a new medium is provided by the European Parliament's concerns regarding the legal status of blogs. A European Parliament resolution on concentration and pluralism in the media in the European Union (2007/2253(INI)), adopted on 25 September 2008, states in the preamble:

Whereas **weblogs** are an increasingly common medium for self-expression by media professionals as well as private persons, the status of their authors and publishers, including their legal status, is neither determined nor made clear to the readers of the weblogs, causing **uncertainties regarding impartiality, reliability, source protection, applicability of ethical codes and the assignment of liability in the event of lawsuits**.¹⁸

The resolution calls for "an open discussion on all issues relating to the status of weblogs".¹⁹ The MEPs

believe that the growth of commercial media outlets for user-generated content, such as photos and videos, used without paying a fee, raises problems of ethics, right of reply and privacy, and puts journalists and other media professionals under pressure. German Liberal Jorgo Chatzimarkakis, who acted as advisor for the European Parliament's Economic and Monetary Committee, as it discussed the report and the resolution, said: "Imagine pressure groups, professional interests or any other groups using blogs to pass on their message. Blogs are powerful tools, they can represent an advanced form of lobbying, which in turn can be seen as a threat." At issue, in particular, are "any blogger[s] representing or expressing more than their personal view".

As regards online content, we are also seeing that the debate – so far very often proceeding from the view that Internet content should not be regulated in any way – is

17. For example, the last sentence of para. 1 of Article 10 ECHR "This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises" may perhaps be an indication that "cinema enterprises" were seen at the time when the Convention was being adopted as central to politics, and therefore requiring control by state. If so, then "cinema enterprises" have certainly since then been redefined from this point of view as they are not licensed today in democratic societies.

18. It is interesting to note in this context that a recent *Guardian* poll showed that 46% of Web users in the United Kingdom think a code of conduct should be created to regulate user-generated content on the Internet. The code of conduct, many believe, would prevent users from committing libel, despite being unenforceable through the law. That is an expression of concern with the fact that such content is unregulated and may elude any forms of accountability.

19. Estonian centre-left MEP Marianne Mikko – the report's author – had originally wanted to call for full clarification of the legal status of weblog authors, disclosure of bloggers' interests and the voluntary labelling of blogs. This was supported by MEPs across the political spectrum at the committee level, but was ultimately rejected – in favour of much softer language – in the plenary.

taking a different turn, not least because it is becoming increasingly obvious that the Internet is successively being taken over and controlled by the traditional forces seeking to control the media, i.e. social, political and business interests. Commercial entities, including media companies, have come to play an increasing role in supporting, searching, aggregating, filtering, hosting, and diffusing UGC. This process is known as “monetisation of user-created content” (Wunsch-Vincent, Vickery, 2007: 23). The Internet is becoming increasingly commercialised, as shown by ubiquitous online advertising and other visual reminders of the profits being made in cyberspace. Big business is taking over sites hosting UGC that used to be regarded as an area of free expression, long essentially non-commercial ventures of enthusiasts or start-ups with little or no revenues (see Table 2 in Appendix 1, p. 39).²⁰ This process is perhaps best symbolised by the fortunes of Napster, once a free online music file sharing service, helping users bypass the established market for such songs, in violation of copyright. It was shut down by court order, reopened as a copyright-respecting commercial pay service and purchased in September 2008 by Best Buy, the largest specialty retailer of consumer electronics in the United States and Canada.

A very pertinent point as concerns Internet content has been made by Tambini, Leonardi and Marsden (2008: 294):

[T]he idea of a pristine Internet, free from regulation, is a myth, and not a particularly helpful one. Internet communication, like all communication, is a social practice that comes with responsibilities, ethics, norms, disputes and harms ... As the Internet embeds itself further into everyday life, so too will concerns about content and its consequences, and we contend that in Europe, and even in

the United States, the illusion that the Internet can constitute a “free” sphere separate from social life will fade...²¹ [D]iscussions of regulation need to take on the positive question of what form of policy intervention may be acceptable – even required – **if the medium of the Internet is to be more fully free.** In our approach to the Internet we need to have a sense that **norms, rules and codes are necessary in all human communication.**

The point that regulation may make the Internet “more fully free” is well taken, as regulation often serves protection of freedom of expression, rather than imposes restrictions on that freedom. So is that regarding the appropriate and acceptable forms of policy intervention.

The initial approach of many governments and parliaments to the regulation of the Internet and other new media, and its evolution, has been well summed up by Lord Currie, Chairman of OFCOM:

It is an entertaining parlour game to guess how many mentions of the Internet there are in the [2003] Communications Act. Answer: zero. But Parliament thought seriously about the issue in the debates leading up to the Act. Its view – I believe the correct one – was that the Internet was still so new and its implications so uncertain that a period of legislative forbearance was called for. **Ask most legislators today and, where they think about it, they will say that period is coming to an end ...** Public policy development on potentially harmful Internet content has got off to a good start. The danger of importing old broadcasting style regulation to the Internet has been avoided...²² Ofcom with other bodies and the industry need to develop, and spread awareness of the practical actions, and the tools and technologies – from the use of filtering and kite-marks, to parent’s enforcement of simple rules about Internet use – that allow people to navigate the online world and for parents to ensure their children’s safety. (Currie, 2008)

Self-regulation of new media content

Of course, different industry groups active in electronic media beyond broadcasting already engage in various forms of self-regulation, as shown in Table 11.

Table 11: Scope and forms of self-regulation according to industry groups

Industry group	Scope and form of the institutionalisation of self-regulation	Practical examples
Cinema/Film/ DVD/Video	Few classification organisations which are not governed by the state	Belgian Video Federation [BEL] Video Standards Council [UK]

Adapted from Latzer, 2007.

20. According to some views, this is a process of “corporate colonisation of online attention and the marginalisation of critical communication”: large corporate portals and commercial media sites are dominating online attention for news, information, and interaction, privileging consumer content and practices while marginalising many voices and critical forms of participation. This situation threatens to limit the Internet’s contribution to the expansion of democratic culture (Dahlberg, 2005).

21. Exactly the same point has been made by the European Internet Co-regulation Network (2005), broadly representing the industry itself, in a policy statement on Internet governance submitted to Commissioner Reding: “Internet is a social space which needs regulation in all its aspects according to common social values. Internet cannot evolve in the future if the social dimension of this space is not recognised. Most of the human activities are now transferred on the Internet and it implies new responsibilities for all the actors, public and private.” Also Frydman and Rorive (2002) agree that “the heroic idea that cyberspace should remain free from any regulation cannot be seriously sustained”.

