

# YOUTUBE TO BE REGULATED? THE FCC SITS TIGHT, WHILE EUROPEAN BROADCAST REGULATORS MAKE THE GRAB FOR THE INTERNET

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## INTRODUCTION

Internet has changed our way of life—television (“TV”) merely the look of our living rooms: The once decorative coffee table around which we used to sit as children whenever our parents forced us to communicate became a mere holding space for plates and mugs. We became spectators, arranging our chairs to face the corner of our living room; there, our TV was flickering.<sup>1</sup> Somehow, TV managed to enter the intimacy of the world’s families.

Showing such pervasive effects,<sup>2</sup> TV might be one of the most powerful gadgets invented, powerful enough to change our way of life, our culture, and our viewpoints, potent enough even to overthrow presidents and to steer politics. Politicians still seek to restrain the might of TV (the influence of broadcasters, networks, cable operators, and media corporations). Today’s media, however, has at its disposal a myriad of ways to convey content. Amazed, we watch our children sitting in front of the TV, checking their e-mails on a laptop, taking calls on their mobile, and probably downloading music from a dubious Russian Website—all simultaneously, drowned in content from diverse sources.

With all these platforms bearing content, even the Federal Communications Commission (“FCC”) admits that the historic rationale for broadcasting regulation—scarcity—is flawed.<sup>3</sup> Today, broadcast regulation with all its spillover effects looks like a grotesque attempt by governments to regain control over information flows. The FCC rightly hesitates to extend its regulatory grip to Internet-based audiovisual services and struggles to implement regulation consistent with First Amendment requirements. Future court decisions might dismiss the scarcity rationale<sup>4</sup> and give rise to a policy change resulting

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<sup>1</sup> See Heribert Seifert, *Verlorene Zeit [Lost Time]*, NZZ FOLIO, Feb. 2001, <http://www.nzzfolio.ch/www/d80bd71b-b264-4db4-afd0-277884b93470/showarticle/57d97e81-2b02-4e0c-9a6c-aa79f4fdf646.aspx>.

<sup>2</sup> See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 193 (1943) (emphasizing the “far-reaching role which radio plays in our society”).

<sup>3</sup> See JOHN W. BERRESFORD, FED. COMM'NS COMM'N MEDIA BUREAU STAFF, *THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING* 30 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-257534A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf).

<sup>4</sup> The Supreme Court, however, indicated in *FCC v. League of Women Voters*, that it will refrain from reconsidering the scarcity rationale “without some signal from Congress or the FCC that technological developments have advanced so far

in abrogation or limitation of the scope of broadcasting regulation. Then, Congress would need to determine whether to keep some regulatory regime for (all) audiovisual media in place. In contrast to the United States' regulatory restraint, the European Union adopted a new legal framework on December 11, 2007, which covers all audiovisual media services, irrespective of technology or distribution platform used.<sup>5</sup> It imposes strict behavioral restraints on broadcasters, regardless of whether they distribute content over the Internet or airwaves. Unfortunately, these new rules seem still inspired by an old media environment. They hardly try to address phenomena like YouTube or Tudou, YouTube's larger Shanghai clone, and their consequences on the future provision of TV-like services.

The European Regulators' grab at the Internet is explained by fundamental differences in the way the broadcasting industry emerged. Broadcasting in the United States draws upon the initiative of private entrepreneurs; public service broadcasting in the United States is decentralized and not government operated.<sup>6</sup> The Public Broadcasting Service ("PBS") with its 355 member TV stations averaged a modest 1.4 percent primetime rating during the 2006–2007 season.<sup>7</sup> In contrast, most European countries—Great Britain, Germany, France, Switzerland, Austria, etc.—rely on strong, publicly-funded TV stations and networks for broadcasting.<sup>8</sup> Traditionally, European governments have protected their public service broadcasters by providing them with regulatory and financial advantages and by limiting the leeway of private broadcasters.<sup>9</sup>

Like private TV and radio stations, public service broadcasters enjoy the protection of freedom of speech. Unfortunately, this protection has rendered European public broadcasters largely unaccountable to the public. Today, public broadcasters in Europe abuse their privileges to expand their

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that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984).

<sup>5</sup> Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>6</sup> See Eli M. Noam & Jens Waltermann, *Public Television: Past Promises and Future Opportunities: An Introduction*, in PUBLIC TELEVISION IN AMERICA 8 (Eli M. Noam & Jens Waltermann eds., 1998).

<sup>7</sup> About PBS: Corporate Facts, [http://www.pbs.org/aboutpbs/aboutpbs\\_corp.html](http://www.pbs.org/aboutpbs/aboutpbs_corp.html) (last visited Nov. 2, 2008).

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See *infra* Parts III.B, III.D, and III.H.

services to print media and the Internet, thereby menacing incumbents that do not enjoy subsidies.<sup>10</sup> Regulatory shortcomings are left in place, all relevant players—politicians, broadcasters, film producers—having more to lose than to gain from changes. Diversity of content, the overarching regulatory goal on both continents,<sup>11</sup> is reduced to a mere fig leaf justifying the inefficiencies of the current legal framework.

Diverse content, that is, the quantity of broadcast content, has vastly increased due to competition for attention of the audience. Unlike Internet users, however, the individual spectator is left without much power to actively promote specific content on TV. His power is to opt out of a certain program, for example, to switch from CSI New York to CSI Miami. The “Iron Law of Television” suggests that a single broadcaster will try to maximize its audience—and hence its advertising revenue—by appealing “to the broadest cross-section of the population, often with programming of the lowest common denominator—bland, uncontroversial, and usually uninteresting.”<sup>12</sup> Despite the use of intrusive instruments, behavioral limits on programmers hardly managed to improve the quality of broadcast. The European tradition of strong public service broadcasters might provide some leverage in maintaining quality; however, governments sponsoring broadcasting are walking a tightrope between First Amendment infringements and maintaining adequate accountability.

Part I of this Article sets out today's rationales for strong public service broadcasting and tight regulation of audiovisual media. Part II explains the key characteristics and main pitfalls of American and European broadcasting regulation. Part III sets

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<sup>10</sup> See *infra* Part III.H.

<sup>11</sup> See, e.g., Cecilia Rothenberger, *The UHF Discount: Shortchanging the Public Interest*, 53 AM. U. L. REV. 689, 692–94 (2004); see also Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age: Communication from the Commission to the Council, EUR. PARL. DOC. (COM 657) 8 (1999).

<sup>12</sup> Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting*, 46 MD. L. REV. 212, 252 (1987); see also ROGER SCHAWINSKI, *DIE TV-FALLE [THE TV TRAP]* 93–115 (2007); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 335 (1997) (arguing that it is the primary incentive of media to provide a package that has the broadest, even if shallowest, appeal); Laurence G.C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 335–36 (1994) (arguing that “a liberalized television environment invariably will lead to a flood of low-quality imports, typically American”).

the cornerstones for a revised regulatory framework, committed to the goals of both the American and European legal framework, and ready to face the completion of convergence of all (audiovisual) media.

#### I. DIVERSITY AS MODERN RATIONALE FOR REGULATING AUDIOVISUAL MEDIA

Scarcity of available spectrum is the traditional rationale for regulating broadcasting.<sup>13</sup> Spectrum itself, however, was never scarce. Spectrum has to be distinguished from information outlets (“channels”), demand for which traditionally exceeds supply. Today, the amount of spectrum allocated for broadcasting provides space for quite a number of TV and radio stations. Further, technical platforms like Internet, cable, and Direct Broadcast Satellite (“DBS”) make it possible to convey information via an abundance of channels.

In audiovisual media markets, scarcity of available channels translates into a general threat to diversity. Independent of scarcity, possible threats to diversity might still be part of a rationale for regulating broadcasting specifically and audiovisual media generally. Further, diversity is closely related to the desire to preserve the cultural identity of distinguished social groups and local forms of culture, both of which legislators regard as a strong rationales for regulating audiovisual media. Some commentators even claim that private programming in audiovisual media is generally of inferior quality. In particular, diversity and localism form the guiding principles for the FCC’s policymaking in broadcasting.<sup>14</sup>

##### A. *Diversity*

Ever since the electromagnetic spectrum was put to commercial use, it has been regarded as a scarce resource, meaning that demand for spectrum exceeds supply. Scarcity constitutes an impediment to “the widest possible dissemination of information from diverse and antagonistic sources.”<sup>15</sup> For this reason, scarcity was the main rationale for regulating broadcast

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<sup>13</sup> See BERRESFORD, *supra* note 3, at 1.

<sup>14</sup> See Philip M. Napoli, *Access and Fundamental Principles in Communication Policy*, 2002 MICH. ST. L. REV. 797, 798–99 (2002).

<sup>15</sup> See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

media. However, if we care to believe physicists, and we should, this assumption was never correct. The electromagnetic spectrum is not a tangible item or resource comparable to assets like real estate or moveable objects. The spectrum itself and the amount of available frequencies are in fact unlimited, the short wavelength limit likely being the Planck length and the long wavelength limit being the size of the universe itself.<sup>16</sup>

Nevertheless, the scarcity rationale initially found wide approval with regulators and courts.<sup>17</sup> Their endorsement of it is not based on a “fundamental misunderstanding of physics,”<sup>18</sup> but rather on the perception that the number of channels available for broadcasting is limited for several reasons. First, the frequency band available is limited by governments reserving frequency bands for their own use (for example, military purposes, coast guard) or uses other than commercial broadcasting (for example, telecommunications networks).<sup>19</sup> Second, signals transmitted on the same or nearly the same frequency may interact, thereby severely deteriorating the quality of the content broadcast; such interference made it necessary to space channels.<sup>20</sup> Third, certain frequencies may not be used for broadcasting content for technical reasons, because the wavelength is too large to allow for reasonably-sized antenna.<sup>21</sup> These reasons combined reduce the amount of available channels to a finite number.

The scarcity rationale for regulating broadcasting (and cable) has not remained unchallenged. Some scholars argue that virtually all goods are scarce.<sup>22</sup> Scarcity of goods alone, however, has not prompted legislators to regulate access to resources.<sup>23</sup>

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<sup>16</sup> See OXFORD DICTIONARY OF PHYSICS (John Daintith & Alan Isaacs eds., 2000).

<sup>17</sup> See, e.g., *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 213 (1943); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 12 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 205 (261–62) (F.R.G.), translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=652](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=652).

<sup>18</sup> BERRESFORD, *supra* note 3, at 9.

<sup>19</sup> See Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 MICH. ST. L. REV. 671, 689–90 (2003).

<sup>20</sup> See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637 (1994); *Nat'l Broad. Co.*, 319 U.S. at 212–13.

<sup>21</sup> See MINORU FUJIMOTO, *PHYSICS OF CLASSICAL ELECTROMAGNETISM* 184 (2007).

<sup>22</sup> See, e.g., Winer, *supra* note 12, at 236–38.

<sup>23</sup> See *id.*

Neither the United States nor Europe regulates access to scarce resources like real estate, gold, or currency. Also, scarce goods are not awarded to applicants on the basis of merit, age, gender, or race, but rather on the basis of a buyer's willingness to pay. In contrast to available channels for broadcasting, most scarce goods get allocated by market forces. Thus, scarcity does not provide a rationale in itself for regulating broadcasting. As the scarcity rationale becomes less and less plausible, other reasons need to be established if broadcast regulation is to withstand First Amendment challenges in the future.

