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Coping with the New Communications Environment: Are Regulations still Relevant?
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Abstract

This paper examines the current and future role of regulation and law within a so-called “converging media” environment. The inevitability of convergence is currently taken for granted, particularly at the European level, but two important points need however reiteration when considering regulatory responses. First the degree of convergence in services is not only highly varied among Member States but the process itself is relatively slow in many cases, and a radically new media world dominated by the new services is far off, and indeed in some cases may never arrive. The area is dogged by false predictions. Therefore we should treat with caution suggestions that the brave new world of communications abundance is imminent, and be slow to abandon the protections developed in the old world of a limited number of media outlets and services. A further point of some importance is that presently no single new media form or market exists, and nor is such uniformity ever likely. Markets remain distinct; for example, there is still a clear distinction between television-type services and on-line services. The message is thus one of caution before we scrap existing regulatory arrangements. Moreover the newer media will be much more complex and will have the potential to differentiate many markets more effectively than has been the case in the old media; in this sense the popular convergence model is misleading since it suggests narrowing, whereas what is happening is some degree of broadening through market differentiation. The implication could be drawn that the market can be successful in maintaining forms of diversity beyond the reach of regulatory controls. However on the other hand, fragmentation of markets means that regulatory concerns will need to be addressed not across media markets, for example through controls on percentage ownership, but instead by concentrating on regulation of particular technological or economic instruments which might give control of each or several of the fragmented markets; an argument for behavioural rather than structural regulation.

This suggests also that there will be a need for continuing regulation of competition aspects of the industry; this could of course simply be part of overall competition law and policy with no specific media constraints, and whether a special regime is needed in the future is main question of the paper.

With the “ending of spectrum scarcity” as a justification for regulation it has been suggested that the days of the current types of media regulation, such as social control of content, special measures to secure diversity on democratic and public interest grounds, and the broad (and vague) concept of public service broadcasting, are numbered. This paper suggests however that these arguments for the withering away of regulation should also be treated with considerable caution. Firstly, as already described, it will be a considerable time before convergence has reached a stage in which the new media supplant the old, or, in key markets, offer effective competition to them. Secondly, it is very likely that the elimination of the scarcity of transmission frequencies will intensify new and other scarcities, such as scarcity of available media content and programme software or even user attention and shared knowledge, the latter dealing with the role of media in providing a “cultural cohesion to the nation”. If this argument for regulation takes as its starting point the maximisation of individual consumer choice, a second argument starts from the need to promote a particular type of society or “public sphere” with particular forms of democratic procedure. This is partially constituted through basic rights including freedom of speech, freedom of the media and a right to access to the media; but it may also form a basis for media regulation.

Forceful arguments for the retention of some types of regulation can also be found by examining four specific regulatory rationales. The need and demand for them does not appear to be withering away in the new media landscape. The first is the social regulation of content; it would certainly not be possible to argue that concern with this is disappearing, and indeed if
anything it would appear to be increasing. This is not of course to say that the traditional attempts to deal with these problems will remain appropriate in the changing media environment, but that expectations of action to deal with them will not die away. Secondly, regulation for competition is also the subject of increasing attention. At one level this concerns the basic rules which make markets possible, for example those allocating intellectual property rights. However, with the move away from dominant state broadcasters and telecommunications operators to a multi-enterprise industry, issues of standardisation and interconnection have come to the forefront. The third regulatory rationale is that of ensuring pluralism and diversity of the media on democratic grounds. It seems unlikely that future market structures will result in diversity of ownership; the trend is more towards consolidation. All these arguments suggest that there will be strong arguments for ensuring internal pluralism, and this is where the arguments made above in favour of retaining elements of a ‘public sphere’ have particular importance. This paper argues that this can best be achieved by regulatory interventions designed to maintain some form of public service broadcasting. This leads on to the final rationale for regulation, that of universal service. It would thus seem clear that regulation will have a considerable place in the new media environment; arguments that it will wither away are based on grossly simplistic assumptions as to the reasons for regulation and on over-optimism as to the likely openness of future market structures. The argument is thus not whether to regulate but how to do so.

This paper concludes that attempts to argue for ‘the end of law’ in the new media are based on an unduly narrow concept of law, – one based on criminal law or so-called ‘command and control’ regulation. In fact four potential future roles for law can be proposed. The first role is that of setting out general frameworks of constitutional principle within which the media will operate; what one might call the ‘moralisation’ or ‘constitutionalisation’ role of law. The second role of law which can be seen as continuing indefinitely is that of competition law to police markets. Thirdly, law is necessary for regulatory agencies in order to define their constitutions, set out their powers and jurisdictions and to establish their procedures. This concern with flexibility and decentralisation brings us to the final role of law which can be identified as becoming important as the process of convergence develops further: that of self-regulation. Important to underline is that self-regulation is a technique of regulation rather than an alternative to regulation; it provides a type of technique to be used for regulatory purposes. To argue for self-regulation is thus not to argue for no regulation or for no law. Moreover, where self-regulation exists, this does not indicate a lack of interest by the state and in many cases self-regulatory techniques have been adopted to head off the alternative of government intervention.