22. Nevertheless, British Secretary of State for Culture, Media and Sport, Andy Burnham, said in September 2008: “The time has come for perhaps a different approach to the Internet. **I want to even up that see-saw, even up the regulation [imbalance] between the old and the new.**” He said that perhaps the wider industry, and government, had accepted the idea that the Internet was “beyond legal reach” and was a “space where governments can’t go”. Burnham said that he would like to “tighten up” online content and services. When a new Minister for Communications, Technology and Broadcasting was appointed in the UK in October 2008, he listed the following among his priorities: “Internet: looking at a range of issues affecting Internet users, such as user security and safety and a workable approach to promoting content standards.”

Table 11: Scope and forms of self-regulation according to industry groups

Industry group	Scope and form of the institutionalisation of self- regulation	Practical examples
Games	Some classification organisations which are not governed by the state	ISFE-PEGI [international]
Online services/ Internet Service Providers, ISPs	Many ISP codes of conduct Many hotlines / NTD systems	ISPAI [IRL] Meldpunt Kinderporno op Internet [NL]
Online services/ Internet Content Providers, ICPs	Sectoral codes of conduct Rating/filter systems	Health on the Net Code [international] ICRA [international]
Mobile communications	Few classification organisations which are not governed by the state	ICSTIS-IMCB [UK]*
Internet search services	One code of conduct	Selbstkontrolle Suchmaschinen (Self-regulation of search engines) [D]

Adapted from Latzer, 2007.

As concerns specifically the Internet, the operation in Europe of organisations such as EuroISPA, INHOPE, INCORE and ICRA testifies to the development of self-regulatory schemes in this area. Table 12 illustrates self-regulatory activities at various stages of the value chain, with the upper row displaying technical measures embedded in the software code and the lower row – codes of conduct adopted by market players.

Table 12: Self-regulation and codes in the Internet value chain

	Content provider	ISP	ISP-user	Search	Access	User
Code	Self-labelling of content (RSACi, PICS, ICRA) Trustmarks	ISP filtering (e.g. BT Clean-Feed/Telnor)	Reputational systems	Search level filtering	Login/access restrictions/reputation management	Browser-level filtering, age verification
Code of conduct	Content standards codes; Privacy codes; Government website guidelines; E-commerce codes	ISP code of conduct (ISPA, EuroISPA code of conduct) privacy codes Hotlines NTD codes	Terms of service	Search engine code of conduct German FSM	Computer misuse codes	Awareness/literacy

Source: Tambini, Leonardi, Marsden, 2008.

In this context, we should also note a new form of self-regulation, the Global Network Initiative (www.globalnetworkinitiative.org) launched in October 2008, founded on the internationally recognised laws and standards for human rights on freedom of expression and privacy set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Its founders include, in addition to human rights organisations, academics and the United Nations Special Representative to the Secretary-General on Business & Human Rights (as an observer), a number of leading players in the field, such as Google Inc., the International Business Leaders Forum; Microsoft Corporation and Yahoo! Inc.

The Initiative provides guidance to the ICT industry and its stakeholders on how to protect and advance the human rights of freedom of expression and privacy

when faced with pressures from governments to take actions that infringe upon these rights. It also seeks to promote the rule of law and the adoption of laws, policies and practices that protect and respect freedom of expression and privacy through collaboration among companies, NGOs, investors and academics. To this end, it adopted *Principles on Freedom of Expression and Privacy* and has developed *Implementation Guidelines*, providing also a framework for collaboration among companies, NGOs, investors and academics. The guidelines are to be regularly reviewed and revised to take into account actual experience, evolving circumstances and stakeholder feedback.

Self-regulation and co-regulation of new media content is encouraged, for example, by the 2006 *Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and on the Right of Reply in Relation to the Competitiveness of the European*

Audiovisual and OnLine Information Services Industry, calling on member states to take the necessary measures to, among other things, ensure the protection of minors and human dignity in all audiovisual and online information services and make the Internet a much more secure medium. In October 2008 the European Parliament approved the European Commission's proposal for

a multi-annual Community programme on protecting children using the Internet and other communication technologies (extending "Safer Internet" for 2009 to 2013), aiming to improve safety for children surfing the Internet (specifically targeting cyber-bullying and child pornography), promote public awareness and create national centres for reporting illegal online content.

Statutory regulation or co-regulation of Internet and other new media content

There is a growing body of binding legislation, or plans to introduce such legislation, at the national and international level concerning forms of regulation and supervision of Internet and other new media content. Obviously, civil and criminal codes are applied to Internet and new media content (see Frydman and Rorive, 2002), but some other examples are:

1. Council of Europe Cybercrime Convention and Additional Protocol;
2. Extension of the scope of broadcasting legislation to online audiovisual media services;
3. "War on terror", security;
4. Intellectual property, copyright, piracy, illegal file-sharing;
5. Consumer protection;
6. Protection of minors and human dignity.

A special case in this regard is a bill (*Global Online Freedom Act of 2007*) submitted to the US House of Representatives, obliging the United States "to promote as a fundamental component of United States foreign policy the right of everyone to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers" and "to use all appropriate instruments of United States influence, including diplomacy, trade policy, and export controls, to support, promote, and strengthen principles, practices, and values that promote the free flow of information, including through the Internet and other electronic media".

Under this law, the freedom of electronic information in each foreign country would become a criterion to be taken into consideration in economic co-operation and security assistance, an Office of Global Internet Freedom would be established, and Internet-restricting countries would be designated by the US President each year and would be subject to a number of restrictions.

This has met with mixed reaction both in the United States itself, and in Europe, where Commissioner Viviane Reding (2009a) has called for self- and co-regulatory measures (like the Global Network Initiative) as a better way of dealing with the challenge than a "hard law" solution.

At the national level, a special example of action on some of these fronts is plans by the Japanese government to develop legislation in three major areas of online communication: web content, mobile phone access, and file sharing (Shioyama, 2007).

The planned regulation targets **all web content**, including online variants of traditional media such as newspaper articles and television broadcasting, while

additionally going as far as to cover user-generated content such as blogs and webpages under the vaguely defined category of "open communication".

As far as web content is concerned, a point of departure in these plans is the blurring line between "information transmission" and "broadcasting", a distinction that becomes less and less meaningful as content-transfer shifts from the realm of traditional media to that of ubiquitous digital communication (so-called "all over IP"). **All online content, with the exception only of private messages between specific persons (i.e. e-mail, etc.), is to be targeted under the proposed policy, including bulletin board systems, personal blogs and webpages.**

Online content judged to be "harmful" according to standards set down by an independent body will be subject to law-enforced removal and/or correction.

As for mobile phone access, the Japanese government has already demanded that mobile carriers NTT Docomo, KDDI, Softbank, and Willcom implement filtering on all mobile phones issued to users under the age of 18. The proposed regulation would heavily strengthen earlier policy by making filtering on mobile phones the default setting for minors; only in the case of an explicit request by the user's parent or guardian could such filtering be turned off by the carrier.