Unlike other goods, scarcity of available channels has a direct impact on another market, the "marketplace of ideas."<sup>24</sup> Whilst only a few broadcasters could be accommodated, some applicants were not able to broadcast at all, either being denied an individual channel or access to a channel. Such restricted access to channels may result in ideas not being uttered, either because these ideas are perceived as false, irrelevant, or as a challenge to the own agenda. Limited access to channels—in broadcasting as well as in cable—restricts, as a consequence, free speech. Thus, a rationale for broadcasting and cable regulation is scarcity's inherent restriction on speech and scarcity's potential challenge to diversity of opinions and—last but not least—democracy.<sup>25</sup>

The potential for diversity of opinions is increasing with the amount of available broadcasting channels. Technological improvements like digital terrestrial broadcasting, cable TV, and the Internet (IPTV Platforms like Hulu<sup>26</sup>, Mogulus,<sup>27</sup> or Zattoo<sup>28</sup>)

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<sup>24</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also* *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . .").

<sup>25</sup> *See, e.g.*, *Observer & Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) ¶ 59 (1991) (stressing the fundamental role of freedom of expression in a democratic society, in particular where, through the press or audiovisual media, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive); *see also* Napoli, *supra* note 14, at 799 (arguing that "the availability of diverse sources and ideas is seen as essential to the well-informed political decision making that underlies a well-functioning democracy").

<sup>26</sup> Hulu offers premium programming to audiences within the United States at <http://www.hulu.com>.

<sup>27</sup> It is possible to set up a live broadcast channel via Mogulus at <http://www.mogulus.com>.

have significantly increased the amount of available channels.<sup>29</sup> The attention of the audience, however, is scarce;<sup>30</sup> likewise, the willingness of the audience to invest large amounts of time in seeking out new offers in the audiovisual landscape is limited. Concentrated ownership of channels (TV and radio stations) adds another challenge to diversity. Like the Lernaean Hydra's many heads and tongues emanating from one body (and mindset), a multitude of channels under single ownership does not increase diversity.<sup>31</sup> Further, clever branding of a channel may attract an extra share of viewers, making market entry difficult and leaving smaller channels starving or even idle. For all these reasons, an abundance of channels does not in itself guarantee sustainable diversity.<sup>32</sup>

The described danger of media market concentration and its inherent challenge to diversity puts forward a rationale for regulating media independent from the traditional scarcity rationale.<sup>33</sup> The German Constitutional Court (*Bundesverfassungsgericht*) explicitly embraced this line of

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<sup>28</sup> Zattoo offers more than forty European channels at <http://zattoo.com>.

<sup>29</sup> The number of TV channels that the average U.S. home receives was 104.2 in 2006, up from 18.8 channels in 1985. *Average U.S. Home Now Receives a Record 104.2 TV Channels, According to Nielsen*, NIELSEN MEDIA RES., Mar. 19, 2007, <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0?vgnextoid=48839bc66a961110VgnVCM100000ac0a260aRCRD>.

<sup>30</sup> See Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in *COMPUTERS, COMMUNICATION, AND THE PUBLIC INTEREST* 40–41 (Martin Greenberger ed., 1971).

<sup>31</sup> See Elizabeth Knowles, *Hydra*, *THE OXFORD DICTIONARY OF PHRASE AND FABLE* (Oxford Univ. Press ed., 2006), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t214.e3468>; Ron Leadbetter, *Hydra*, *ENCYCLOPEDIA MYTHICA ONLINE*, <http://www.pantheon.org/articles/h/hydra.html>.

<sup>32</sup> See Mónica Ariño & Christian Ahlert, *Beyond Broadcasting: The Digital Future of Public Service Broadcasting*, 22 *PROMETHEUS* 398, 399–400 (2004) (arguing that “more producers do not necessarily mean more choice,” because “[c]ontent is still competing for the same eyeballs”); see also Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *DUKE L.J.* 1, 38 (1984) (arguing that monopolistic practices, economies of scale, and an unequal distribution of resources have made it difficult for new ventures to enter the business of mass communications). The marketplace of ideas' inevitable bias supports entrenched power structures, supporting those ideas appealing to the self-interest of individuals who manage the media. *Id.* at 39.

<sup>33</sup> See KLAUS A. VALLENDER, PETER HETTICH & JENS LEHNE, *WIRTSCHAFTSFREIHEIT UND BEGRENZTE STAATSVANTWORTUNG [ECONOMIC LIBERTY AND LIMITED RESPONSIBILITY OF THE STATE]* 283, 909–10 (4th ed. 2007).



argument.<sup>34</sup> The Court rejected the idea that broadcasting regulation might become obsolete as soon as scarcity of channels is overcome.<sup>35</sup> Competition, according to the German Constitutional Court, does not result automatically in a diverse supply of content.<sup>36</sup> Regulatory safeguards need to be put in place in order to satisfy the standards for freedom of speech as derived from the German Constitution.<sup>37</sup>

The approach of the German Constitutional Court may be taken to its logical conclusion by applying the line of argument to other media. Until today, speech in print media and the Internet has remained largely unregulated (or self-regulated). If an abundance of channels does not *eo ipso* result in diversity in broadcasting, then print media and even the Internet do not guarantee diversity. With diversity being the ultimate goal of intervention, legislators would need to inquire whether features of print and Internet media markets differ from broadcasting in a way that warrants preferential treatment.<sup>38</sup> If no such distinguishing features exist anymore, legislators need to assess whether broadcast regulation should be abrogated or extended to all audiovisual services regardless of their technical platform (broadcast, cable, Internet, etc.). Indeed, the European Union adopted a new audiovisual media services directive on December 11, 2007, which covers all “television-like” audiovisual services.<sup>39</sup>

In contrast to the European approach, the U.S. Supreme Court is locked into the scarcity rationale, waiting for “some signal from Congress or the FCC” before considering a limitation of broadcasting regulation.<sup>40</sup> As a consequence, regulation is submitted to a different level of scrutiny depending on the

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<sup>34</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 16, 1981, 57 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 295 (F.R.G.).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt [BGBl.] 2002 I S. 2862–63, art. 5(1); see BVerfG, June 16, 1981, 57 BVerfGE 295 (F.R.G.).

<sup>38</sup> See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 68 (D.C. Cir. 1977) (finding that “important differences between cable and broadcast television and differences in the characteristics of new media justify differences in the First Amendment standards applied to them” (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386, 389 (1969))).

<sup>39</sup> See Council Directive 2007/65, ¶¶ 16–17 2007 O.J. (L 332) 27 (EC).

<sup>40</sup> See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984).

affected platform: While broadcasters face a heavy regulatory burden, cable companies enjoy more freedom, and Internet Service Providers largely remain unrestrained.<sup>41</sup> The U.S. Supreme Court has tolerated a vast amount of restrictions affecting traditional broadcasters. The Court has upheld content-neutral broadcasting regulation when the restriction was narrowly tailored and furthered a substantial, not compelling, governmental interest.<sup>42</sup> With regard to content-based restrictions, the U.S. Supreme Court acknowledges that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”<sup>43</sup>

The U.S. Supreme Court submits content-neutral regulation of cable,<sup>44</sup> as well as direct broadcast satellite systems (“DBS”) to the more rigorous *O’Brien* standard of scrutiny.<sup>45</sup> Unlike broadcasters, cable systems were not perceived as a big threat to diversity, because spectrum scarcity and signal interference do not apply to cable. Until the Cable Communications Policy Act of 1984,<sup>46</sup> cable regulation consisted of a mere spillover from broadcasting.<sup>47</sup> Eager to maintain programmer’s access to cable

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<sup>41</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 741 & nn.16–17, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”).

<sup>42</sup> See *League of Women Voters*, 468 U.S. at 380; see also *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 798–802 (1978) (upholding a ban on certain newspaper-broadcast combinations); *Red Lion*, 395 U.S. at 375–78, 387–89 (holding the fairness doctrine to be constitutional and to “enhance rather than abridge the freedoms of . . . the First Amendment”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 218–19 (1943) (confirming that the FCC has the authority to regulate network practices contrary to public interests).

<sup>43</sup> *Pacifica Found.*, 438 U.S. at 748 (sustaining a partial ban of indecent speech, which was deemed to serve the compelling interest of protecting minors); see also *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127–28 (1989) (distinguishing *Pacifica* with regard to telecommunications).

<sup>44</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 623, 661–62 (1994) (regarding the must-carry rules in question as “content neutral and thus . . . not subject to strict scrutiny”); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (finding that regulation of speech may be justified if it furthers an important or substantial governmental interest and if the provisions do not burden substantially more speech than necessary to further that interest); see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

<sup>45</sup> See *Satellite Broad. & Commc’n Ass’n v. FCC*, 275 F.3d 337, 354–55 (4th Cir. 2001) (upholding must-carry obligations for direct broadcast satellite providers); cf. *infra* notes 231–233 and accompanying text.

<sup>46</sup> Pub. L. No. 98-549, § 2, 98 Stat. 2779 (1984).

<sup>47</sup> See *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968). The Court upheld an interim order of the FCC restricting the expansion of CATV service in

systems from diverse sources, the courts sustained must-carry requirements,<sup>48</sup> as well as rules requiring cable operators to reserve channels for leased access and public, educational, and governmental programming.<sup>49</sup> The courts, however, have refused to sustain the siphoning rules<sup>50</sup> or the strict cable ownership limits of the FCC,<sup>51</sup> some of which have recently been reenacted.<sup>52</sup> With regard to content-based restrictions, a heavy burden lies on

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areas in which the service had not operated previously, pending hearings on the merits of the incumbent local broadcasters complaint. The order was held to be covered by the FCC's responsibilities for providing a widely dispersed TV service. Lacking a clear congressional mandate for cable regulation, the authority of the FCC was

restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission [could], for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'

*Id.* at 178 (citing 47 U.S.C. § 303(r) (2000)); *see also* United States v. Midwest Video Corp., 406 U.S. 649, 653–54 (1972) (upholding regulation, which required cable systems to operate as local outlets by cablecasting and to make available facilities for local production and presentation of programs); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 361 (D.C. Cir. 1963). In *Carter*, the court affirmed the FCC's denial for permission to construct a microwave communication system to transmit signals to community antenna systems, because the improved community antenna television (CATV) service would threaten the local TV station. Thereby, the court gave indirect effect to the broadcasting regime on CATV. *Id.* at 363–64. *But see* FCC v. Midwest Video Corp., 440 U.S. 689, 708–09 (1979) (holding that the FCC lacked statutory authority to promulgate access rules, i.e., requiring cable operators to reserve channels for public, governmental, educational, and leased access).

<sup>48</sup> *See Turner Broad. Sys.*, 520 U.S. at 180–83; *see also* Gary Lutzker, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried*, 12 CARDOZO ARTS & ENT. L.J. 467, 477–90 (1994). *But see* Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (holding that the FCC had failed adequately to articulate and tailor the government's substantial interest in the must-carry rules so as to overcome the cable operator's First Amendment right to editorial autonomy).

<sup>49</sup> *See* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 962 (D.C. Cir. 1996).

<sup>50</sup> *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 27 (D.C. Cir. 1977) (holding that the FCC is required to demonstrate that the objectives to be achieved by regulating cable TV are also objectives for which the Commission could legitimately regulate the broadcast media); *see also infra* note 220.

<sup>51</sup> *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1139–44 (D.C. Cir. 2001) (reversing the rules on horizontal and vertical limits on ownership and letting survive the FCC's threshold for attribution of a broadcast station to be controlled or influenced by cable operators); *see also infra* Part II.C.