Finally, one can state that the future media world will of course be very different from that of today, but to suggest that this removes our responsibility to address issues of law and regulation would be to allow technological change (complex enough in itself) to mask even more difficult problems of economic, social and legal organisation.
Introduction

One of the areas of contemporary life which is changing most rapidly is that of the media. It includes rapidly changing technology; even more importantly, it bears with it economic and social change which is widely claimed to be revolutionary. The aim of this paper is to assess the effects of these changes on the capacities of law to regulate the media and, in particular, to examine the extent to which it remains possible for governments and other public authorities to shape the changing media in such a way as to ensure that important social values are not neglected.

Convergence

The changes, initiated by digitalisation and compression, affect all levels of the media value chain, content, distribution and interface, and thus leads to media convergence. The computer storage, manipulation and display of text, pictures and sound in a common digital form makes possible new forms of media - 'multimedia' - and thus new products or services and new markets.

Firstly, different services that had previously been carried by different physical media may be carried by a single medium (e.g. CD-ROM); and secondly, a service that had previously been carried by a single medium may be distributed through several different physical media (e.g. the electronic newspaper). The movement from a single purpose network or transmission mode towards multipurpose networks is another consequence of this process. No longer do the separate media involve physical carriers with widely differing characteristics: all new communications services can be delivered in an off-line

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1 This paper is based upon Verhulst (S.), Goldberg (D.) and Prosser (T.), Regulating the Changing Media: A Comparative Study. Oxford University Press, Spring 1998
2 The issue of definitions was discussed in Wallis R, Lack of clarity in multimedia definitions can hinder development of useful applications. <http://www.city.ac.uk/multimedia/fnewslt.htm>
3 The daily press coverage of changes in communications technologies plays neatly on the words 'revolution', 'evolution' and so on. However, the present 'revolution', if such it be, is one of investment and of transformation of scale rather than technological innovation. Indeed, the history of the technologies of information reveals, rather, a gradual change. It has also been suggested that forecasts and expectations are inspired by the desired (r)evolution and not the real ones. Anyone who tries to make an analysis of the changes in the communications landscape must be well aware of these possible pitfalls. See D. Goldberg, T. Prosser and S. Verhulst, The Impact Of New Communications Technologies On Media Concentrations And Pluralism (1997, Council of Europe, Strasbourg) p.2.
mode, and through packaged media (e.g. by CD-ROM), or in an on-line mode, or through delivered and network media (e.g. over the Internet).\(^6\)

These changes are not merely technical in effect. Already they have had profound effects on the economic structure of the (broadly-defined) media industries. In some respects they may have appeared to make it more pluralistic through the lowering of entry barriers and through the growth of small companies such as Internet service providers and software houses. However, in other respects they have encouraged consolidation through alliances between different companies each trying to dominate emerging markets and to achieve a synergy of different but interdependent parts of the market such as telecommunications, broadcasting and information technology. This raises far-reaching questions about how competition is to be maintained and policed. Even more profound are the social implications; current uncertainty is shown by the range of predictions as to what they may be. On the one hand, these include visions of an ‘information society’ with a new diversity of information sources permitting vastly enhanced consumer choice and so enriching democratic debate and cultural diversity. On the other, they envision a society profoundly divided between ‘information haves’ and ‘information have-nots’, and so increased political and cultural alienation. Moral and social fears about pornography, particularly child pornography, on the Internet have also pointed to a dark side of the new diversity, suggesting that the freedoms involved can never transcend more established social concerns.

**Technological determinism**

One theoretical reflection should however be expressed at the outset of this paper. There is an assumption implicit in much work about this topic which posits a causal relationship between technological developments and social impact. I do not accept such a causal relationship; as a recent writer has put it, “[i]t is indisputable that digitalisation has advanced rapidly in the media industries, but it is an unwarranted leap of logic to see convergence as the determining factor in the ongoing concentrations of capital, and the tempestuous merger activity in the communication industries”.\(^7\)

**The regulatory capacities of law**

If the media are the subject of unprecedentedly rapid technological, economic and social change, law as a regulatory technique is coming under increasing scrutiny and more and more limits on its capacity to police change are suggested as new challenges arise. In one sense this paper will consider the question posed by European Commissioner Bangemann opening the Global Information Networks Conference:

Traditional borders between telecommunication, audio-visual and publishing are blurring. What must the new regulatory framework look like that stimulates rather than hinders the cross fertilisation between these sectors, leading to radically new

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\(^6\) Van Bolhuis, H.E. and Colom, I., *Cyberspace Reflections*, European Commission, DG XII, Social Research Unit, 1995, p.X.

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Concepts of multimedia content and services, a potential source for many new jobs?

Uncertainty about the regulatory framework applies to traditional legal forms such as criminal law; much difficulty has already been encountered in attempts to control pornography on the Internet. Other forms of law also face difficulties. For example, attempts to ensure diversity of media ownership on democratic grounds are increasingly questioned as unnecessary in a world of new diversity of output, as unenforceable and as hindering the competitive opportunities of enterprises on a world scale. Even more strikingly, attempts to guarantee universal provision of public services including broadcasting and telecommunications have been criticised as reflecting an outdated and complacent unitary conception of national culture and as neglecting consumer sovereignty through treating the citizen as a passive recipient of public services defined paternalistically. In a radically different area, intellectual property law is a cornerstone of the law relating to on-line services and especially the Internet, and one of the major debates surround recent developments in the media is the extent to which in its existing form it can serve a useful purpose in the common digital environment. Finally, as some of these examples vividly show, the historic concentration on the use of law by national authorities to resolve national problems has become outdated with the development of industries to which national boundaries are irrelevant; the very liberation that this represents makes regulation, it is claimed, a historical throwback rather than a practical task for the future.