According to the new policy proposal, sites would be categorised on two lists, a "blacklist" of sites that would be blocked from mobile access by minors and a "whitelist" of sites that would not. The categorisation of sites into each list will reportedly be carried out together with carriers through investigations involving each company targeted. The definition of "harmful" content is likely to be very broad indeed. Current optional filtering services offered on NTT Docomo phones include categories as sweeping as "lifestyles" (gay, lesbian, etc.), "religion", and "political activity/party", as well as a category termed "communication" covering web forums, chat rooms, bulletin boards, and social networking services.

Finally, as concerns file sharing, the existing law currently bans uploading of copyrighted material onto public websites, while permitting copies for personal use only. The new law would ban "illegal" file sharing.

We could also mention the Australian example, where first the broadcasting regulator (Australian Broadcasting Authority) and then the integrated regulator (Australian Communications and Media Authority - ACMA) have been mandated by broadcasting legislation to administer the national regulatory scheme for online content in order to address community concerns about

offensive and illegal material on the Internet and mobile phones. ACMA investigates complaints about online content and Internet gambling services; encourages the development and registration of codes of practice (Internet Industries Codes of Practice developed under its supervision cover areas such as Internet content, spam, gambling, privacy and cybercrime); and undertakes a range of supporting activities including research and international liaison. If the content is hosted in, or provided from, Australia and is prohibited, or is likely to be prohibited, ACMA will direct the content service provider to remove or prevent access to the content on their service. If the content is not hosted in, or provided from, Australia and is prohibited, or is likely to be prohibited, ACMA will notify the content to the suppliers of approved filters in accordance with the Internet Industry Association's Code of Practice. If the content is also sufficiently serious (for example, illegal material such as child pornography), ACMA may refer the material to the appropriate law enforcement agency.

Extension of the scope of broadcasting legislation to online audiovisual media services is taking place following the adoption of the EU's *Audiovisual Media Services Directive* and its transposition into domestic law in member states. In consequence, broadcasting regulation will be applied *inter alia* to IP services via broadband connections on ADSL or Internet; mobile phone Internet

Protocol streaming; digital broadcasting to mobile phones, IPTV, pay-per-view (linear service); video-on-demand (non-linear service).

Linear television services available via mobile television are licensed by broadcasting regulators in many countries (Broadcast Mobile Convergence Forum, 2008).

As for protection of minors and human dignity, the *Protect Our Children Act*, adopted in the United States in 2008, creates a strong nationwide network of highly trained law enforcement experts to track down offenders and requires the Department of Justice to develop and implement a National Strategy for Child Exploitation Prevention and Interdiction. The Act authorises \$320.5 million over the next five years for:

- (i) The National Strategy for Child Exploitation Prevention and Interdiction;
- (ii) An ICAC Grant Program, ensuring that local agencies have the additional resources necessary to create robust cyber units with highly trained investigators;
- (iii) Increased Forensic Capacity for child exploitation cases at the Regional Computer Forensic Labs (RCFL); and
- (iv) Enhanced Reporting Requirements, increasing the legal responsibilities of Internet Service Providers to report any evidence of child exploitation discovered on their network to the National Center for Missing and Exploited Children.

Developing and democratising co-regulation

According to Palzer (2002), "co-regulation" is normally used as a generic term for co-operative forms of regulation that are designed to achieve public authority objectives. It contains elements of self-regulation as well as of traditional public authority regulation. The co-regulation model is based on a self-regulation framework (in its broadest sense), which is anchored in public authority regulations in one of two ways:

1. the public authority either lays down a legal basis for the self-regulation framework so that it can begin to function,
2. or integrates an existing self-regulation system into a public authority framework.

In line with this, Mandelkern Group on Better Regulation (2001: 17) lists two forms of co-regulation:

- **Setting of objectives by the regulatory authority and the delegation of the details of implementation.** An initial approach involves establishing, by regulation, global objectives, the main implementation mechanisms and methods for monitoring the application of a public policy. At the same time, the intervention of private players is requested in order to define the detailed rules. This method means that regulations can be avoided which are too general or which are too unwieldy to be applied precisely in fields which require adaptability and flexibility.
- **Regulatory validation of rules stemming from self-regulation.** A bottom-to-top approach may also prove effective. If necessary, co-regulation may lead to a non-compulsory application method established by private partners being changed into a man-

datory rule by the public authority. Similarly, the public authority may penalise companies' failure to honour their commitments without giving any regulatory force to those commitments.

These two basic types of co-regulation may take many forms, including:

- **subcontracting:** where the state limits its involvement to setting formal conditions for rule-making, leaving it up to parties to shape the content;
- **concerted action:** where the state not only sets the formal, but also the substantive conditions for rule-making by one or more parties;
- **incorporation:** where existing but non-official norms become part of the legislative order by insertion into statutes (PCMLP, 2004: 11).

Thus, there are different combinations of public authority and private sector elements, as well as of the degree of trust between them. There is scope for developing and democratising this relationship, primarily by promoting a third form of co-regulation, in addition to the ones listed at the outset of this section:

3. joint development of the normative and regulatory framework.

Regulation involves rule-making, implementation and enforcement. The key to understanding co-regulation and measuring the extent of co-operation and trust between state and non-state partners lies in the degree of involvement of both partners in all elements of the process. We could therefore distinguish three basic forms of co-regulation:

- **Top-down (or state-led) co-regulation:** whereby rule-making is done by state authorities and non-state partners are invited to be involved in the process of implementation and enforcement;
- **Bottom-up (or non-state-led) full co-regulation:** whereby rule-making developed by non-state partners (potentially within a general formal framework defined by the state) is then validated and adopted by the state;
- **Mixed full co-regulation:** assigning the two sides **leading and supplementary roles** in rule-making, e.g. with the state providing the general legislative framework and non-state actors are invited to fill in more detailed rules.

Naturally, all the above cases may apply also in co-regulatory co-operation between an international organisation and non-state actors.

In reality, we usually have to do with top-down co-regulation. Thus, according to the Hans Bredow Institut/EMR (2006: 35) study, co-regulation means “combining non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation”.

A detailed list of conditions which must be met if state/non-state co-operation is to be regarded as a true case of co-regulation has been formulated in the Hans Bredow Institut/EMR (2006: 35) study. According to this, the non-state component must fulfil the following conditions:

- It must involve specific organisations, rules or processes;
- These must be created for the purpose of to influencing decisions by persons or, in the case of organisations, decisions by or within such entities;
- This activity must be performed – at least partly – by or within the organisations or parts of society whose members are addressees of the (non-state) regulation;
- The entire system must be established to achieve public policy goals targeted at social processes;
- There must be a legal connection between the non-state regulatory system and the state regulation (however, the use of non-state regulation need not necessarily be mentioned in acts of parliament);
- The state must leave discretionary power to a non-state regulatory system;
- The state must use regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals).