<sup>52</sup> *See infra* Part II.C.

the government to prove that less restrictive alternatives are ineffective to further its compelling interests.<sup>53</sup>

So far, the FCC has refrained from regulating the Internet.<sup>54</sup> Up to now, the several attempts made by Congress to regulate indecent speech on the Internet have all failed.<sup>55</sup> Also, the FCC exempts broadband Internet access over cable,<sup>56</sup> power line,<sup>57</sup> and

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<sup>53</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815–16 (2000) (arguing that there is “a key difference between cable television and the broadcast media . . . : Cable systems have the capacity to block unwanted channels on a household-by-household basis”); cf. *Action for Children's Television v. FCC*, 58 F.3d 654, 672–88 (D.C. Cir. 1995) (Edwards, J., dissenting) (arguing that no reasonable basis can be found to distinguish broadcast from cable). *But see Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996) (holding constitutional a provision permitting cable operators to prohibit indecent programming on leased access channels, a provision requiring segregating and blocking of indecent programming on leased access channels, and a provision permitting cable operators to prohibit patently offensive or indecent programming on public access channels).

<sup>54</sup> In the absence of a coherent regulatory framework of the FCC, the regulation of the Internet is left to the courts. See, e.g., *EBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1073 (N.D. Cal. 2000) (granting a preliminary injunction preventing Bidder's Edge from accessing EBay's computer system by use of any automated querying program without plaintiff's written authorization); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH, 2000 WL 525390, at \*1345–46 (C.D. Cal. Mar. 27, 2000) (holding that Ticketmaster failed to show harm done by Tickets.com's spiders and software in its computers); *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 510–11 (D.C. Cir. 1999) (holding that domain name registration services are not a governmental service); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (holding that defendants' unsolicited commercial e-mails—spam—constitute trespass to chattels); see also Michael Kende, *The Digital Handshake: Connecting Internet Backbones* 9 (FCC Office of Plans and Policy, OPP Working Paper No. 32, 2000) (explaining why Internet backbone services should remain unregulated), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf).

<sup>55</sup> The U.S. Supreme Court has struck down the Communications Decency Act of 1996 (“CDA”), 47 U.S.C.A. § 223 (West 2006), in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997), and the Child Online Protection Act (“COPA”), 47 U.S.C. § 231 (2000), in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 673 (2004), as violating the First Amendment. *But see United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003) (holding that the Children's Internet Protection Act (“CIPA”), requiring libraries to install filter software when providing Internet access, does not violate the First Amendment).

<sup>56</sup> See *In re Appropriate Framework for Broadband Access to the Internet over Wireless Facilities*, 20 F.C.C.R. 14986, 14988 (2005). *But see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (sustaining the FCC's initial distinction between Internet access through DSL technology and Internet through cable service after companies offering DSL had been required to make their wires available to competing Internet service providers).

DSL<sup>58</sup> from mandatory common-carrier regulation under Title II of the Communications Act; these services, therefore, are regulated lightly and in a technology neutral manner.

Of all media, the press probably faces the fewest restrictions. Still, the U.S. Supreme Court acknowledged the emergence of large newspaper corporations, as a result of which the power to inform the American people and to shape public opinion is placed in only a few hands.<sup>59</sup> This has led to a market structure similar to the structure formed by traditional broadcast networks. Theoretically, newspaper concentration—and scarcity in outlets to inform the public—would provide a rationale for regulation analogous to broadcasting. The U.S. Supreme Court, however, rejected intervention based on scarcity of print media outlets: “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”<sup>60</sup>

In sum, the U.S. Supreme Court has accepted the protection of diversity—as equivalent to scarcity—as sufficient justification to limit the First Amendment rights of some speakers in order to give room for other speakers. Any regulation of audiovisual services in general needs to show that it is able to increase the total amount of available speech.<sup>61</sup> With regard to audiovisual services transmitted via the Internet, a government might have difficulties in showing that its regulatory framework serves the goal of diversity. There is probably no platform that is as easily accessible for speakers than the Internet. Political science suggests that the government needs to prove that its regulatory framework improves diversity beyond the current regime, and it

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<sup>57</sup> See *In re* United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, 21 F.C.C.R. 13281, 13281, 13285 (2006).

<sup>58</sup> See *id.* at 13282, 13286.

<sup>59</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 249–50 (1974) (holding unconstitutional, under the First Amendment’s guarantee of a free press, Florida’s “right of reply”).

<sup>60</sup> *Id.* at 256.

<sup>61</sup> Cf. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226 (1997) (Breyer, J., concurring) (“I do not deny that the compulsory carriage . . . extracts a serious First Amendment price. . . . This price amounts to a ‘suppression of speech.’ But there are important First Amendment interests on the other side as well.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .”).

needs to show that the improvement in diversity justifies the possible harm to other goals and the cost of regulation.<sup>62</sup>

### B. Culture

Culture<sup>63</sup> manifests itself in such places as music, literature, painting, theater, and film.<sup>64</sup> TV provides one platform to convey these cultural manifestations or expressions to a large audience. TV serves, as a consequence, to promote culture. When establishing the Corporation for Public Broadcasting ("CPB") in the United States, Congress declared that "it is in the public interest to encourage . . . the use of such media for instructional, educational, and cultural purposes."<sup>65</sup> The mere formation of the CPB implies that public service broadcasting is expected to serve different cultural purposes than private broadcasting. Such different cultural purposes are served, for example, by developing "programming that involves creative risks,"<sup>66</sup> and addressing "national concerns and solv[ing] local problems through community programs and outreach programs."<sup>67</sup>

Individual expressions of culture vary from community to community, from state to state, and from nation to nation. We may assume that this variety of individual cultural expressions is a result of the distinctive cultural needs of a particular social group. Therefore, regulators do not aim to protect a single American culture as such, but seek to maintain a level of cultural diversity. The FCC's licensing standards<sup>68</sup> and media ownership

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<sup>62</sup> See *Turner Broad. Sys.*, 520 U.S. at 226–27 (Breyer, J., concurring in part) (balancing between "speech-restricting and speech-enhancing consequences"); see also Owen, *supra* note 19, at 677 (arguing that "[f]ree markets are an inferior choice when they are so imperfect that even flawed regulation produces better results").

<sup>63</sup> The term "culture" lacks clear boundaries; a stringent, categorical definition; and a corresponding, widely-accepted catalogue of expected functions. See, e.g., Werner Fuchs-Heinritz, *Kultur [Culture]*, in LEXIKON ZUR SOZIOLOGIE [ENCYCLOPEDIA OF SOCIOLOGY] 379 (Werner Fuchs-Heinritz et al. eds., 3d ed. 1994); Lyn Spillman, *Culture*, in THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 922 (Georg Ritzer ed., 2007); see also JEFFREY KENNETH HASS, ECONOMIC SOCIOLOGY: AN INTRODUCTION 9 (2007). This Article will, therefore, refrain from defining the term "culture."

<sup>64</sup> See Spillman, *supra* note 63, at 926–27.

<sup>65</sup> 47 U.S.C. § 396(a)(1) (2000 & Supp. IV 2004).

<sup>66</sup> *Id.* § 396(a)(6).

<sup>67</sup> *Id.* § 396(a)(7).

<sup>68</sup> See *infra* Part II.B.

rules,<sup>69</sup> both promoting localism, might be regarded as efforts to protect local culture.<sup>70</sup>

There is no reason why the production of cultural products should not obey market forces. Due to market forces, any given shortfall of domestically produced culture will be compensated by cultural expressions produced abroad, assuming overall demand for cultural products remains unchanged. The reasons for such expansion of foreign culture probably vary and shall not be discussed here.<sup>71</sup> Like falling domestic production in other industries, a perceived shortfall of domestic cultural production will capture domestic public interest and easily find a place on the agenda of domestic governments.<sup>72</sup> Governments may regulate TV stations as an instrument to promote individual cultural expressions in general. For the reasons explained above, a government is most likely to focus on promoting domestically produced cultural expressions.<sup>73</sup> In order to promote domestic culture, however, a nation also will have to change the established consumption pattern and will have to shift the ratio between consumption of foreign and domestic culture.

The promotion of culture and, in particular, cultural diversity is an important public interest. Unlike other countries'

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<sup>69</sup> See *infra* Part II.C.

<sup>70</sup> Cf. Kevin Martin, FCC Chairman, Statement at Public Hearing on Localism (Oct. 31, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-277762A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277762A1.pdf). For localism as a guiding principle for policy decisions, see generally Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (noting that local values “pervade the system and make state legislatures and courts resistant to altering these arrangements in ways that would undermine local independence”); Philip M. Napoli, *supra* note 14, at 801–02.

<sup>71</sup> Foreign culture, e.g. Hollywood films in Europe, may have more appeal for different reasons. Foreign production standards may outclass domestic ones, foreign culture may be produced en masse and, as a consequence, may be sold cheaper than domestic products, or domestic production may just be too small to meet demand.

<sup>72</sup> See, e.g., Leslie Wayne, *U.S.-Europe Team Beats Out Boeing on Big Contract*, N.Y. TIMES, Mar. 1, 2008, at A1 (describing the outrage of the Washington State delegation in Congress when a forty billion dollar contract for aerial refueling tankers was awarded to Airbus instead of Boeing).

<sup>73</sup> This is including, at best, the promotion of “cultural dialogue” or “interculturality.” For the concept of “cultural dialogue,” see Jürgen Habermas, *Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849, 849 (1995). UNESCO defines “interculturality” as “the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect.” U.N. Educ., Sci. & Cultural Org. [UNESCO], Convention on the Protection and Promotion of the Diversity of Cultural Expressions, pt. III, art. 4, ¶ 8 (Oct. 20, 2005) [hereinafter UNESCO Convention], available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

constitutions, the U.S. Constitution does not address the cultural responsibilities of the state.<sup>74</sup> Despite this omission, and although the United States is home to so many ethnic groups, most would not deny the existence of a unique “American Culture” or a unique “American way of life.” Such American Culture would be distinguishable from other cultures on other continents and from the way of life in other nations. The preservation of “Culture” and “Cultural Diversity” is a goal of several international, federal, and state policies. A whole chapter of the United States Code deals with American Folklife Preservation.<sup>75</sup> Public funds support a wide range of cultural activities.<sup>76</sup> The protection and promotion of the diversity of cultural expressions is the sole objective of a UNESCO Convention, which entered into force on March 18, 2007.<sup>77</sup>

There is no standard instrument for promoting cultural diversity. To pursue policy goals, governments have various policy instruments at their disposal, such as regulation,

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<sup>74</sup> The lack of cultural responsibilities in the U.S. Constitution is contrasted by other constitutions, which often contain cultural goals. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), available at <http://laws.justice.gc.ca/en/Charter/index.html>; Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 2, (Switz.), translation available at <http://www.admin.ch/org/polit/00083/index.html?lang=en>. As one of its goals, the European Union is charged to “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.” *See* Treaty Establishing the European Community art. 151, Dec. 29, 2006, 2006 O.J. (C321) 113.

<sup>75</sup> 20 U.S.C. §§ 2101–2144 (2000). Section 2101 states:

Congress hereby finds and declares (1) that the diversity inherent in American folklife has contributed greatly to the cultural richness of the Nation and has fostered a sense of individuality and identity among the American people; (2) that the history of the United States effectively demonstrates that building a strong nation does not require the sacrifice of cultural differences . . . .

*Id.* § 2101.

<sup>76</sup> *See, e.g.*, New York City Department of Cultural Affairs, About Cultural Affairs, <http://home2.nyc.gov/html/dcla/html/about/about.shtml> (last visited Nov. 2, 2008).