So we can conclude that the rapid change in the technology, the economics and the social role of the media has been accompanied by growing caution about the regulatory capacities of law.

The stage of convergence

Before going into more detail about the future role of regulation and law, some points of reiteration needs to be emphasised. First, one point of particular relevance for the call of global solutions is that convergence is at radically different stages in all countries as a result of a number of factors including differences in legal and political structures.

Second, the degree of convergence in services is not only highly varied but relatively slow in many cases, and a radically new media world dominated by the new services is far off, and indeed in some cases may never arrive.

A further point of some importance is that there is no single new media form or market, and there is never likely to be such uniformity. Markets remain distinct; for example, there is still a clear distinction between television-type services and on-line services. Technological convergence may be imminent in the form of television Internet access (or Web TV) becoming cheaply available, but the cultures remain radically different. Indeed, in the context of television, it seems likely that, though delivery forms may change, the culture may not and that new types of media may supplement rather than

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8 Dr M. Bangemann, Opening Speech <http://www2.echo.lu/bonn/openspeech.html>
replace existing ones. The implication from the uncertainty and the distinction is one of caution before we scrap existing regulatory arrangements. Even in the area of the so-called information superhighway, the metaphor of such a single network is inappropriate.

These radical differences between new forms of media market have contradictory implications for regulation. On the one hand, they lessen the likelihood of the sort of dull uniformity based on the broadcasting of similar, cheap programmes which has been feared in the context of the development of new television services. The newer media will be much more complex than this and will have the potential to differentiate many markets more effectively than has been the case in the old media; in this sense the popular convergence model is misleading since it suggests narrowing, whereas what is happening is some degree of broadening through market differentiation. The implication could be drawn that the market can be successful in maintaining forms of diversity beyond the reach of regulatory controls.

On the other hand, fragmentation of markets means that regulatory concerns will need to be addressed not across media markets, for example through controls on percentage ownership, but instead by concentrating on regulation of particular technological or economic instruments which might give control of each or several of the fragmented markets; an argument for behavioural rather than structural regulation to which I shall return later.

One further point needs to be made in this connection. This paper has stressed that convergence has been unequal between different nations, has been slower than expected and will not break down distinctions between different markets as rapidly as is claimed. Nevertheless, the industry is behaving as if there is fundamental change imminent. Again the implications are contradictory. On the one hand there has been a considerable degree of industrial diversification with the creation of new industries and sectors; key examples are those of Internet service providers, publishers and content providers. At first this has appeared to be an example of the market creating and preserving diversity; after all, these have been industries in which entry barriers have been low and so small operators have emerged. Even here, however, there are signs that this is ending with a strong degree of consolidation and emerging dominance as exemplified, for example, by the sale of CompuServe during 1997 in a three-way deal with WorldCom and America Online; The result of all this corporate restructuring is that the potential for market dominance, anti-competitive practices and barriers to market entry are likely to increase, not decrease, in the changing media world.

Will We Need Regulation?

Of course, before we discuss the potential role of law as a regulatory device, we need to answer the preliminary question of whether any regulation will be required at all. The discussion above has already suggested that there will be a need for continuing regulation of competition aspects of the industry; this could of course simply be part of overall competition law and policy with no specific media constraints, and whether a

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10 See, for example, 'US Entertainment and Information: Traditional Media Stay in Fast Lane', Financial Times, 29 July 1997.
special regime is needed in the future will be discussed further. Yet when commentators refer to media regulation this does not usually refer to competition policy and law; rather it refers to social control of content, special measures to secure diversity on democratic and public interest grounds, and the broad (and vague) concept of public service broadcasting.\textsuperscript{12} As we noted in our introductory chapter, there are influential arguments to the effect that the days of these types of regulation are numbered with the ending of spectrum scarcity as a justification for regulation, although the European Commission’s Green Paper on Convergence makes the point that ‘[f]requency remains a key, but finite resource even in the digital age’\textsuperscript{13}, the ending of the uniquely pervasive and intrusive role of television in the household as it is supplemented by other media delivery systems and the promise of a diversity of content undreamt of in public service broadcasting with the arrival of multi-channel digital broadcasting.

\textit{Maximalisation of Consumer Choice}

I would suggest that these arguments for the withering away of regulation should also be treated with considerable caution. Firstly, as already described, it will be a considerable time before convergence has reached a stage in which the new media supplant the old, or, in key markets, offer effective competition to them. Secondly, it is very likely that the elimination of the scarcity of transmission frequencies will intensify new and other scarcities.\textsuperscript{14} Scarcity of available media content and programme software is already a large problem. Moreover the problem becomes even bigger when considering the qualitative aspect of programming. Other major scarcity problems are concerned with user attention and shared knowledge, the latter dealing with the role of media in providing a “cultural cohesion to the nation”.\textsuperscript{15} As Hoffmann-Riem stated: “[s]carcity constellations of all kind are at the same time power constellations. The crucial topic of regulation is the problem of use and abuse of power”. Concerning the newer media he concludes that “the basic normative idea of necessary protection against the one-sided use of power, however, continues to apply, even if there is a shift in scarcity constellations and new abuse potentials become identifiable”.\textsuperscript{16} Thirdly, there are other arguments which support the maintainance of a media sphere which is different from that which would be supposed by a market-based model, even should convergence develop much further. The argument has been made in the past convincingly in relation to the different treatment of the press and broadcasting industries and has been summed up as justifying “the divergent treatment of the two media on the ground that society is entitled to remedy the deficiencies of an unregulated press with a regulated broadcasting system. This may be preferable to attempting to regulated both sectors. Regulation poses the danger of government control, a danger which is reduced if one branch of the media is left free.”\textsuperscript{17}