The fact that “a non-state regulatory system **links up** with state regulation” is explained to mean that “there is a **legal connection** between the non-state regulatory system and the state regulation” and that “the state must use regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals)”. What this means in this system is that non-state partners are trusted to perform only some elements of the process of regulation,

largely implementation and enforcement, with the national or international regulatory system always retaining backstop powers to intervene, if this is deemed necessary. As a result, co-regulatory schemes apply in a narrow range of cases, mostly to do with protection of minors and advertising regulation (Jakubowicz, 2007).

An alternative view of co-regulation has been presented by Jean-Pierre Teyssier (2007), chairman of the European Advertising Standards Alliance), who rejected the definition of co-regulation in the EU *Interinstitutional Agreement* of 2003, as a “mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties”, and supported the definition of the draft AMS directive: “a form of regulation based on co-operation between public authorities and self-regulating bodies.” That definition did not, however, make its way to the final text of the directive. Teyssier also called for the autonomy and responsibility of self-regulatory systems and bodies and finally for openness to civil society, stakeholders and consumer organisations.

A truly multi-stakeholder – and indeed a more democratic – approach would seem to require more than an asymmetrical approach and one-sided rule-making. In some cases, it will not be possible to ensure a “legal link” between the official and industry-based regulatory system, nor will the national or international regulatory or standard-setting system be able always to have backstop powers, allowing it to take over, should self-regulation or co-regulation fail. Full co-regulatory co-operation and partnership should be pursued. Further Council of Europe efforts to develop appropriate standards of effective self- and co-regulation are needed (see Appendix 3, p. 43).

An imperfect example of this approach could be provided by the *European Framework for Safer Mobile Use by Younger Teenagers and Children*, described as “brokered by the European Commission”, with mobile operators committing themselves to access control mechanisms, to raise awareness and education to the classification of commercial content and to fighting illegal content on mobile community products or on the Internet. Another example is the Social Networking Task Force, convened by the European Commission in 2008, which in February 2009 issued *Safer Social Networking Principles for the EU*. The Commission acted as a facilitator, held a public consultation and will monitor further progress in this field.

Both documents are an act of self-regulation, inspired and promoted by an international organisation. They could thus be recognised as an act of co-operation between an official body and the industry. What appears to be lacking is integration of this self-regulation system into a public authority framework, i.e. formal adoption of these norms and standards by the European Union itself, as only this would make it a case of true full co-regulation.

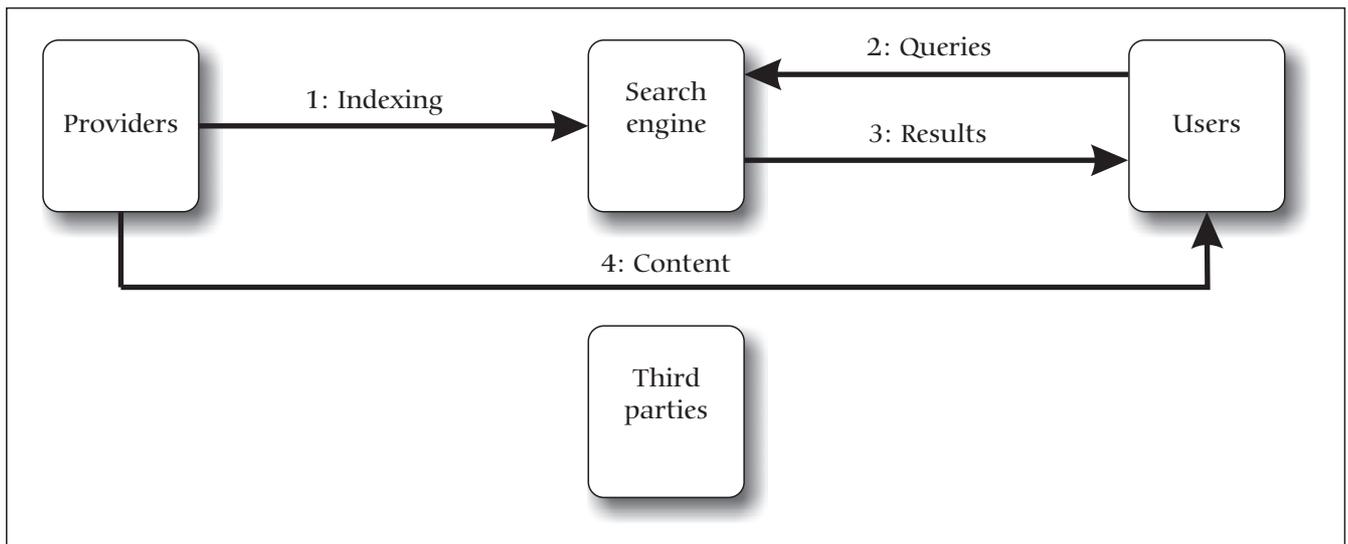
Information Services with “no place in [media] law”

Given the importance of the new intermediaries in the dissemination of, and access to, content and information, the role of search engines also merits consideration.

Search engine operations can be understood in terms of the **information flows** among four principal actors: search engines themselves, their users, information providers, and third parties (such as copyright holders and censorious governments) with interests in particular

content flows. There are, in turn, **four significant information flows**: the indexing by which a search engine learns what content providers are making available, user queries to the search engine for information about particular topics, the results returned by the search engine to users, and finally, the content that providers send to users who have found them through searching (Grimmelmann, 2006).

Figure 5: The operation of a search engine



As Machill, Beiler and Zenker (2008) put it, search engines assume a **selection** and **mediation** function at the interface between public and individual communication. Their ability to reduce the complexity of the web and extend the horizon of the purely human search in many cases enables certain information to be accessed at all. They therefore perform a function similar to that of the **classical gate-keepers**.

The authors explain that search engines are not machines in the traditional sense. They can be described as software which produces an index of defined data that is accessible using retrieval methods and utilises a particular presentation mode to display the search results. The contents are stored in compressed form in an index from which the search engines produce a ranked list of search results in response to a user's search query. **The relevance criteria represent corporate secrets kept by the search-engine companies.**

Van Eijk (2006) believes that the search engine is mainly **an information service**. He lists three forms of **manipulation of search results**: the search engines themselves (their algorithms; deliberate omission of some information; or manual adjustment of information by employees, based on more detailed criteria); information providers, seeking to achieve higher ranking for their webpages; finally hackers.