<sup>77</sup> *See* UNESCO Convention, *supra* note 73. The Convention was not approved or adopted by the United States. For a list of the current member states, see UNESCO.org, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, <http://portal.unesco.org/la/convention.asp?KO=31038&language=E&order=alpha> (last visited Nov. 2, 2008).



contracting, corrective taxes, and grants.<sup>78</sup> Policy instruments vary in intrusiveness with regard to TV stations' ability to operate freely, consumers' freedom to consume their preferred cultural products, and the instruments' effect on international trade in cultural products.<sup>79</sup> By regulating broadcast and cable in order to promote domestic culture, a government chooses a rather more intrusive government tool compared to subsidizing domestic artists, for example.<sup>80</sup> Direct regulation of content broadcast (for example, by imposing a culture quota), however, might be much more effective than mere financial incentives for producers and distributors of content. This Article aims to explore the impact and effectiveness of the policy instruments used by governments in audiovisual media. As will be discussed in detail below,<sup>81</sup> European regulation promoting culture would raise the eyebrows of American Supreme Court Justices.

### C. *Quality*

In addition to the claim that private programmers do not care to preserve cultural diversity, some commentators argue that private media generally produce programs of little educational and cultural value.<sup>82</sup> "Even if the market could give consumers exactly what they wanted, the media would not necessarily deliver what a strong democracy and civil society needs in terms of exposure to diversity, the forging of solidarity, and elevation outside of market exchanges."<sup>83</sup> Thus, media markets are deemed to work imperfectly, producing undesired equilibria. This general lack of—broadly speaking—"quality" is

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<sup>78</sup> See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *The TOOLS OF GOVERNMENT* 1, 4 (Lester M. Salamon ed., 2002).

<sup>79</sup> See *id.* at 25–26.

<sup>80</sup> See *id.*

<sup>81</sup> See *infra* Part II.

<sup>82</sup> See Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *BERKELEY TECH. L.J.* 1389, 1418 (2004) (citing the Chairman of the Parents Television Council, who had described TV offerings as "raw sewage").

<sup>83</sup> *Id.* at 1455. See also 2 THEODOR W. ADORNO, *Prolog zum Fernsehen [Prologue to Television]*, in *KULTURKRITIK UND GESELLSCHAFT [CULTURE CRITIQUE AND SOCIETY]* 507, 512 (Rolf Tiedemann ed., 2003) (arguing that TV estranges people and replaces social interaction, and as a consequence, TV makes people dumber, although the broadcasted content is not dumber than other consumed cultural goods); Baker, *supra* note 12, at 313–15 (arguing that the audience would prefer higher quality video products if given the choice, that is, if markets would work perfectly).

regarded as another reason for interventionist media policy, justifying, for example, the Children's Television Act of 1990.<sup>84</sup> One could argue that the audience itself, faced with huge transaction costs, is unable to coordinate and to carry out negotiations with broadcasters on improving the quality of programming. The quality argument also connects audiovisual media with the notion of "merit goods"<sup>85</sup> (or "public goods," assuming that some superior programming would not be produced by private markets at all).<sup>86</sup> The concept of "merit goods" acknowledges that the market is theoretically able to provide the collectively desired goods merit wants. These goods, however, "are considered so meritorious that their satisfaction must be provided for through the public budget, over and above any market provision that individuals may wish to make."<sup>87</sup> Intervention in markets based on the merit good rationale overrides individual consumption decisions. Richard Musgrave explains this defiance of consumer sovereignty by the emergence of certain situations, in the context of a democratic community, where an informed group considers itself justified in imposing its decisions upon others.<sup>88</sup> Legislators and regulators, supposedly the "informed groups" here, regard certain types of programming as superior per se, and consequently prefer local and public service programmers to commercial programmers.<sup>89</sup> Why legislators and regulators should be better able to judge quality than the audience itself still needs to be explained. Even if one assumes that today's media markets work inefficiently, produce inferior quality work, and produce negative externalities on

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<sup>84</sup> Pub. L. No. 101-437, § 102, 104 Stat. 996 (1990) (codified at 47 U.S.C. §§ 303(a)–(b) (2000)). This act aims to increase the amount of educational and informational programming for children on TV. Each broadcast TV station in the United States is required to serve the needs of children through its overall programming, including programming specifically designed to serve their needs. The act limits the amount of advertisements permitted during children's programs. *Id.*

<sup>85</sup> See Goodman; *supra* note 82, at 1414.

<sup>86</sup> See Baker, *supra* note 12, at 322–29 (arguing that content bears characteristics of public good). Baker's argument, however, applies only to free-to-air broadcasting. A public good is determined by non-rivalry of *and* non-excludability from consumption. Today, there are ample technological possibilities to exclude free-riders from the consumption of content—cable systems, on-demand video—rendering content a private good, which markets are able to provide for. *Id.*

<sup>87</sup> Jack Wiseman, *The Public Economy*, 27 *ECONOMICA* 258, 261 (1960).

<sup>88</sup> See RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* 14 (1959).

<sup>89</sup> See *infra* Parts II.A–B.

democratic values,<sup>90</sup> replacing market mechanisms with government schemes can only be justified if better performance results.<sup>91</sup>

Early U.S. Supreme Court decisions raise the idea that licensees of airwaves act as public trustees. As such, they “must present representative community views and voices on controversial issues which are of importance to [their] listeners.”<sup>92</sup> The concept of public trustees implies that the spectrum is owned by the public. Governments naturally regard themselves as representatives of the public. Public ownership would give them a say on how the spectrum should be put in use. It supports the idea that broadcasters are not meant to align their programming solely with market forces, but also with the needs of society. Public ownership of spectrum, however, would also “bring[] into play the First Amendment, which requires that governmental authority may not be used in and of itself to justify deprivation of freedoms of speech and press.”<sup>93</sup> Thus, the claim of

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<sup>90</sup> See, e.g., Baker, *supra* note 12, at 414–15 (arguing that, beyond subsidies, policies directed at encouraging the allocation of control over content creation to people with commitments to quality rather than merely to the bottom line would make media entities more responsive to the market); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 502–04 (2000) (arguing that public interest requirements for broadcasters still make sense where channels abound, that the concept of consumer-sovereignty is ill-suited to communications markets, and that an unregulated media market cannot promote the aspiration to deliberative democracy).

<sup>91</sup> See RENÉ L. FREY, WIRTSCHAFT, STAAT UND WOHLFAHRT [ECONOMY, STATE AND WELFARE] 238–40 (11th ed. 2002) (arguing that state interventions in order to correct market failure may result in government failure); VALLENDER ET AL., *supra* note 33, at 286–88; JOE WALLIS & BRIAN DOLLERY, MARKET FAILURE, GOVERNMENT FAILURE, LEADERSHIP AND PUBLIC POLICY 32 (1999) (discussing the problems and costs of government intervention and possible government failures); Colin Robinson, *Introduction to ARTHUR SELDON, GOVERNMENT FAILURE AND OVER-GOVERNMENT*, at ix, xiii (Colin Robinson ed., 2005) (emphasizing the supremacy of market forces over governmental power).

<sup>92</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 111–12 (1973); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) (emphasizing “the special status of licensees as trustees of a scarce public resource”).

<sup>93</sup> *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 68 (D.C. Cir. 1972); see *Radio Television News Dirs. Ass’n v. United States*, 400 F.2d 1002, 1019 (7th Cir. 1968); BERRESFORD, *supra* note 3, at 18–19 (pointing out that 47 U.S.C. § 301 provides the United States with control of all channels, but not with ownership and further emphasizing that licensees may be granted use but not ownership of such channels). Governments in Europe have not assumed ownership of spectrum, but have secured themselves the right to regulate the use of spectrum. See Grundgesetz

public ownership does not seem to help legislators in pursuing their goal of improving quality in broadcasting beyond the narrow limits set by the First Amendment.

Limiting First Amendment rights of broadcasters has been justified by the protection of the privacy of the home, in particular the protection of minors from indecent or obscene broadcasting.<sup>94</sup> In contrast to bookstores or movie theaters, where young people's access to offensive speech may be blocked without interfering with content, broadcast is deemed too easily accessible for children.<sup>95</sup> The powers of the government to impose such content-based restrictions on programmers, however, are limited. With regard to programming on cable systems, parents are expected to request the blocking of indecent programming in order to protect their children.<sup>96</sup> With regard to the Internet, restrictions at the source seem out of the question even where minors are to be protected.<sup>97</sup>

## II. CURRENT STRATEGIES FOR ACHIEVING DIVERSITY AND PRESERVING CULTURE

Public service broadcasters, licensing regimes, ownership limits, behavioral restraints, promotion of domestic culture, must-carry requirements, rules on anti-siphoning, and subsidies are the most common regulatory instruments for achieving diversity and preserving culture. Applied with alternating

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für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt [BGBl.] 2002 I S. 2862–63, art. 73(7) (F.R.G.); Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 92 (Switz.), available at <http://www.admin.ch/org/polit/00083/index.html?lang=en>.

<sup>94</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978). After the 2004 Super Bowl incident involving Janet Jackson, Congress even increased indecency fines by enacting the Broadcast Decency Enforcement Act of 2005. Pub. L. No. 109-235, 120 Stat. 491 (codified as amended at 47 U.S.C.A. § 503(b)(2) (West 2008)). For a similar discussion concerning Europe, see Bundesgericht [BGer] [Federal Court] May 3, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 136, 141–46 (Switz.) (discussing the limits to indecent programming in the European Union and Switzerland).

<sup>95</sup> See *Pacifica*, 438 U.S. at 748–49.

<sup>96</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000). The signals in question had been scrambled by cable operators; however, “signal bleed” resulted in the leaking of portions of the program. *Id.* at 806; see also *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959–60 (8th Cir. 2003) (“[T]he government cannot silence protected speech [such as violent video games] by wrapping itself in the cloak of parental authority.”).

<sup>97</sup> *Cf. supra* note 55.

eagerness, these instruments have found the approval of regulators on both sides of the Atlantic. This Part highlights the key characteristics of American and European broadcast regulation. Since most European broadcast regulation is concretized on member state level, references to German broadcast regulation will serve to complete the picture. As this Part will show, American and European (in particular, German) broadcast regulations both center on the fundamental right of freedom of speech, as guaranteed by the First Amendment and article 5 of the German Constitution,<sup>98</sup> respectively.

#### A. *Public Service Broadcasters*

Shortly after broadcasting first became established as a new media in Europe, it was abused by the Nazis for propaganda purposes. The nationalization and abuse of radio by the Nazis seems to suggest that government-sponsored broadcasting is not the best way to achieve diversity of opinions.<sup>99</sup> Thus, the formation of strong public service broadcasters in Europe, starting after World War II, comes as a surprise. Strong public service broadcasters have been established in the United Kingdom (BBC), Germany (ARD, ZDF), France (France Télévisions), Italy (Radiotelevisione Italiana), Austria (ORF), and Switzerland (SRG SSR idée suisse). In most of these countries, public service broadcasters have at their disposal quite a number, if not the majority, of available broadcast channels.

Public service broadcasting in the United States is subsidized by the Corporation for Public Broadcasting (“CPB”), a corporation established by the Public Broadcasting Act in November 7, 1967.<sup>100</sup> The purpose of the CPB is to “facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence and innovation . . . will be made available to public . . . entities.”<sup>101</sup>

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<sup>98</sup> See Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt [BGBl.] 2002 I S. 2862–63, art. 5(1) (F.R.G.).

<sup>99</sup> See, for example, the efforts of Justice Murphy in restraining the power of the government over radio in *National Broadcasting Co. v. United States*, 319 U.S. 190, 228 (1943) (“Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression.”).

<sup>100</sup> Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 369 (1967) (codified at 47 U.S.C. § 396 (2000 & Supp. IV 2004)).