\textsuperscript{12} For a good brief survey of the traditional justifications for media regulation see Barendt, E., \textit{Broadcasting Law: A Comparative Study} (Oxford; Clarendon Press, 1993), pp. 3-10.
\textsuperscript{13} op.cit., 19.
\textsuperscript{16} Hoffmann-Riem W., op cit., p 333
\textsuperscript{17} Barendt, op. cit., 8. This theory is particularly associated with the work of Lee Bollinger; see his ‘Freedom of the Press and Public Access’ (1976) 75 \textit{Michigan Law Review}, 1-42 and ‘The Rationale of...
This argument maintains its force even in conditions of growing diversity; to quote the leading proponent;

even though we may have the *opportunity* to acquire all relevant points of view, in the absence of agreed-upon structures or methods for deciding questions, we may very well end up with poorer decisions than we would otherwise have. It is important, therefore, that we recognise the following: public regulation requiring the media to grant access under certain conditions need not be thought of as designed only to correct structural defects in the market. ... we must therefore be careful not to make the mistake of thinking that public regulation hinges only on one possible rationale, and certainly not on the traditionally expressed rationale of market failure.\(^\text{18}\)

An implication from this is that there may be justification for regulating *part* of the media whilst leaving other parts free in order to achieve true pluralism; regulation may be needed simply to ensure that the media landscape does not become too uniform and to guarantee access *somewhere* in the media to a range of different viewpoints; in Bollinger’s phrase, ‘partial regulation’.\(^\text{19}\) This may require forms of regulation similar to those associated with public service broadcasting in the past to ensure that the best traditions of such broadcasting are preserved alongside new types of media.

If one accepts this argument, then, there may be good reason for regulating part of the media even where competitive markets can operate; regulation should not be limited to competition law. Apart from particular rationales for different types of regulation, there are at least two justifications at a macro-level for such partial regulation. Firstly, if regulatory action can preserve something qualitively different from the outcome of unregulated markets, this has in itself the justification of creating real choice and real diversity for consumers. One example is that of the listed events by which national action (now supported by European Community facilitation) has been taken to protect universal free-to-air access to events of key national importance which would otherwise be priced outside the range of large numbers of consumers; another is that of the must-carry rules which require public service broadcasting to be included in subscription and cable systems thus increasing their availability and hence consumer choice. In both cases the effect is to provide consumers with a broader range of programming than that which would be made available simply through specialist subscription channels, especially as the choice available to subscribers is anyway constrained through packaging by those who offer subscription services. Regulation here can also support the availability of a common culture in the same way as public service broadcasting has done in the past. Finally, some of the regulatory action designed to limit the bundling of programming packages and rights can be seen as, amongst other justifications, serving to maximise consumer choice, here by attempting to prevent companies using a powerful market position to restrict it. This argument for regulation then does not concern itself with the existence of limits on the operation of markets such as spectrum scarcity but assumes that

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\(^{19}\) See Bollinger, ‘Freedom of the Press and Public Access’, *op. cit.*, esp. 17, 26-37.
markets will marginalise some sorts of programming and therefore in the long run diminish consumer choice.\textsuperscript{20}

\textbf{Public Sphere}

If this argument for regulation takes as its starting point the maximisation of individual consumer choice, a second argument starts from the need to promote a particular type of society with particular forms of democratic procedure. This builds on an important area of social theory concerned with the distinctive nature of the public sphere as a location for political and social debate; it is particularly associated with the work of the German social philosopher Jurgen Habermas.\textsuperscript{21} The work is far too complex and dense to be treated here, but to give an (inadequate) summary from recent writings, '[t]he public sphere can best be described as a network for communicating information and points of view ...; the streams of communication are, in the process, filtered and synthesised in such a way that they coalesce into bundles of topically specified public opinions.'\textsuperscript{22} This process involves a testing of claims through debate of a particularly demanding kind referred to as the 'ideal speech situation' in which the sole determinant of the outcome is the force of the better argument. Of course, such a situation is in practice unattainable but it can be used as a counterfactual critical tool for the assessment of actual existing institution.

One justification for regulation, including constitutional, is thus to preserve a public sphere for debate of this kind, and it has been suggested that this is associated with the public service model of broadcasting.\textsuperscript{23} Of course not all broadcasting will contribute; entertainment also plays a major role in viewing, after all! Nevertheless, the theme of maintaining a public sphere does support the argument made earlier that it will be important to preserve a plurality of different media forms and structures which provide access to a range of competing viewpoints and information sources; this may best be accomplished through regulatory action. As the Commission's Green Paper states, the success of convergence as one of the key 'enablers' of the Information Society '...will depend largely on the kind of regulatory framework devised to encourage it.'\textsuperscript{24}

\textsuperscript{20} For a developed reflection on the concept of choice in a variety of contexts see Lewis, N., \textit{Choice and the Legal Order: Rising Above Politics} (London: Butterworths, 1996).