Trying to make search engines provide only “objective” search results is not realistic, says van Eijk, given that the operating model of search engines is determined precisely by manipulation. Excesses of this market fail-

ure should nevertheless be examined more closely and be considered for regulation.

According to Schultz (2008), risks posed by Internet search engines include: access to harmful and/or illegal content; discrimination of content; misleading consumers; influence on opinion makers. There is also the danger of exploitation of protected works and of personal data. Other risks mentioned by Schultz are more systemic: fragmentation of the public sphere, distortion of competition, including transfer of market power to other markets (e.g. advertising).

Accordingly, Grimmelmann (2006) notes that in addition to enormous benefits that the use of search engines can bring, they can “also cause enormous harms to particular parties”. By controlling the matching process between users and content providers, they create winners and losers within these communities. Both users and providers entrust search engines with valuable information and may be upset at the terms on which search engines reveal that information. Third parties who would prefer that certain content not flow from providers to users are also injured when search engines enable such flows.

The harm may be in terms of the privacy of users or the interests of copyright-holders to content accessed via the search engine. From our point of view, the key issue is access to, and quality of, information retrieved with the use of the search engine, which should provide what is sometimes called “unbiased results” of search engine use.

All this has considerable implications for the media and **the right of access to information**.

Search engines are universally used by journalists as a preliminary research instrument, though classical journalistic research methods have not declined in importance to the extent feared by critics. The Internet appears to supplement rather than displace other research sources.

Nevertheless, a number of risks are attached to such use of search engines by journalists, as Machill, Beiler and Zenker (2008) point out, especially that of **reality being distorted**: because of the quality of information available on the Internet, or because of the highly selective nature of the ranking and updating algorithms the search engines employ. Then, there is the risk of dependence on a single search engine: the **“Google-isation of research”**. Given also that basically only already-published information is adopted, an entirely new dimension of journalistic self-referentiality may result.

However, as already mentioned, search engines not only impact on journalism indirectly as a research instrument, but also assume journalistic functions themselves, as shown by Google News and the MSN Newsbot. These are automated news portals which automatically assign reports found on the Internet to topics and arrange them on a page which bears a strong similarity to an online journalistic offering. With these offerings, search engines venture into an area previously the preserve of traditional journalism.

The selection of sources is one of the most critical aspects of the news search, since it determines the offerings from which news is conveyed. In the case of Google News, for example, this is entirely up to the providers and is a non-transparent process.²³ When selecting sources, the search-engine operators must also decide whether non-traditional offers, such as weblogs, are to be included. The inclusion of press releases is problematic because the dividing line between editorial contents and PR is blurred. Google News has encountered criticism for precisely this reason. The concentration of the news on only a few sources is also a problem associated with news search engines. For example, a 2005 study involving the Altavista news and Paperball showed that 75% of the news originated from only 10 different offerings. The same applied to 38% of the items featuring in Google News. A further unanswered question is the degree of similarity between the selection and ranking processes performed by news search engines in comparison with editorial journalistic offerings.

Even more serious risks are involved in situations when a search engine might consciously bias its results by favouring one provider or viewpoint over another. In China, major search engines remove from their indices content disfavoured by the government, such as infor-

mation on the banned Falun Gong movement. Google has been accused of bias towards the other in its advertising policies. The concern is commercial as well as political: some have claimed that search engines systematically favour their own advertisers or providers corporately affiliated with them.

Technical design features of search engines can also introduce unconscious structural biases in their coverage and ranking of content. Studies of relative traffic and links to websites have also caused some to discern a “Googlearchy”, in which the most popular content receives more attention from users and therefore becomes even more popular, effectively preventing new providers from entering because they can never hope to catch up with established content in this vicious circle.

Those who are concerned about systematic biases have also proposed various forms of forced ranking or inclusions. One proposal would have search engines be required randomly to intermix new content that has not yet had the time to establish itself with older and already popular content. Others would require search engines to show users more diverse content to break down their biases towards the familiar and towards their own viewpoint. There is a strong counter-argument, however, that regulators would be grossly incompetent (and even more biased) at the task of dictating search results in general, a claim that would place a significant upper limit on the ambition of any anti-bias proposal.

Nevertheless, there is a clear need for a media-policy debate on the subject of search engines. On the one hand, this is because of the high degree of concentration in the search-engine market. The three US search-engine operators Google, Yahoo and MSN enjoy a **global oligopoly**. This is associated with considerable market power and the potential risk of abuse. The concentration in the search-engine market is in fact even more serious since numerous takeovers have occurred in recent years and the search engines are additionally linked with each other via supply contracts.

This market power results in considerable social responsibility on the part of the search-engine operators which – according to Machill, Beiler and Zenker (2008) – **cannot be left to the free play of market forces**. To date, however, the concentration of the search engines has not been regulated either in their home market or in Europe, in spite of the fact that, in the case of other electronic media, **an overall concentration to the aforementioned extent and a market dominance such as that enjoyed by Google would not be permissible in the US or in Europe**. There are no rules for the search-engine market that would correspond to limits on media concentrations in force in various countries. Thought must therefore be given to extending the system of con-

23. Nevertheless, as noted by Dahlberg (2005: 165–166): “the selection and ranking of news stories for any particular event biases the big media. The 4 500 sources, though numerous, are dominated by the so-called authoritative Western, commercial media. Most independent online media channels and weblogs are not included. Furthermore, although the details of the algorithm are corporate secrets, a number of the main (relevancy) criteria for the selection and ranking of stories are well known. Three of the criteria are the credibility of the source, how recently stories are published on the Web, and how widely linked and reproduced stories are. These criteria again privilege the big, corporate media, which enjoy their codification as so-called quality and thus trusted news, have the resources to continually update their reports, and are extensively referred to online, given (and subsequently reinforcing) their trusted news status. So whereas a few non-Western media sources and a few noncommercial news sites are included, it is the dominant commercial media reports that are constantly ranked highest.”

trol of market power and the ability to influence opinion to cover the area relating to search engines. Machill, Beiler and Zenker (2008) point out that measures might include installing advisory councils comprising socially relevant groups that are, for example, entrusted with the task of ensuring that discrimination against content providers in terms of their access to the search engine does not occur. Flanking measures would also include a duty on the part of search engines to publicly justify their corporate and journalistic activity in regular reports.

Secondly, the need for a media-policy debate on search engines results from content-related problems. In addition to that, legislation and the activity of the regulatory authorities are concerned with aspects relating to the protection of minors, the liability of search engines in the case of copyright violations, and consumer protection.

Some approaches concerning content-related aspects do already exist. However, given that, as part of the Internet, search engines operate globally, their legal obligations are difficult to enforce in countries where they do not maintain any infrastructure. Hence the importance of self- and co-regulation. A co-regulatory model has developed in Germany, as shown in Tables 11 and 12.²⁴ Media regulation of search engines must also concern itself with copyright-related aspects.