<sup>101</sup> 47 U.S.C. § 396(g)(1)(A).

All nine members of the Board of Directors of the CPB are appointed by the President.<sup>102</sup> Thus, although the CPB is declared not to “be an agency or establishment of the United States Government,”<sup>103</sup> the President’s power to appoint all Directors throws doubt on the private nature of the CPB.<sup>104</sup> The CPB provides funding to the Public Broadcasting Service (“PBS”) and National Public Radio (“NPR”) and to other local public TV and radio stations that are members of PBS or NPR, as well as to independent broadcasters. In more recent years, the CPB has started funding Internet-based projects.<sup>105</sup> Most public interest programming is produced by PBS and NPR, which are private non-profit corporations owned by member stations that receive and broadcast the programming.<sup>106</sup> PBS averaged a modest 1.4% primetime rating during the 2006–2007 season.<sup>107</sup>

Public service broadcasters in Germany have been established as agencies of the government.<sup>108</sup> They must provide a basic TV service, which the German Constitutional Court construed as a constitutional right based on Free Speech.<sup>109</sup> This constitutional right secures public service broadcasting as such and includes a right to develop and to grow (*Bestandes- und Entwicklungsgarantie*).<sup>110</sup> As a consequence, public service

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<sup>102</sup> *Id.* § 396(c)(1).

<sup>103</sup> *Id.* § 396(b).

<sup>104</sup> See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 391 (1995) (holding that Amtrak is a state actor); see also Peter Hettich, *Governance by Mutual Benchmarking: How State-Owned Enterprises May Induce Private Actors to Observe Policy Goals*, 32 U. DAYTON L. REV. 199, 212–14 (2007).

<sup>105</sup> See CORP. FOR PUB. BROAD., 2006 ANNUAL REPORT 12 (2007), available at [http://www.cpb.org/aboutcpb/reports/annual/cpb\\_2006\\_annualreport.pdf](http://www.cpb.org/aboutcpb/reports/annual/cpb_2006_annualreport.pdf).

<sup>106</sup> See National Public Radio, About NPR, <http://www.npr.org/about> (last visited Nov. 2, 2008); About PBS: Corporate Facts, *supra* note 7.

<sup>107</sup> See CORP. FOR PUB. BROAD., *supra* note 105.

<sup>108</sup> See HUBERTUS GERSDORF, GRUNDZÜGE DES RUNDFUNKRECHTS: NATIONALER UND EUROPÄISCHER REGULIERUNGSRAHMEN [BASICS OF BROADCASTING LAW] 133 (2003).

<sup>109</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 12 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 205 (262–63), translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=652](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=652).

<sup>110</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 11, 2007, 1 BvR 2270/05 (¶ 123), Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 5, 1991, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 238 (297) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 1987, 74 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 297 (350) (F.R.G.), translation available at

broadcasters have a constitutional right to access appropriate distribution platforms (spectrum, as well as—even if in addition to the basic service—other platforms like cable, satellite and Internet). They have to honor this right by providing diverse and balanced programming.<sup>111</sup> The constitutional right of Free Speech precludes not only political meddling in programming,<sup>112</sup> but also effective supervision by the government. If the law is violated, supervising authorities are supposed to notify public service broadcasters, but enforcement orders may be issued only if the violation is not remedied in due time.<sup>113</sup> The operational efficiency of public service broadcasters is subject to a yearly assessment,<sup>114</sup> but lack of efficiency may not be sanctioned.<sup>115</sup> Several internal bodies within a public service broadcaster are responsible for supervision. A council with representatives of all “relevant” groups in society (*Rundfunkrat*) is the guardian of public interest, elects the managing director of the broadcaster (*Intendant*), as well as approves the budget and drafts the guiding principles of programming.<sup>116</sup> The managing director is

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[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=635](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=635).

<sup>111</sup> See BVerfG, Sept. 11, 2007, 1 BvR 2270/05 (¶ 123); BVerfG Mar. 24, 1987, 74 BVerfGE 297 (326) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 4, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (157–58) (F.R.G.) (describing the functions of public broadcasting); see also Rundfunkstaatsvertrag [Interstate Broadcast Treaty], Aug. 31, 1991, amended by Vertrag, Dec. 19, 2007, § 19a [hereinafter Interstate Broadcast Treaty], <http://www.br-online.de/content/cms/Universalseite/2008/03/06/cumulus/BR-online-Publikation--189888-20080828132017.pdf>, translation available at [http://www.alm.de/fileadmin/Englisch/9\\_RAESTV\\_Englisch.pdf](http://www.alm.de/fileadmin/Englisch/9_RAESTV_Englisch.pdf); Council Directive 89/552, art. 19, 1989 O.J. (L298) 23 (EC), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>112</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 16, 1981, 57 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 295 (320) (F.R.G.), translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=641](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=641); BVerfG, Feb. 28, 1961, 12 BVerfGE 205 (261) (F.R.G.); see also GERSDORF, *supra* note 108, at 157–58.

<sup>113</sup> ZDF-Staatsvertrag [Treaty on the Formation of the Second German Television], Aug. 31, 1991, § 31, amended by Vertrag, Mar. 1, 2007; Gesetz über den Westdeutschen Rundfunk Köln [WDR-Gesetz] [State Act on the Broadcaster of Western Germany], Mar. 23, 1985, § 54, available at [http://www.wdr.de/unternehmen/\\_media/pdf/basis\\_struktur/wdr\\_Gesetz\\_neu.pdf](http://www.wdr.de/unternehmen/_media/pdf/basis_struktur/wdr_Gesetz_neu.pdf); see also WOLFGANG HOFFMANN-RIEM, REGULATING MEDIA 124–25 (1996).

<sup>114</sup> ZDF Staatsvertrag, § 30; WDR-Gesetz, § 42.

<sup>115</sup> See GERSDORF, *supra* note 108, at 158–59.

<sup>116</sup> See ZDF-Staatsvertrag, §§ 20, 24, 26; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 5, 1991, 83 Entscheidungen des

responsible for programming, leaving the council with hardly any powers to interfere.<sup>117</sup> A Board of Directors (*Verwaltungsrat*) is responsible for the supervision of the business and technical aspects of operations.<sup>118</sup> In 2007, the two largest public broadcasters held a market share of 13.4% and 12.8%, respectively, still unbeaten even by the large private broadcasters (RTL: 12.5%, Sat.1: 9.6%, ProSieben: 6.5%, Vox: 5.7%).<sup>119</sup> Large public service broadcasters on regional levels held an aggregated share of 13.3%.<sup>120</sup> The largest Swiss public TV broadcaster, for the sake of comparison, held a market share of 33.5%.<sup>121</sup> The main public broadcasters in France, under the roof of France Télévisions, held a share of 34.9% of the French audience; in Italy, RAI held even 43.6%.<sup>122</sup>

Although charged with the same task of promoting cultural diversity, public service broadcasters in the United States and in Europe serve different roles. Looking at current market shares in the United States, public service broadcasting is expected to fill a gap neglected by private TV stations. Its programming is supposed to supplement private offerings. In contrast, in Europe, one of the principal sources of information for the public are public service broadcasters. They hold a strong position and compete with private broadcasters with a similar selection of programs (feature films, sports, news, sitcoms, etc.).<sup>123</sup> European governments argue that only strong public service broadcasting succeeds in fulfilling cultural, social, and democratic functions,

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Bundesverfassungsgerichts [BVerfGE] 238 (326) (F.R.G.); HOFFMANN-RIEM, *supra* note 113, at 123–24; *see also* GERSDORF, *supra* note 108, at 145–47.

<sup>117</sup> *See* ZDF-Staatsvertrag, §§ 20, 27; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 4, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (170) (F.R.G.); *see also* GERSDORF, *supra* note 108, at 147, 150.

<sup>118</sup> ZDF-Staatsvertrag, §§ 23, 28; WDR-Gesetz, § 21.

<sup>119</sup> *See* Quoten von ARD und ZDF Stürzen auf Historisches Tief [Audience of ARD and ZDF Drops to Historic Low], SPIEGEL ONLINE (F.R.G.), Dec. 15, 2007, <http://www.spiegel.de/kultur/gesellschaft/0,1518,523550,00.html>.

<sup>120</sup> *Id.*

<sup>121</sup> *See* Schweizer Fernsehen Verliert Marktanteile [Swiss Public Broadcaster Loses Market Shares], TAGES-ANZEIGER (Switz.), Jan. 10, 2008, <http://tagesanzeiger.ch/dyn/news/schweiz/830527.html>.

<sup>122</sup> *See* FRANCE TÉLÉVISIONS, RAPPORT ANNUELLE 2006 [ANNUAL REPORT 2006] 11 (2007), available at [http://www.francetelevisions.fr/downloads/rapport\\_annuel\\_2006.pdf](http://www.francetelevisions.fr/downloads/rapport_annuel_2006.pdf); RAI, Bilancio 2005 [Financial Statements 2005], <http://www.bilancio2005.rai.it/ita/bilancio/index.htm> (last visited Nov. 2, 2008).

<sup>123</sup> *See infra* note 273.



and is capable of providing information, culture, education, and entertainment to the whole of society, thereby enhancing social, political, and cultural citizenship and stimulating the cohesion of society.<sup>124</sup> Public service broadcasting needs independence from state actors in order to fulfill these functions.<sup>125</sup> A latent threat to independence is state supervision and dependence on public funding. Monitoring and the power to cut funding, however, are also required to punish incompetence and waste. The line between legitimate monitoring and political meddling is easily crossed. One of the most extreme examples of “abuse” of public service broadcasters in post-communist times was provided by Italy’s Silvio Berlusconi, a media mogul controlling most Italian private TV stations. Whilst serving as Prime Minister of Italy, he gained indirect control of Italy’s public service broadcaster RAI, sacking two of their journalists after they criticized him.<sup>126</sup> Privately owned broadcast stations, of course, are similarly vulnerable to air their owners’ propaganda.

### B. Licenses

After the FCC<sup>127</sup> was allowed to assume control over spectrum in 1927,<sup>128</sup> the airwaves got licensed on the basis of public interest, convenience, or necessity.<sup>129</sup> This criterion is, according to the U.S. Supreme Court, “as concrete as the complicated factors for judgment in such a field of delegated

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<sup>124</sup> See Resolution of the Council and of the Representatives of the Governments of the Member States, 1999 O.J. (C 30) 1 (EU); Eur. Parl. Ass., Comm. on Culture, Sci. and Educ., *Report on Public Service Broadcasting*, 10th Sess., Doc. No. 10029 (2004), available at [http://assembly.coe.int/main.asp?link=/Documents/Working\\_Docs/doc04/EDOC10029.htm](http://assembly.coe.int/main.asp?link=/Documents/Working_Docs/doc04/EDOC10029.htm).

<sup>125</sup> See Yvo Hangartner, *Unabhängigkeit vom Staat und von staatlichen Unternehmen als Voraussetzung der Medienfreiheit [Independence from the State and State-Owned-Enterprises as Precondition of Freedom of Media]*, 14 AJP/PJA 1183, 1185–86 (2005).

<sup>126</sup> See Peter Popham, *Berlusconi Attacks Italy’s Last Bastion of Independent Television*, INDEPENDENT (London), Feb. 16, 2006, at 22.

<sup>127</sup> In 1927, Congress established the Federal Radio Commission. H.R. 9971, 69th Cong. § 3–4, 44 Stat. 1162–64 (1927).