\textsuperscript{21} The seminal work was Habermas, J., \textit{The Structural Transformation of the Public Sphere} (Cambridge: Polity, 1989) and see more recently is \textit{Between Facts and Norms} (Cambridge: Polity, 1996), esp. chs. 7-8.

\textsuperscript{22} Habermas, \textit{Between Facts and Norms}, ibid., p. 360 (emphasis retained).

\textsuperscript{23} Garnham, 'The Media and the Public Sphere', op. cit., pp. 45-53.

\textsuperscript{24} op.cit., 8.
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Types Of Regulation

Forceful arguments for the retention of some types of regulation can also be found when we look at four specific regulatory rationales.

The first is social regulation of content; it would certainly not be possible to argue that concern with this is disappearing, and indeed if anything it would appear to be increasing. Examples which suggest this include the concern with the protection of children from violent and sexually explicitly broadcast material, something of a high profile issue in the USA with the recent constitutional litigation, and in the UK with the banning of overseas satellite stations broadcasting such material (action not limited to a concern for children but for adult decency also). Concern about pornography, and particularly child pornography, on the Internet has also had a high and growing profile. Similarly, concern with privacy issues and of the relationship between encryption and potentially criminal activities is growing, not disappearing. This is not of course to say that the traditional attempts to deal with these problems will remain appropriate in the changing media environment, but that expectations of action to deal with them will not die away. The problem in relation to say child pornography on the Internet is not the principle of regulation but practical problems of enforcement, on which more will be said below.

Regulation for competition is also the subject of increasing attention, as has already been made clear. At one level this concerns the basic rules which make markets possible, for example those allocating intellectual property rights. However, with the move away from dominant state broadcasters and telecommunications operators to a multi-enterprise industry, issues of standardisation and interconnection have come to the forefront. In this context the European Community has done excellent work as part of its pioneering liberalisation of telecommunications; in other contexts the issue has become one of considerable legal controversy, notably in the United States but also in the UK and in New Zealand. Both these concerns are with the creation of markets; however, their policing raises further issues of competition policy and law, notably through the scrutiny of mergers. In the field of the media, as in others such as civil aviation, mergers are of an increasingly trans-national character and this has posed regulatory problems. The European Community has done something to address this issue but it is one which is going to continue to pose further problems given that, as suggested earlier, much consolidation has already taken place in the 'old' media and we are on the threshold of a major process of consolidation within the new media industry also. The need for clarifying problems of international jurisdiction in merger control is now urgent, and not just in the media. An issue of key importance within competition policy is that of interconnection and access to networks, which is addressed in, for instance, Open Network Provisions (ONP) directives and resolutions of the EU with respect to partial areas. All this requires supervision and structural safeguards.

A further problem will be caused by difficulties in using tests of ownership and of market share as a base for regulatory action in relation to the media, both on competition

25 See Mercury Communications Ltd. v Director General of Telecommunications [1996] 1 All ER 575 (HL) and Telecom Corporation of New Zealand v Clear Communications Ltd. 19 Oct. 1994 (LEXIS) (PC).
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grounds and for reasons of democratic pluralism. However, as we noted in our introductory chapter, given the fragmentation of markets characteristic of the changing media, overall ownership figures will give little indication of dominance, and it will be difficult to assemble a general test of market share working across the different markets, as shown by the difficulty in constructing a 'media exchange rate' to permit this to be done. Moreover, as we have emphasised, control of key access points such as conditional access technology, billing, customer care and maintenance systems and Internet search engines can give power to their controllers quite out of proportion to ownership or direct market participation.26 We are not opposed to the retention of structural regulation based on ownership and control over particular markets such as television viewing whilst the process of convergence remains as incomplete as we have suggested. However, we would expect there to be a gradual move away from such structural regulation towards more behavioural forms as new markets develop. A particularly good example of such action is that taken by the European Community in relation to conditional access and related systems and which, in the UK at least, has been implemented effectively which does appear to have been successful in producing a common European standard.27 Other examples of behavioural regulation include action being taken to limit the degree of bundling permitted in the sale of programmes to cable companies in the UK and the action launched by the US justice department in relation to Microsoft's supply of Internet browsers. Another concern is with the institutional arrangements for regulation of competition; we have seen in the national reports a combination exists of international, governmental and sector-specific bodies with these responsibilities. Given the complexity of the new media and the need for close and continual scrutiny of their complex market structures, we see a strong case for entrusting these tasks to specialist regulatory bodies, as recognised recently in Germany and Italy, although in Australia important telecommunications responsibilities have passed to the general competition authority. Whatever the best instruments or regulatory arrangements, however, it is clear that regulation for competition is likely to remain as an important future concern.