Nevertheless, regulatory structures for search engines have so far only developed in connection with individual aspects and only at national level.

According to Grimmelmann (2006), in order to achieve both the provision, and the use, of “neutral” search engines, some form of governmental intervention – to be derived from a duty of care as yet to be fleshed out within the framework of the information society – will be unavoidable. This could lead to the support of initiatives that aim to provide independent search engines. In view of the fact that these forms of government intervention would be within the domain of information law and concern freedom of expression, caution is advised in outlining possible government policies.

The problem, however, is that – as van Eijk (2006) points out – it is difficult to place search engines squarely in the Article 10 framework, given their dual, telecom and information-related nature: “the search engine ... concerns issues that are considered to fall within telecommunications law and partly – if not very much so – issues to do with content”, so it operates in a “a legal vacuum ... [and] does not have a place in [media] law” (van Eijk, 2006: 7). This is confirmed by Valcke (2008) on the basis of her examination of the EU regulatory framework, including the Audiovisual Media Services Directive. As noted by van Hoboken (2008), the matter should perhaps be approached primarily in terms of Article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, which contain an explicit reference to the “right to seek information and ideas” (whereas the European Convention on Human Rights does not refer to such a right directly).

24. After the entry into force of the *State Treaty on the Protection of Minors from Harmful Media Contents* in 2003, a law which also provided for systems of voluntary self-control in the case of the Internet, the most important search-engine operators with German offerings (e.g. Google, Yahoo, MSN and Lycos) agreed to self-control within the umbrella association for the “voluntary self-control of multimedia service providers” (FSM). In December 2004 they agreed on a code of conduct which regulates Internet pages that are harmful to minors or clearly illegal in Germany, such as, for example, those that incite hatred and violence against segments of the population, deny the reality of Auschwitz or contain child pornography. Measures include the exclusion of the relevant pages or the employment of family filters. The FSM complaint centre must be contacted in the case of complaint. Sanctions are available, depending on the seriousness of the violation. In addition, the search-engine operators have committed themselves to labelling commercial search results in an appropriate manner and to exercising restraint in the recording and utilisation of user data.

Part III. Council of Europe standards and the new media: Possible lines of action

Article 10 of ECHR guarantees freedom of expression and information, but also states in paragraph 2 that the exercise of these freedoms carries with it duties and responsibilities and may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. A number of reasons are given for subordinating the mass media to forms of control: pervasiveness, invasiveness, publicness and influence of mass communications (Verhulst, 2002); or special impact on the formation of opinion; spread (multiplication) effect; suggestive power; immediacy (Grünwald, 2003). These may not apply fully to new communication services, so the rationale for legitimate public policy intervention into these services, where appropriate and needed, must be developed.

The Council of Europe is a standard-setting organisation. As has already been stated, the Committee of Ministers has in recent years been revising and updating its standard-setting documents which originally applied to “traditional” mass media alone. In *Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society (CM (2005) 56 final)*, the Council of Europe undertook to take a number of steps to continue this work. The results up till now are presented in Appendix 2.

Though the record so far is encouraging and valuable, more remains to be done. Naturally, the point of departure in considering standards regarding freedom of expression and information in new communication services must be the 2003 *Declaration of the Committee of Ministers on freedom of communication on the Internet*, which called for reaffirming the principle of the freedom of expression and the free circulation of information on the Internet, while at the same time pointing to the need to balance freedom of expression and information with other legitimate rights and interests, in accordance with

Article 10, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

As the above analysis suggests, there are new sources of media content, and new forms of media or media-like activity on new communication services, that remain unexplored, or insufficiently explored, in terms of protection of human rights, including particularly freedom of expression and information.

Five main lines of action suggest themselves:

1. In-depth analysis of how new forms of media affect democracy, democratic processes and institutions, and the engagement of citizens in democracy and governance, in order to develop or modify policy serving the preservation and enhancement of democracy in the Information Age (see Buchsbaum, 2008; Frissen, 2008; Gross, 2008);
2. Continued full analysis of how human rights standards apply to new media and other media-like content providers on the new communication services and of the need, if any, to adapt or develop these standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests. *Human rights guidelines for online games providers*, developed by the Council of Europe in co-operation with the Interactive Software Federation of Europe are one example, but they are an example of co-regulation, projecting existing standards onto a new area, rather than new formal standard-setting, responding to specific new challenges, on the part of the Council of Europe itself. Human rights instruments may in some cases need to be “translated” into Information Society terminology, in order to specify the precise requirements that need to be met in order for some rights to be safeguarded in cyberspace,²⁵ though the danger of technology-specific

25. One example of this approach is the APC Internet Rights Charter which seeks to render rights enshrined in the Universal Declaration of Human Rights in technological terms. For example, Article 27 (“Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”) is transformed in the Charter into the following “rights”: “The right to free and open source software; The right to open technological standards; The right to share content; The right to benefit from convergence and multimedia content.”

standards which may with time become outdated should be avoided. In any case, more attention should be paid for example to new forms of online journalism;

3. Full analysis of how new intermediaries and other stakeholders who may perform media-like activities as part of their operation (ISPs, search engines, access mechanisms), affect freedom of expression and information. This should facilitate consideration of the need, if any, to adapt or develop human rights standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests in this regard. Again, *Human rights guidelines for Internet service providers*, developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA)²⁶ are an important start, but this should be backed up by more formal standard-setting. We have shown that

ISPs perform a crucial gate-keeping role, sometimes in possible violation of constitutional standards, and this requires an adequate standard-setting response, especially as the ISPs may be the only actor in communication in cyberspace under the jurisdiction of the particular country with effective control over the flow of content that could be held accountable or liable for violation of the law or human rights standards;

4. Consideration of which policy goals and objectives can be achieved through self- and co-regulation, and which go beyond the capacity of market players to regulate or co-regulate themselves and therefore require traditional regulation;²⁷
5. Continued analysis of media self-regulation and co-regulation systems and the development of standard-setting documents, enabling these systems to meet the needs of the Information Society.

26. In this case, unlike in that of the *European Framework for Safer Mobile Use by Younger Teenagers and Children* and *Safer Social Networking Principles for the EU*, the *Guidelines*, developed by an international organisation in co-operation with an industry association, were formally adopted by the organisation, but the role of the public authority framework appears to have been predominant, and that of the industry association subsidiary, thus again falling somewhat short of full and equal co-regulation.