<sup>128</sup> With the Congressional Mandate, the chaos created by *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923) (holding that the issuance of a license for broadcasting is a ministerial duty), and *United States v. Zenith Radio Corp.*, 12 F.2d 614, 618–19 (N.D. Ill. 1926) (holding that the Government has no power to regulate frequencies, power, and time of a station), was brought to an end. *But see* *Tribune Co. v. Oak Leaves Broad. Station*, 68 CONG. REC. 215, 216–19 (Cir. Ct. Cook County Ill. Nov. 17, 1926).

<sup>129</sup> See 47 U.S.C. § 303(f) (2000).

authority permit.”<sup>130</sup> Traditionally, the FCC decided on applications by way of comparative hearings, taking into account financial and engineering capabilities, minority interests, and diversity considerations when issuing a broadcast license.<sup>131</sup> The ban of foreign governments and non-citizens to assume ownership of a radio or TV station, however, is absolute.<sup>132</sup> Broadcasts from foreign countries are not regulated by the FCC; they may be received via Internet (“IPTV”), subject to approval of the holders of the intellectual property rights concerned. No applications for new TV stations will be accepted by the FCC until 2009, when it is expected that the conversion from analog to digital broadcasting will be complete.<sup>133</sup> New applications for commercial broadcasting will be subject to broadcast auctions.<sup>134</sup> Applications for channels reserved for noncommercial educational stations will be assessed by a point system.<sup>135</sup>

European Union Law does not deal with the licensing of broadcasters. On a European level, the European Court of Human Rights has held that member states may not reserve licenses exclusively to public service broadcasters.<sup>136</sup> Setting a minimum standard, both the Audiovisual Media Services Directive as well as the preceding Television without Frontiers Directive merely require the member states to allow broadcasts originating from other member states into their territory without asking for a license.<sup>137</sup> The member states, Germany, for

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<sup>130</sup> FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

<sup>131</sup> See FED. COMM'NS COMM'N MEDIA BUREAU, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 7–8 (2008), available at [http://www.fcc.gov/mb/audio/decdoc/public\\_and\\_broadcasting.html](http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html).

<sup>132</sup> 47 U.S.C. § 310(a)–(b) (2000).

<sup>133</sup> See FCC Audio Division, How To Apply for a Broadcast Station, <http://www.fcc.gov/mb/audio/howtoapply.html> (Last Visited Nov. 2, 2008).

<sup>134</sup> *Id.* Congress requires the FCC to use auctions to resolve mutually exclusive applications for initial licenses. Exemptions apply, inter alia, for digital TV licenses to replace analog licenses and noncommercial educational and public broadcast stations. 47 U.S.C.A. § 309(j)(1)–(2) (West 2006).

<sup>135</sup> See *In re* Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 15 F.C.C.R. 7386, 7387–88 (2000), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-00-120A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-120A1.pdf) (the point system still relies on criteria like local diversity, state-wide network, technical parameters, and local establishment).

<sup>136</sup> See *Informationsverein Lentia v. Austria*, 17 Eur. Ct. H.R. (ser. A) 93, 93 (1993).

<sup>137</sup> See Council Directive 89/552, art. 2a, 1989 O.J. (L 298) 23 (EC), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65,

example, have implemented complex provisions for licensing domestic private broadcasters, while public service broadcasters benefit from statutory licenses.<sup>138</sup> In Germany, licenses are issued by independent regulators on the state level (*Landesmedienanstalten*).<sup>139</sup> The *Landesmedienanstalten* are also competent to supervise programming.<sup>140</sup> From September 2008, a central authority (*Kommission für Zulassung und Aufsicht*) will finally be able to issue licenses for the whole of Germany.<sup>141</sup> Applicants have to prove their ability to provide an adequate service level.<sup>142</sup> Members of state or the federal

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2007 O.J. (L332) 27 (EC). The Directive, whose intended purpose is to facilitate broadcasts between member states of the European Union, does not contain substantive provisions for broadcasts from third countries. The directive, however, is applicable to media service providers whose head office or a significant part of their workforce is in a member state or to media service providers using a satellite up-link or satellite capacity of a member state. *See id.* art. 2(3)(c). No provision of the Directive prevents a member state of the European Union from establishing jurisdiction over foreign broadcasts distributed over IPTV; such transmission via IPTV, however, may have their origin and may be received anywhere. According to the Directive, E.U. law shall not apply to audiovisual media services, which are intended exclusively for reception in third countries *and* which are not received with standard consumer equipment. *Id.* art. 2(6). The absence of any limits to a government's jurisdiction over IPTV is astonishing. No international standards have been established in this regard, with the possible exception of regional conventions like the European Convention on Transfrontier Television or the international convention of 1936 on the use of broadcasting for the promotion of peace, the latter banning the use of programs for propaganda and warmongering. *See* European Convention on Transfrontier Television art. 5, May 5, 1989, 132 Europ. T.S., available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/132.htm>; International Convention Concerning the Use of Broadcasting in the Cause of Peace arts. 1–2, Sept. 23, 1936, 186 L.N.T.S. 301.

<sup>138</sup> *See* Interstate Broadcast Treaty, *supra* note 111, § 19.

<sup>139</sup> *See id.* § 20; *see also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 4, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (125); GERSDORF, *supra* note 108, at 163–64.

<sup>140</sup> *See* Interstate Broadcast Treaty, *supra* note 111, § 35; *see also* GERSDORF, *supra* note 108, at 162–63, 175–83.

<sup>141</sup> Interstate Broadcast Treaty, *supra* note 111, §§ 35–36.

<sup>142</sup> *Id.* § 20a(1); Landesmediengesetz Baden-Württemberg (LMedienG) [Media Law of Baden-Württemberg], July 19, 1999, GBl. Baden-Württemberg at 273, amended by Feb. 14, 2007, GBl. Baden-Württemberg at 108, § 13 [hereinafter Media Law of Baden-Württemberg]; Bayerisches Mediengesetz (BayMG) [Bavarian Media Law], Oct. 22, 2003, GVBl. Bayern at 799, amended by Gesetz, Dec. 11, 2007, GVBl. Bayern at 1008, art. 24, 26 [hereinafter Bavarian Media Law]; Landesmediengesetz Nordrhein-Westfalen (LMG NRW) [Media Law of North Rhine-Westphalia], last amended by Gesetz, June 29, 2007, GV. NRW at 192, § 5 [hereinafter Media Law of North Rhine-Westphalia].

governments may not apply for licenses.<sup>143</sup> The programming of TV stations must promote diversity, in particular cultural diversity. All major forces shaping public opinion (e.g., religious groups, political parties) must be heard.<sup>144</sup> Most states in Germany are satisfied if TV stations achieve diversity of opinions on an aggregate level.<sup>145</sup> Some states, however, insist that each individual broadcaster meet the criterion of diverse programming.<sup>146</sup> The German Constitutional Court accepts both models as constitutional,<sup>147</sup> holding that diversity standards may only be relaxed for private broadcasters, as long as public service broadcasters guarantee independent and diverse programming.<sup>148</sup>

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<sup>143</sup> Media Law of Baden-Württemberg, *supra* note 142, § 14; Bavarian Media Law, *supra* note 142, § 24; Media Law of North Rhine-Westphalia, *supra* note 142, § 6; *see also* BVerfG Mar. 12, 2008, 2 BvF 4/03 (holding that a total ban on political parties holding shares in TV stations, regardless of influence, is unconstitutional); BVerfG, Nov. 4, 1986, 73 BVerfGE 118 (124–26) (F.R.G.).

<sup>144</sup> Media Law of Baden-Württemberg, *supra* note 142, §§ 12, 23; Bavarian Media Law, *supra* note 142, §§ 4, 26; Media Law of North Rhine-Westphalia, *supra* note 142, §§ 4, 31.

<sup>145</sup> Landesrundfunkgesetz Rheinland-Pfalz (LRG RP) [Media Law of Rhineland-Palatinate], July 28, 1992, GVBl. Rheinland-Pfalz at 247, last amended by Gesetz, Dec. 16, 2002, GVBl. Rheinland-Pfalz at 493, § 16 [hereinafter Media Law of Rhineland-Palatinate]; Hessisches Privatrundfunkgesetz (HPRG) [Hessian Media Law], Jan. 25, 1995, GVBl. Hessen I at 87, last amended by Gesetz, June 5, 2007, GVBl. Hessen I at 294, § 14 [hereinafter Hessian Media Law]; Media Law of Baden-Württemberg, *supra* note 142, § 23; Bavarian Media Law, *supra* note 142, § 4. However, German broadcasters still have to meet the criteria of objectivity and balance at all times. *See* BVerfG, Nov. 4, 1986, 73 BVerfGE 118 (124–26) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 16, 1981, 57 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 295 (325–26) (F.R.G.); BVerfG Feb. 28, 1961, 12 BVerfGE 205 (262–63).

<sup>146</sup> Saarländisches Mediengesetz (SMG) [Media Law of Saarland], Feb. 27, 2002, Amtsbl. Saarland at 498, last amended by Gesetz, Apr. 25, 2007, Amtsbl. Saarland at 1062, § 16 [hereinafter Media Law of Saarland]; Hamburgisches Mediengesetz (HmbMedienG) [Media Law of Hamburg], July 2, 2003, HmbGVBl. at 209, last amended by Gesetz, Nov. 4, 2005, HmbGVBl. at 443, § 3; Bremisches Landesmediengesetz (BremLMG) [Media Law of Bremen], Mar. 22, 2005, Brem.GBl. at 71, § 13 [hereinafter Media Law of Bremen]; Media Law of North Rhine-Westphalia, *supra* note 142, § 33.

<sup>147</sup> *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 5, 1991, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 238 (316) (F.R.G.); BVerfG, Nov. 4, 1986, 73 BVerfGE 118 (171) (F.R.G.).

<sup>148</sup> *See* BVerfG, Feb. 5, 1991, 83 BVerfGE 238 (316) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 1987, 74 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 297 (325) (F.R.G.); BVerfG, Nov. 4, 1986, 73 BVerfGE 118 (158) (F.R.G.); *see also* HOFFMANN-RIEM, *supra* note 113, at 120; EMMANUEL E. PARASCHOS, MEDIA LAW AND REGULATION IN

Diversity is best served if no available slots for broadcasting remain unused. Thus, authorities in the United States and in Germany have no discretion to deny a license, provided that the applicant fulfills all statutory requirements and provided that no other mutually exclusive application is pending.<sup>149</sup> With spectrum becoming less scarce due to digital broadcasting and with cable and the Internet providing additional platforms for audiovisual media providers, the licensing process has lost its significance. Market entry has become much easier for providers of traditional TV services. Since April 2007, for example, a provider of audiovisual media services in Switzerland does not even need a license; the provider simply has to notify the supervising authority when it starts operations.<sup>150</sup> With regard to audiovisual media providers in general (TV-like, On-Demand etc.), the expansion of the European regulatory framework to all communication networks constitutes a certain threat to easy market entry. Although the new Audiovisual Media Services Directive does not “encourage the member states to impose new systems of licensing or administrative authorization,”<sup>151</sup> member states are free to do otherwise. A dubious public interest rationale and the desire to protect established public service broadcasting may induce the member states to regulate an infant new media industry using the Internet as their platform.

### C. Ownership Limits

The FCC has imposed restrictions on the ownership of broadcast media and cable systems. The media ownership rules encompass the national TV multiple ownership rule,<sup>152</sup> the local

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THE EUROPEAN UNION: NATIONAL, TRANSNATIONAL, AND U.S. PERSPECTIVES 137 (1998).

<sup>149</sup> 47 C.F.R. § 73.3591(a)(1) (2007); *see also* GERSDORF, *supra* note 108, at 178. *But see* Demuth v. Switzerland (No. 38743/97), 2002-IX Eur. Ct. H.R. ¶ 29 (arguing that, under conditions of scarcity, a government legitimately may reserve channel capacity for programmers, which are better able to comply with cultural goals, rather than giving away capacity to an applicant promoting cars).