The third regulatory rationale is that of ensuring pluralism and diversity of the media on democratic grounds; one can divide this between internal pluralism to ensure that content covers a wide range of interests and tastes rather than offering only content which is cheap or appealing to advertisers, and external pluralism concerned with the maintenance of a range of different services.28 External pluralism might appear to be the rationale least appropriate for regulatory intervention because of the approaching diversity of niche channels to be made possible by the development of digitalisation, and

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26 For analysis of these issues see Graham, A. op. cit., and Prosser, T., Goldberg, D., and Verhulst, S., The Impact of New Communications Technologies on Media Concentrations and Pluralism, (Strasbourg: Council of Europe, 1997).
28 This was based upon the definition of the Committee of Experts on Media Concentration and Pluralism of the Council of Europe, which states that pluralism can be measured by four elements: a) the existence of a plurality of autonomous and independent media; b) diversity of media types and contents available to the public, resulting in a diversity of choice; c) segments of society capable of addressing the public by means of media owned by, or affiliated to, them; d) diversity of media contents in relation to media functions, issue covered and audience groups served. See MM-CM (96) 11, Strasbourg, September 1996
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because of the difficulties in controlling ownership and market share for the reasons outlined above. Moreover, it could be argued that if internal pluralism exists we need not worry about external pluralism as diversity is guaranteed. However, the opposite is clearly not true in the sense that a diversified ownership and even a dramatic increase in the number of channels available will not necessarily guarantee a diversified content; it is just as easy to imagine competition driving down profit margins so that market participants can only afford the cheapest forms of programming and those most likely to appeal to mass advertising markets. Moreover, it seems unlikely that future market structures will result in diversity of ownership; as we saw earlier the trend is towards consolidation.

All these arguments suggest that there will be strong arguments for ensuring internal pluralism, and this is where the arguments made above in favour of retaining elements of a 'public sphere' have particular importance. We would argue that this can best be achieved by regulatory interventions designed to maintain some form of public service broadcasting. This does not only mean public broadcasting in the sense of broadcasters completely insulated from the market through public ownership or through guaranteed subsidy; programming requirements have been in the past a way of maintaining internal pluralism even for broadcasters operating within what are basically market structures, for example in the UK. Interventions of this kind could do much to serve the basic justifications for regulation discussed early in this chapter, those of providing a more effective choice for consumers and of ensuring the maintenance of some form of public sphere for democratic debate. Something of the same sort of thinking indeed lies behind the Protocol on Public Service Broadcasting to the Amsterdam Treaty of the European Union.29

The question is whether this will remain feasible in a new environment of greatly enhanced media outlets. It could be the case that, if these become increasingly successful at attracting viewers, the audience figures for public service broadcasters will decline in such a way as to make public funding politically indefensible. Moreover, it is argued that those broadcasters subject to public service regulation but operating in the commercial marketplace will have no choice but to compete at the expense of their public service requirements; if the latter cannot be lifted the companies will go under. This may ultimately be the case, but the evidence that we have amassed in this study suggests that we are still far away from such a crisis; the conventional broadcasters remain dominant in terms of market share and the new forms of delivery are merely biting away at the edges, in the case of television-type services at least. This suggests that the maintenance of a distinctive model of public service broadcasting will not be unfeasible for a considerable time into the future.30 Indeed, there are already signs that in some countries public service broadcasters, at first threatened by changes in the mass market, are filling successfully niches not covered by new commercial broadcasters; for example in

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Germany at a national level public stations have lost market share and advertising revenue but have a growing role at regional level, as the national chapter above describes.

This leads on to the final rationale for regulation; that of universal service. This has been a major concern in telecommunications, as noted in some of the chapters above, especially in the United States, the European Community and Australia. It has also been applied in some cases to new communications technologies such as the Internet, notably in the US through the FCC rule-making process. In the case of broadcasting it has also formed part of the basis for a number of regulatory interventions, for example the system of ‘listed events’ in some member states of the European Union which prevent events of key national importance from being shown exclusively on subscription or pay-per-view services. A further example is that of ‘must carry’ rules requiring cable operators to provide access to other stations and, in the UK, the guaranteed access for public service broadcasters to digital terrestrial television. Not only can these be seen as examples of the application of principles of universal service, but also as attempts to protect the particular character of public service broadcasting in the new environment.

It would thus seem clear that regulation will have a considerable place in the new media environment; arguments that it will wither away are based on grossly simplistic assumptions as to the reasons for regulation and on over-optimism as to the likely openness of future market structures. This is particularly true in the case of mass broadcasting and the tv-type markets; some of the arguments described above will have less application in the on-line markets, though even here issues such as Internet pornography and consolidation of the industry suggest that the idea of leaving the net as simply a ‘functioning anarchy’ are themselves far too simplistic. The argument is thus not whether to regulate but how to do so. This is where an attempt can be made to analyse the future role of law.

The Role Of Law In Regulating The Changing Media

What role will law play in the future? We suspect that attempts to argue for ‘the end of law’31 in the new media are based on an unduly narrow concept of law, basing it on criminal law or so-called ‘command and control’ regulation.32 We shall argue in a moment that law’s potential is much richer than these limited conceptions would suggest. However, we are also not able to accept that we are about to see a new rationalised and unified system of law applying across the new media; the future will be much more pragmatic and less tidy than this. We would in fact see four potential future roles for law.