27. According to Schultz (2008), the German example of self-regulation by search engines shows that, in the field of protection of minors, co- and self-regulation could function. The same goes for the problems of discrimination of content and misleading consumers. Voluntary self-regulation of search engine providers in Germany also addresses some of the issues that concern the transparency of the selection process (not of the algorithm as such). Regarding the risk that search engines might play a role in exploiting protected (audiovisual) works or personal data, there also seems to be at least some leeway for co-regulation. However, when it comes to public policy goals, like controlling the influence of public opinion making, and the fragmentation of the public sphere, which might be aggravated by search engines, there is no incentive for search engine providers to co-operate. Moreover, the distortion of competition and the transfer of market powers is obviously not a field in which it could be expected that service providers would offer their co-operation voluntarily. In these fields, if any regulation is called for, it would be traditional state regulation that would seem to be necessary.

Appendix 1

Additional Tables

Table 1: American technology users

	Group name	Median age	% of adult population	Description
Elite tech users (31% of American adults)	Omnivores	28	8	Have most information gadgets and services which they use to participate in cyberspace and express themselves online; Web 2.0 activities: blogs, own webpages
	Connectors	38	7	Use cell phones and online services to connect to people and manage digital content, work with community groups and pursue hobbies
	Lackluster veterans	40	8	Frequent use of Internet, less avid about cell phones; not thrilled with ICT-enabled connectivity
	Productivity enhancers	40	8	Strongly positive views about how technology lets them keep up with others, do their jobs, learn new things
Middle-of-the-road tech users (20%)	Mobile centrics	32	10	Use cell phones and Internet, but not often; like how ICTs connect them to others
	Connected but hassled	46	10	Invested into a lot of technology, but find connectivity intrusive and information a burden
Few tech assets (49%)	Inexperienced experimenters	50	8	Occasionally take advantage of interactivity, but with more experience might do more with ICTs
	Light but satisfied	50	15	Have some technology but it does not play a central role in their daily lives
	Indifferents	47	11	May have cell phones or online access, but use ICTs only intermittently
	Off the network	–	15	Older adults content with old media, neither cell phones nor Internet connectivity

Source: Pew Internet & American Life Project April 2006 Survey.

As can be seen, only 15% of the adult American population, who also happen to be relatively the youngest of all the groups, are “omnivores” and “connectors”, most likely to become one-to-many communicators and engage in many-to-many communication.

Table 2: Acquisition of UGC platforms by media corporations

Date	Acquirer	Acquired	Type	Price in USD millions
2005	News Corp	MySpace	Social networking	580

Source: Wunsch-Vincent, Vickery, 2007.

Table 2: Acquisition of UGC platforms by media corporations

Date	Acquirer	Acquired	Type	Price in USD millions
2005	Viacom/MTV	iFilm	Video	49
2006	Sony	Grouper	Video	65
2006	Viacom/MTV	Atom Films	Games, films, animations	200
2006	Yahoo	Jumpcut	Video editing	Undisclosed
2006	Viacom/MTV	Quizilla.com	Texts, quizzes, images	Undisclosed
2006	Google	YouTube	Video	1 580
2006	Google	Jotspot	Wiki	Undisclosed

Source: Wunsch-Vincent, Vickery, 2007.

Appendix 2

Council of Europe legally-binding and standard-setting documents concerning protection of human rights in the Information Society

(* denotes a document concerning freedom of expression standards)

1. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)
2. Convention on Cybercrime
3. Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems
4. Human rights guidelines for Internet service providers*
5. Human rights guidelines for online games providers*
6. Council of Europe guidelines for the co-operation between law enforcement authorities and ISPs against cybercrime (2008)
7. Recommendation CM/Rec (2008) 6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters*
8. Declaration on protecting the dignity, security and privacy of children on the Internet*
9. Declaration on the allocation and management of the digital dividend and the public interest*
10. Recommendation CM/Rec (2007) 16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet*
11. Recommendation CM/Rec (2007) 15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns*
12. Recommendation CM/Rec (2007) 11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment*
13. Recommendation Rec (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the Information Society*
14. Recommendation Rec (2007) 2 of the Committee of Ministers to member states on media pluralism and diversity of media content*
15. Council of Europe Resolution ResAP (2007) 3 of the Committee of Ministers on "Achieving full participation through Universal Design"
16. Recommendation Rec (2006) 12 of the Committee of Ministers to member states on empowering children in the new information and communications environment*
17. Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society (CM(2005)56 final)*
18. Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment*
19. Council of Europe Rec (2004) 11 of the Committee of Ministers on legal, operational and technical standards for e-voting
20. Recommendation Rec (2004) 15 on electronic governance ("e-governance")
21. Declaration on freedom of communication on the Internet*
22. Recommendation No. R (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting*
23. Recommendation No. R (2001) 8 on self-regulation concerning cyber content*
24. Recommendation No. R (2001) 7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment
25. Council of Europe Resolution ResAP (2001) 3 "Towards full citizenship of persons with disabilities through inclusive new technologies"
26. Declaration on a European policy for new information technologies*

- | | |
|--|---|
| 27. Recommendation No. R (99) 14 on universal community service concerning new communication and information services* | 29. Recommendation No. R (92) 15 concerning teaching, research and training in the field of law and information technology* |
| 28. Recommendation No. R (92) 19 on video games with a racist content* | 30. Recommendation No. R (89) 7 concerning principles on the distribution of videograms having a violent, brutal or pornographic content* |

Appendix 3

Recommendations regarding self- and co-regulatory schemes

In their book *Codifying Cyberspace. Communications self-regulation in the age of Internet convergence*, Tambini, Leonardi and Marsden (2008) formulate recommendations which are relevant in the context of the foregoing

remarks on self- and co-regulation. Below follows a selection of those recommendations, as arranged by the author of this paper.

General

1. The European Commission, Council of Europe, and OSCE should develop and publish clear benchmarks for acceptable levels of transparency, accountability and due process and appeal, particularly with regard to Communications regulation that may impact upon freedom of expression.
2. Self-regulatory institutions should follow the guidelines for transparency and access to information

that are followed by public and government bodies according to international best practice. At the very least, self-regulators should provide summaries of complaints by clause of code of conduct, numbers of adjudications and findings of adjudications on their website. Failure to conform to these baseline standards of transparency should be viewed as a failure of self-regulation.

Multi-stakeholder participation in co-regulation

1. If co-regulation is to operate successfully, it is essential that IRAs or ministries ... ensure that a continual programme of technical and regulatory education be provided to consumer groups for their effective participation and trust in co-regulatory fora.
2. Industry professionals should constitute a minority on boards of content self-regulatory bodies. Measures should be adopted to ensure that bodies that are 100% funded by their industry are not captured by

it. These measures could include: forced tenure for board members, dismantling separate “funding boards” (who may attempt to hold regulatory boards to ransom), and replacing them with a compulsory levy on industry participants, as currently applies to premium telephony in, for instance, the United Kingdom. This transparent and guaranteed funding then permits industry participants to play a much greater expert role in advising the regulator, with less conflict of interest.