<sup>150</sup> *See* Bundesgesetz über Radio und Fernsehen [RTVG] [Swiss Federal Law on Radio and Television] Mar. 24, 2006, SR 784.40, art. 3 (Switz.).

<sup>151</sup> Council Directive 2007/65, ¶ 15, 2007 O.J. (L332) 27, 29 (EC). German Law does not require a license to provide non-TV-like audiovisual media services, but imposes some regulatory safeguards. *See* Telemediengesetz (TMG) [Telemedia Act] Feb. 26, 2007, BGBl. I at 179, § 4.

<sup>152</sup> 47 C.F.R. § 73.3555(e)(1) (2008) (limiting national TV ownership to a maximum aggregate national audience reach of thirty-nine percent, as directed by

TV multiple ownership rule,<sup>153</sup> the radio/TV cross-ownership rule,<sup>154</sup> the dual network rule,<sup>155</sup> the local radio ownership rule,<sup>156</sup> and the newspaper/broadcast cross-ownership rule.<sup>157</sup> In 2004, the U.S. Court of Appeals for the Third Circuit rejected a relaxation of the six broadcast ownership rules currently in force.<sup>158</sup> On December 18, 2007, the FCC decided to modify slightly the newspaper/broadcast cross-ownership rule, leaving the other rules unchanged.<sup>159</sup> With regard to cable ownership, the horizontal and vertical limits established by the FCC have been reversed and remanded by the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*.<sup>160</sup> On December 18, 2007, the FCC decided to reenact the reversed horizontal ownership limit of thirty percent.<sup>161</sup>

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Congress); see also *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004).

<sup>153</sup> 47 C.F.R. § 73.3555(b) (allowing the combination of two TV stations in the same Designated Market Area, subject to certain restrictions). A less restrictive rule was reversed in *Prometheus*. 373 F.3d at 414–21.

<sup>154</sup> 47 C.F.R. § 73.3555(c) (allowing cross-ownership of broadcast radio and TV stations, subject to certain restrictions). A less restrictive rule was reversed in *Prometheus*. 373 F.3d at 399–411.

<sup>155</sup> 47 C.F.R. § 73.658(g) (2007) (allowing affiliation of a TV station with a network, with the exception of combinations between or among ABC, CBS, Fox, and NBC).

<sup>156</sup> 47 C.F.R. § 73.3555(a)(1) (limiting local radio ownership, depending on the number of stations in the same service). A less restrictive rule was reversed in *Prometheus*. 373 F.3d at 425–34.

<sup>157</sup> 47 C.F.R. § 73.3555(c)(2) (allowing a newspaper to own one commercial broadcast station in the twenty largest markets, subject to restrictions).

<sup>158</sup> See *Prometheus*, 373 F.3d at 425–34.

<sup>159</sup> See Press Release, Fed. Commc'ns Comm'n, FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule (Dec. 18, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278932A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf); see also *In re 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 F.C.C.R. 14460, 14460–61 & nn.1–2 (2006). The FCC also declared its guiding principles consisting in the promotion of competition, diversity, and localism. *Id.* at 14461–62.

<sup>160</sup> 240 F.3d 1126, 1128–29, 1144 (D.C. Cir. 2001) (reversing the horizontal limit of thirty percent on the number of subscribers that may be served by a multiple cable operator and reversing the vertical limit of forty percent of channel capacity, meaning that sixty percent of channels are reserved for non-affiliated firms). Although 47 U.S.C. § 533 directs the FCC to impose ownership limits, no new rules have been put in place.

<sup>161</sup> Cf. Press Release, Fed. Commc'ns Comm'n, FCC Adopts Rules To Promote Diversification of Broadcast Ownership (Dec. 18, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A1.pdf) (seeking further comment on appropriate vertical ownership limits).

In the European Union, as in the United States, member states seek to secure diversity by adding specific regulation on media ownership to the normal set of antitrust rules.<sup>162</sup> In Germany, an independent commission (*Kommission zur Ermittlung der Konzentration im Medienbereich*) is charged to constantly assess media concentration.<sup>163</sup> There is a statutory rebuttable presumption that a market share of thirty percent of the audience compromises diversity; above this threshold, parts of society are feared not to be heard anymore on the marketplace of ideas.<sup>164</sup> Even if a provider stays below the thirty percent limit, its dominant position in neighboring markets (for example, print media) may be regarded as a threat to diversity.<sup>165</sup> If the threshold is met, no new licenses will be issued to the dominant provider; the independent commission may order divestments or may ask the provider to grant transmission time to third parties.<sup>166</sup>

Effective protection of diversity needs specific rules on media ownership and media concentration.<sup>167</sup> General antitrust laws

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<sup>162</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 4, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (158–59, 172–73) (F.R.G.); European Convention on Transfrontier Television art. 10bis, May 5, 1989, 132 Europ. T.S., available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/132.htm>; see also Christine Cooper, *Television on the Internet: Regulating New Ways of Viewing*, 16 INFO. & COMM. TECHN. L. 1, 11–12 (2007) (discussing the U.K.'s media regulatory regime and, in particular, the regulation of media ownership, which traditionally has been used to protect the pluralism in the U.K.).

<sup>163</sup> Interstate Broadcast Treaty, *supra* note 111, §§ 35(1)–(2), 37(1).

<sup>164</sup> *Id.* §§ 26(2), 28(2); see also KOMMISSION ZUR ERMITTLUNG DER KONZENTRATION IM MEDIENBEREICH [COMMISSION ON CONCENTRATION IN THE MEDIA], SIEBTER JAHRESBERICHT [SEVENTH ANNUAL REPORT] 194 (2003–2004), available at [http://www.kek-online.de/Inhalte/jahresbericht\\_03-04.pdf](http://www.kek-online.de/Inhalte/jahresbericht_03-04.pdf); KEK, SAT.1 SATELLITENFERNSEHEN GMBH: ÜBERNAHME SÄMTLICHER ANTEILE AN DER PROSIEBENSAT.1 MEDIA AG DURCH DIE AXEL SPRINGER AG—AKTENZEICHEN, KEK 293-1 BIS -5 BESCHLUSS [TAKEOVER OF PROSIEBENSAT.1 MEDIA AG BY AXEL SPRINGER AG] 70, 79 (2006) [hereinafter TAKEOVER OF PROSIEBENSAT.1], available at <http://www.kek-online.de/cgi-bin/resi/v-ent/416.html>; cf. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 16, 1981, 57 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 295 (322–24) (F.R.G.).

<sup>165</sup> TAKEOVER OF PROSIEBENSAT.1, *supra* note 164, at 80.

<sup>166</sup> Interstate Broadcast Treaty, *supra* note 111, art. 26(3), 26(4), 30, 32.

<sup>167</sup> See PETER HETTICH, WIRKSAMER WETTBEWERB: THEORETISCHES KONZEPT UND PRAXIS [EFFECTIVE COMPETITION: THEORETIC CONCEPT AND CASE LAW] 403 (2003). *But see* Owen, *supra* note 19, at 672, 688 (concluding that the ownership rules duplicate “antitrust law enforcement and should therefore be abolished as wasteful of public resources and a burden on consumer welfare”).

aim at dispersion of power and long-term protection of innovation, which is not always in line with protection of diversity.<sup>168</sup> Media ownership rules require, however, careful design in order to prevent inefficient market structures and undue sacrifices in efficiency.<sup>169</sup> Market analysis in the media sector, for example, is unlikely to be accomplished by generic, off-the-shelf techniques.<sup>170</sup> Media markets are interrelated, with a daily newspaper sometimes being easily substitutable by sources on the Internet; to some degree, broadcasting may even be substituted by a newspaper and vice versa.<sup>171</sup> We observe print media offering short video clips on the web and broadcasters creating newspaper-like content. Current rules on media ownership focus on traditional broadcasting, which is not adequate in times of convergent media. The FCC rules on media cross-ownership only half-heartedly embrace a convergent approach. In the process of approving the merger between the only two satellite radio providers, XM and Sirius, the U.S. Department of Justice acknowledged that satellite radios do not form a market entirely distinct from other audio sources,<sup>172</sup> thereby implicitly acknowledging convergence in media markets.

#### D. Behavioral Restraints and Content Restrictions

Under the First Amendment, the FCC has few powers to prohibit the broadcasting of any opinion on any subject. There are highly disputed restrictions on promoting political

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<sup>168</sup> Cf. Owen, *supra* note 19, at 677.

<sup>169</sup> *Id.* at 681 (arguing that rules on radio station ownership have imposed significant costs on society).

<sup>170</sup> See EUROPE ECONOMICS, MARKET DEFINITION IN THE MEDIA SECTOR: ECONOMIC ISSUES 6 (2002), available at [http://ec.europa.eu/comm/competition/publications/studies/european\\_economics.pdf](http://ec.europa.eu/comm/competition/publications/studies/european_economics.pdf).

<sup>171</sup> See Rekurskommission für Wettbewerbsfragen [Competition Appeals Commission], May 4, 2006, 2006/2 Recht und Politik des Wettbewerbs [Law and Politics of Competition] [RPW] 347, 370 (Reko/Wef FB/2004-4) (Switz.).

<sup>172</sup> See Press Release, Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision To Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), available at [http://www.usdoj.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html). *But see* Press Release, Fed. Comm'ns Comm'n, Commission Approves Transaction Between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings, Inc. Subject to Conditions (July 28, 2008), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-284108A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284108A1.pdf) (evaluating the merger under "worst case" assumptions, for example, that the relevant market is limited to satellite digital audio radio service).



candidates,<sup>173</sup> standards for children's TV programming,<sup>174</sup> bans on obscene and restrictions on indecent programming,<sup>175</sup> prohibitions on broadcast hoaxes,<sup>176</sup> and rules on payola and sponsorship identification.<sup>177</sup> Other statutes ban advertisements for lotteries and tobacco.<sup>178</sup> Private TV stations are free to set times and rates for their advertisement slots. Public service broadcasters and other noncommercial TV stations acknowledge their donors by airing "underwriting spots," which are subject to regulatory restrictions such as times and language.<sup>179</sup> Offending speech with regard to religion, race, national background, gender, and the like is protected by the First Amendment, with the only exception of speech constituting a "clear and present danger" to the public.<sup>180</sup>

The new European Audiovisual Media Services Directive submits all "TV-like" media services providers to a set of stringent rules. Its provisions contain no exception for small or private websites offering on-demand services or linear programming.<sup>181</sup> At least, the preamble expresses an intention to cover mass media only, leaving out noncommercial services not in competition with TV broadcasting.<sup>182</sup> Thus, the European Union seeks to cover mass media "which are intended for reception by, and which could have a clear impact on, a significant proportion

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<sup>173</sup> See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2676 (2007). The Bipartisan Campaign Reform Act of 2002 makes it a federal crime for a corporation to use its general treasury funds to pay for any "electioneering communication." 2 U.S.C. § 441b(b)(2) (2000 & Supp. I 2002). In *Wisconsin Right to Life*, two Justices held that the statute was unconstitutional as applied, while three Justices argued that the statute was unconstitutional on its face. 127 S. Ct. at 2673. See also *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 330 (2003). There is also the requirement to afford equal broadcast opportunities to candidates for public office. 47 U.S.C. § 312(a)(7) (2000 & Supp. IV 2004); 47 U.S.C. § 315(a)-(b) (2000 & Supp. I 2002).