The first role is that of setting out general frameworks of constitutional principle within which the media will operate; what one might call the ‘moralisation’ or ‘constitutionalisation’ role of law. This would include defining, and protecting, values such as freedom of expression and acceptable limitations to it, rights to privacy, and

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31This was the title of a book analysing the very different Marxist claims for the ‘withering away’ of law and the state; O’Hagan, T., The End of Law? (Oxford: Basil Blackwell, 1984).
32For elucidation of this concept see Ogus, A., Regulation: Legal Form and Economic Theory (Oxford: Clarendon Press, 1994), ch. 11.
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conceptions of public service. This is something which the courts, and in particular constitutional courts, have already carried out in a number of important jurisdictions, most notably the United States but also, amongst the countries covered in this book, in Germany, Italy, Hungary and to some extent, Australia. The exception is of course the United Kingdom where, although there have been sporadic decisions of the courts on matters such as obscenity, 'the position ... is striking because of the complete absence of constitutional principles and the relative dearth of case-law.' Even in this jurisdiction, however, matters could change with the forthcoming incorporation of the European Convention of Human Rights (incorporating a right to freedom of expression) into domestic law and the greater willingness of senior judges to treat the common law as a source of constitutional principle.

The second role of law which we see as continuing indefinitely is one which has already been discussed above; that of competition law to police markets. Indeed, this is a type of law whose importance is increasing with the growth of multi-enterprise markets rather than their being dominated by national telecommunications operators or a few public broadcasters, both categories often being exempt from the application of competition law. We have dealt with some of the problems of such regulation for competition above. It should be added, however, that older doctrines of competition law, such as those of the common carrier and of essential facilities may have much to offer in the new digital world, especially in relation to gateway monopolies. As a commentator has stated, criticising share of voice regulation, '[a] different approach is required but one that is familiar to traditional US telecommunications regulation: comme back common carrier, all is forgiven. In the digital age, all owners of servers, networks and set top boxes carrying on demand services and enjoying more than say 25% distribution market share, should be required to give common carrier access to all content and service providers.' The essential facilities doctrine, building on earlier principles of the duties of a common carrier, has been developed in United States regulation and competition law and increasingly adopted by the European Community. It provides a basis for enforcing third party access to such facilities needed by competitors. Thus if there is control of an essential facility by a monopolist, inability of competitors to duplicate the essential facility, denial of the use of the facility to a competitor of the monopolist and it is feasible or practical to provide third party access, the facility owner may be ordered by the courts to provide such access on fair terms. For example, in one case the European Court of Justice decided that companies with exclusive rights over port operations and the unloading of goods would breach the prohibition on abuse of a dominant position in the European Community Treaty if they engaged in overcharging, in failure to take up

33 For details from a number of jurisdictions see Barendt, E., op. cit. and Craufurd-Smith, R., Broadcasting Law and Fundamental Rights (Oxford: Clarendon Press, 1997).
34 Barendt, op. cit., p. 10
modern technology or in undue discrimination.\(^\text{38}\) The same concern also of course lies behinds policies of open network provision discussed in our European chapter, and a similar approach played a central part in pioneering work by the UK Officer of Telecommunications on how to facilitate fair competition in the process of convergence. This recommended different forms of regulation according to the extent of market dominance, reserving the strictest controls for dominant operators.\(^\text{39}\) Finally, of course, some means will have to be found of supporting universal service provision though, as we shall argue below, this may be better done through techniques involving delegation of regulatory responsibilities combined with setting of some more official standards.

Mention of such a specialist regulatory agency brings us on to the third role of law in the regulation of the changing media. We have noted that there has been a tendency towards the creation of specialist regulatory agencies for telecommunications and broadcasting regulation, and this has replaced the older form of regulation by unitary government departments. This in fact creates the need for new law; whilst the internal workings of government could be left to administrative or political controls, law is necessary for new agencies in order to define their constitutions, set out their powers and jurisdictions and to establish their procedures. Already we have massive experience of such agencies through the long experience of the Federal Communications Commission in the United States; Australia has also used this type of agency and is continuing to do so in the shape of the new Australian Communications Authority, although there has also been a move towards the use of the general competition authorities. Similar experience has occurred in Europe with the creation of the Federal telecommunications authority in Germany and the lengthy process of establishing the new authority covering both broadcasting and telecommunications in Italy. In the UK the Office of Telecommunications had been created as a direct result of privatisation, and in Hungary the absence of a clear regulatory structure of this kind is now causing problems. Finally, European Community telecommunications regulation, whilst not requiring the establishment of regulatory agencies at arms-length from government, has required the separation of regulatory and operating functions and so has encouraged such institutional change.

As this brief summary suggests, there is no agreement on the optimum jurisdiction of such regulatory bodies. The US model of the Federal Communications Commission combines telecommunications and broadcasting responsibilities; in other cases they are the responsibility of separate agencies, for example in Germany (complicated further by the split between Federal and Lander powers) and in the UK, where a considerable debate has taken place as to the best pattern for the division of functions. It has been suggested, for example in the European Commission Green Paper on convergence, that a more rational division of functions would be between infrastructure and delivery on the one hand and content on the other; the former could than be primary a matter of competition law and policy whilst the latter could bring in the

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\(^{39}\) Office of Telecommunications, Beyond the Telephone, the Television and the PC (London: Office of Telecommunications, 1995).
more social concerns which we have discussed earlier and which are likely to continue even after convergence has developed more fully. However, the two functions should not be regarded as completely separate and overall, the best solution may be to allocate these two functions to separate divisions in an overall super-regulator covering both, as in the case of the FCC. This was also the underlying rationale for the Italian Authority composed of a Commission for regulating infrastructure and networks and a Commission for regulating services and products. Clearly there is considerable need for legal construction of appropriate powers for such agencies; again the case of Hungary suggests the problems which can arise if this is neglected.