Internet co-regulation

1. Technical enthusiasts or global user communities without real self-interest cannot achieve the co-ordination that is necessary. Future studies of filters and hotlines should continue to focus not only on the technical capabilities of filtering technology or police co-operation, but on the skills of users, parents, children and others and awareness and ease-of-use of these technologies. Moreover, end-user software, for instance filters and search engines, raise significant problems for freedom of expression.

For instance, popular search engines may have rules for search that prioritise content inappropriately for specific cultures: by language, content type or software format.

2. It is essential that studies of filters be instituted that examine the freedom-of-speech implications of commercial ranking of sites, pages, content types and languages. ISP or portal judgments of speech freedoms must be subjected to national law as well as international standards of freedom of speech (for

example, standards set out in regional and international human rights agreements).

3. Co-regulatory practice needs to take account of rapidly developing technologies and content types in (a) broadband and (b) mobile Internet networks.

Co-regulation: resource audit role of Independent Regulatory Authorities (IRAs)

1. Industry must take an active part in co-regulatory initiatives. Whereas large multinational corporations (such as Microsoft, AOL and ISP subsidiaries of national telcos) and voluntary actors (typically from research or educational backgrounds) are active participants, proactive measures need to be taken to fully engage with user groups and smaller for-profit content and access providers.
2. IRAs should convene a co-regulatory forum on a quarterly basis located at their offices, with minutes and participants published on the IRA website. This will introduce much-needed transparency into the co-regulatory process, to ensure all commercial operators take content co-regulation seriously. Effective co-regulatory schemes will find this no extra burden, but indeed a stimulus for new members and educational function for the consumer.
3. Accrediting co-regulatory codes of conduct and behaviour can only be carried out under the auspices of IRAs, who have the regulatory resource, stakeholder participation and competition law exclusion to effectively institute a voluntary kite-marking scheme. IRAs may choose to sub-contract the scheme's functioning to a third party.
4. IRA audit of self-regulatory activity, incorporating assessment of market structure and interests in self-regulation and an assessment of impact on fundamental rights, must take place within a dynamic and pragmatic framework which encourages rather than discourages self-regulatory activity where it is appropriate. We also recommend a "national resource audit of ISP and content sectors" – to answer essential questions of effective and sustainable ISP self-regulation:
 - Who is engaged in the notice and take-down regime?
 - What is the dedicated legal resource in each ISP?
 - Are the crucial code writing and adjudication functions sufficiently independent from industry?
 - Who performs the freedom-of-expression function in each ISP?
 - Does the self-regulatory industry scheme, as well as individual ISPs, have sufficient resource "ringfenced" away from industry participant control, to operate efficiently, transparently and fairly?

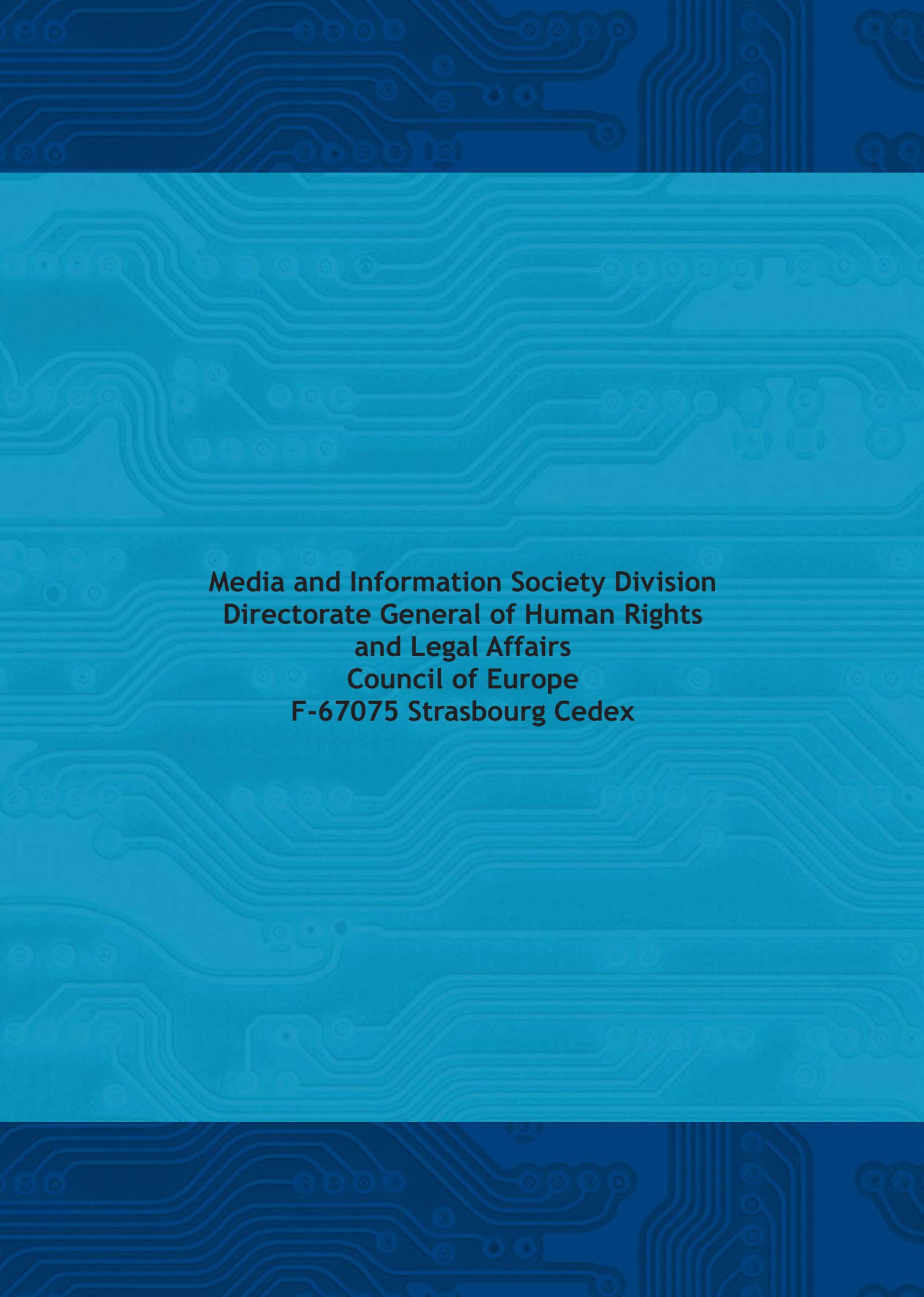
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