A final point about this role of law also needs making. The new agencies will of course be responsible for developing a considerable body of law of their own. Very obvious examples of these are the large rule-making procedures undertaken by the Federal Communications Commission on universal service, interconnection and other matters; others are the work of OFTEL in the UK on the same issues, the issue of codes which have legal backing on programme standards and advertising practice by the Independent Television Commission also in the UK, and the development of codes of practice by the Australian Broadcasting Authority. If we accept the argument that regulation is likely to continue even as convergence develops further, the use of such techniques would seem to offer opportunities for the use of law in a more flexible and decentralised form which can better cope with the complexities of rapidly changing markets. The delegation of rule-making powers to agencies permits more effective study of the changing industries and markets, and more developed consultation, than does the use of more formal law in the form of primary legislation or judicial decision.

This concern with flexibility and decentralisation brings us to the final role of law which we would identify as becoming important as the process of convergence develops further. In a number of cases one can identify moves towards self-regulation, the most famous being that of regulation of content on the Internet. At first sight this might appear to be the antithesis of legal regulation; however on closer examination this is far too simple a characterisation of the limits to law. Firstly, self regulation is not a useful way of characterising a whole regulatory regime as almost inevitably it is accompanied by more direct interventions by public authorities including use of criminal or civil sanctions, as illustrated vividly by the example of Internet policing. Self-regulation is thus a technique of regulation rather than an alternative to regulation; it provides a type of technique to be used for regulatory purposes. Moreover, where self-regulation exists this

40 During November 1997 the European Commission adopted an Action Plan for 1998 to 2001 on promoting the safe use of the Internet which identifies key areas where measures are needed and could be supported by the European Union. This includes for reporting illegal content, industry-led self-regulation and content-monitoring schemes, internationally compatible and interoperable rating and filtering systems as well as awareness. See http://www2.echo.lu/legal/en/internet/actplan.html At more or less the same time, a Communication and a draft Council Recommendation on the protection of minors and of human dignity in audiovisual services was also adopted. The documents define common objectives and cooperation fields at Community level. The underlying idea is that self-regulation schemes at national level are the most appropriate answer as regards both television and the Internet. See http://europa.eu.int/en/comm/dg10/avpolicy/new_srv/comlv-en.htm
often evolves towards more detailed official regulation as crises have to be faced and government cannot decline responsibility for their resolution. A striking example of this is that of the UK financial services industry; as a Parliamentary committee put it in a study of the regulation of this area, "the evidence we have received from the regulators has ... stressed that the term "self regulation" is a misnomer and fails to reflect their independence or the statutory basis of their authority". The stark opposition of self regulation to statutory regulation is probably due to an over-reliance of the peculiar position of UK press regulation which has to some degree been arranged through the industry itself, although even this has changed in recent years.

To argue for self-regulation is thus not to argue for no regulation or for no law. Moreover, where self-regulation exists, this does not indicate a lack of interest by the state and in many cases self-regulatory techniques have been adopted to head off the alternative of government intervention; a celebrated example is that of the British Board of Film Censors (more recently of Film Classification), established by the industry precisely to avoid official censorship and later given statutory responsibility for classification of video cassettes. Indeed a strong case has been made for recognition of the interdependence of self-regulation and official regulation through the development of 'enforced self-regulation' involving negotiation between the state and individual firms to establish appropriate standards and regulations, which can then be publicly enforced. A related approach is that of 'coregulation' in which regulation is undertaken by an industry association with some oversight and/or ratification by government. A number of examples of such a mixture of official- and self-regulation, notably in relation to regulation of content on the Internet and agreeing Internet standards exist. We suspect that a further important technique for law in the future will be setting the conditions for such enforced self-regulation or co-regulation through setting out basic standards to be followed, delegating the details of drafting and enforcement machinery to private actors and associations and securing that enforcement takes place effectively. We are already seeing something of the sort in relation to universal service provision in the European Union where the authorities have favoured the setting of basic standards and then leaving the details of implementation to market actors, for example through a system of 'pay or play' in which enterprises may volunteer to provide the universal service or, if they do not do so, are required to pay a levy to support its provision by others. On a more general level, something of the sort has been proposed by the European Commissioner responsible for telecommunications, when he proposed the creation of 'a new global framework for communications for the next millennium... [the] International Charter for Global Communications' which is forseen as 'an international level [agreement] on a framework based on a range of principles and basic rules.' i.e. not based on detailed

41 Treasury and Civil Service Committee, The Regulation of Financial Services in the UK, HC 332, 1994-5, para. 25 (emphasis retained).
44 Ayres and Braithwaite, ibid., p. 102.
norms. Mr Bangemann has been quoted as saying that ‘[w]e want something that’s not legally binding, but which can embrace many different problems and is politically binding, like a charter.  

Conclusion

Of course, the future media world will be very different from that of today, but to suggest that this removes our responsibility to address issues of law and regulation would be to allow technological change (complex enough in itself) to mask even more difficult problems of economic, social and legal organisation. I have suggested that legal regulation will, and should, continue to have an important place in the new media world; indeed, I suspect that political crises and political concerns so evident around issues such as Internet pornography will ensure that this remains high on the political agenda. I hope to have clarified the purposes which one should seek through this regulation, and that my suggestions for more flexible legal responses will strike a chord amongst those who wish to combine the undoubted potential of the new media world with cultural values derived from the old.