<sup>174</sup> 47 U.S.C.A. §§ 303a, 303b (West 2008).

<sup>175</sup> See *supra* Part I.C.

<sup>176</sup> 47 C.F.R. § 73.1217 (2008).

<sup>177</sup> 47 U.S.C. §§ 317, 508 (2000); 47 C.F.R. § 73.1212 (2008).

<sup>178</sup> FED. COMM'N'S COMM'N MEDIA BUREAU, *supra* note 131, at 18, 22.

<sup>179</sup> 47 U.S.C. § 399b (2000); 47 C.F.R. §§ 73.503, 73.621 (2008); see also *Producing for PBS: Funding Standards and Practices*, <http://www.pbs.org/producers/guidelines/index.html> (Last Visited Nov. 7, 2008).

<sup>180</sup> FED. COMM'N'S COMM'N MEDIA BUREAU, *supra* note 131, at 12-13.

<sup>181</sup> See Council Directive 89/552, art. 1(a), (e), (g), 1989 O.J. (L298) 23 (EC), *amended* by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>182</sup> See Council Directive 2007/65, *pmb.* ¶ 16, 2007 O.J. (L332) 27 (EC).

of the general public.”<sup>183</sup> However, who could deny that then presidential candidate Barack Obama’s speech on race, published on YouTube, had such an impact?<sup>184</sup> It is an open question whether the member states will use the Directive as a pretext to regulate services like YouTube. Regulation by European democracies may just hamper the development of these new outlets for communication, but authoritarian countries have started to use media, information, and electoral laws as instruments to suppress Free Speech. In 2007, for example, “Uzbekistan changed its media law to count all websites as ‘mass media’—a category subject to Draconian restriction.”<sup>185</sup>

Under the European Directive, all media service providers shall identify themselves, shall refrain from inciting hatred based on race, sex religion, or nationality, and shall make their services gradually accessible to the disabled.<sup>186</sup> Advertisements (“commercial communications”) shall be recognizable as such, shall not be surreptitious, shall not use subliminal techniques, shall not promote discrimination, and shall not encourage behavior prejudicial to health or to the protection of the environment. Further provisions restrict commercials for alcoholic beverages, medicinal products, and commercials directed towards minors.<sup>187</sup> Minors shall not be able to access certain On-Demand Services that might impair their physical, mental, or moral development.<sup>188</sup> Advertisements in traditional TV are subject to stricter rules, in particular if inserted during programs.<sup>189</sup> Sponsorship in TV is regulated, and product

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<sup>183</sup> *Id.*

<sup>184</sup> See Larry Rohter & Michael Luo, *Groups Respond to Obama’s Call for National Discussion About Race*, N.Y. TIMES, Mar. 20, 2008, at A21.

<sup>185</sup> See *Blog Standard; Politics on the Web*, ECONOMIST (London), June 28, 2008.

<sup>186</sup> See Council Directive 89/552, art. 3a–d, 1989 O.J. (L298) 23 (EC), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>187</sup> *Id.* arts. 3e, 15; see also, e.g., Interstate Broadcast Treaty, *supra* note 111, § 7.

<sup>188</sup> Council Directive 89/552, art. 3h, 1989 O.J. (L298) 23 (EC), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>189</sup> *Id.* arts. 11, 18 (directing that advertising during programs shall not prejudice the integrity of the program; films and news may be interrupted once for each scheduled period of at least thirty minutes, and the proportion of advertising spots within a given clock hour shall not exceed twenty percent). Stricter rules for linear audiovisual media (TV) are justified by the diminished control of the spectator over content. See Press Release, European Union, Presenting the New Audiovisual

placement, as a general rule, is prohibited.<sup>190</sup> Television broadcasts must not contain pornography or gratuitous violence.<sup>191</sup> Other programs potentially “detrimental” to minors shall be aired, for example, at times when they are normally not seen or heard by minors.<sup>192</sup> TV broadcasters have to grant a right to reply to persons, whose legitimate interests, reputation, or good name have been damaged by an assertion of incorrect facts in a TV program.<sup>193</sup>

Several decisions of the German Constitutional Court point out that free speech needs to be secured by regulating broadcasters.<sup>194</sup> All TV stations have to respect constitutional principles like human dignity and tolerance of diverging opinions and must uphold principles of good journalism.<sup>195</sup> Some states in Germany have audiovisual media promote gender equality,<sup>196</sup> protection of minorities,<sup>197</sup> and protection of the environment,<sup>198</sup> as well as international dialogue and peace.<sup>199</sup> Public service broadcasters are deemed to have a special responsibility in

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Media Services Without Frontiers Directive (May 24, 2007), *available at* <http://europa.eu/rapid/searchAction.do>.

<sup>190</sup> Council Directive 89/552, art. 3f–g, 1989 O.J. (L298) 23 (EC), *amended by* Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), *and* Council Directive 2007/65, 2007 O.J. (L332) 27 (EC) (providing extensive exceptions with regard to product placement for films, sports programs, light entertainment, etc.); *see also, e.g.*, Interstate Broadcast Treaty, *supra* note 111, § 8.

<sup>191</sup> Council Directive 89/552, art. 22, 1989 O.J. (L298) 23 (EC), *amended by* Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), *and* Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* art. 23.

<sup>194</sup> *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 22, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 60 (88) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 5, 1991, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 238 (296) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 16, 1981, 57 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 295 (320) (F.R.G.).

<sup>195</sup> Interstate Broadcast Treaty, *supra* note 111, § 41(1); Media Law of Baden-Württemberg, *supra* note 142, § 3(1); Hessian Media Law, *supra* note 145, § 13(1); Bavarian Media Law, *supra* note 142, art. 5(1); Media Law of Saarland, *supra* note 146, § 15(2); Media Law of Rhineland-Palatinate, *supra* note 145, § 31(1).

<sup>196</sup> Media Law of Baden-Württemberg, § 3(1); Hessian Media Law, § 13(1); Media Law of Saarland, § 15(2); Media Law of Rhineland-Palatinate, § 31(1).

<sup>197</sup> Hessian Media Law, § 13(1).

<sup>198</sup> *Id.*

<sup>199</sup> Media Law of North Rhine-Westphalia, *supra* note 142, § 31(3); Media Law of Bremen, *supra* note 146, § 14(2); Media Law of Saarland, *supra* note 146, § 15(2); Media Law of Rhineland-Palatinate, *supra* note 145, § 31(1).

shaping and displaying public opinion.<sup>200</sup> Thus, public service broadcasters have a statutory mandate for impartiality and balance.<sup>201</sup> Further, their advertisement time is restricted to twenty minutes daily.<sup>202</sup> Public service broadcasting, according to the German Constitutional Court, enables regulators to relax slightly the standards for private broadcasters, in particular with regard to impartiality and balance.<sup>203</sup> Still, major churches and political parties during elections have a right to demand transmission time from all TV stations.<sup>204</sup>

This Article will not deny the compelling interest of governments in protecting minors from harm, such as confrontation with sexually explicit material, with surreptitious commercials, or with tobacco and alcohol advertisements directed at young people. However, serious flaws render the current regulatory framework partly overreaching, partly grossly fragmentary. It is overreaching, because the current framework aims at the source of content, thereby affecting minors as well as adults. It is fragmentary, because great efforts are directed at preventing minors from seeing revealed breasts or hearing filthy words on broadcast and cable,<sup>205</sup> while access to hard pornography on the Internet is as easy as operating a remote control. The new European Audiovisual Media Service Directive seeks to implement a holistic approach, regulating audiovisual media using the Internet as well as airwaves. However, the directive is bound to fail in regulating audiovisual media providers in off-shore countries beyond the European Union's jurisdiction. This failure should not result in abandoning efforts to protect minors. However, the prospect of imposing a broadcast-like regulation on the whole Internet raises serious First Amendment concerns, even if for the purpose of protecting minors. These concerns may only be resolved by shifting part of

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<sup>200</sup> Interstate Broadcast Treaty, *supra* note 111, § 11.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* § 16(5) (vesting the states with the power to extend daily advertisement time to ninety minutes).

<sup>203</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 4, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (159) (F.R.G.).

<sup>204</sup> Interstate Broadcast Treaty, *supra* note 111, § 42; Media Law of Baden-Württemberg, *supra* note 142, § 5; Media Law of North Rhine-Westphalia, *supra* note 142, § 36; Media Law of Saarland, *supra* note 146, § 19.

<sup>205</sup> See *supra* note 94.

the responsibility to protect minors to the receiving ends of audiovisual media communications, that is, to parents and guardians.<sup>206</sup> This approach calls for moderation in regulating an infant audiovisual industry on the Internet, for imposition of restraints on all TV like audiovisual media and for the strengthening of existing blocking possibilities in end-user devices (e.g., an improved V-Chip or other parental controls).<sup>207</sup>

### *E. Culture Quotas*

In the United States, the CPB has a statutory mandate to promote programs of high quality, diversity, creativity, excellence, and innovation.<sup>208</sup> The CPB has full discretion in fulfilling its obligations under the mandate.<sup>209</sup> Private programmers are not subject to requirements promoting any kind of specific programming, with an exception being the Children's Television Act of 1990.<sup>210</sup>

The new Audiovisual Media Services Directive requires all TV-like media to reserve at least ten percent of their transmission time and ten percent of their programming budget for European works created by independent producers.<sup>211</sup> Further, a majority of their transmission time must be reserved for European works.<sup>212</sup> In the same way, on-demand services shall promote, where practicable and by appropriate means, production and access to European audiovisual works.<sup>213</sup> Since these services deliver "on-demand," that is, on the request of the consumer, the consumer cannot be coerced to consume European works. However, European member states may regulate the

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<sup>206</sup> See TANYA BYRON, SAFER CHILDREN IN A DIGITAL WORLD: THE REPORT OF THE BYRON REVIEW 6–10 (2008), available at <http://www.dcsf.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf>; see also, e.g., Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 960 (8th Cir. 2003) (arguing that the state cannot "silence protected speech," such as violent video games, "by wrapping itself in the cloak of parental authority").

<sup>207</sup> See *infra* Part III.B.

<sup>208</sup> 47 U.S.C. § 396(g)(1)(A) (2000 & Supp. IV 2004).

<sup>209</sup> See *id.*

<sup>210</sup> See *supra* note 84.

<sup>211</sup> Council Directive 89/552, art. 5, 1989 O.J. (L298) 23 (EC), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>212</sup> See *id.* art. 4 (stating that the requirement is subject to practicability and to appropriate regulatory means and that transmission time excludes time for news, sports events, games, advertising, teletext services, and teleshopping).

<sup>213</sup> *Id.* art. 3(i).

financial contribution that such on-demand services have to spend for European works, as well as the share and prominence of European works in the catalogue of programs offered.<sup>214</sup> Progress reports of the European Commission show that the share of European works amounts currently to sixty percent and, therefore, exceeds the required threshold of fifty percent by far.<sup>215</sup>

Until recently, the European audiovisual industry lagged hopelessly behind America. In 1996, nearly seventy percent of feature films in TV were made in the United States.<sup>216</sup> The American film industry dominated Europe, because its “shows [were] cheap, top quality, and breach[ed] the language barrier.”<sup>217</sup> While Europeans could accept dominance of United States’ products in other sectors (for example, the dominance of Coke and Pepsi in soft drinks), feature films and cinematographic works have been regarded as cultural products deserving protection.<sup>218</sup> The European film industry was pepped up with great efforts. Because the share of European works is now easily above the fifty percent threshold,<sup>219</sup> a phase out or at least a reconsideration of the culture quotas for broadcasters seems appropriate.

#### F. Anti-Siphoning

Anti-siphoning rules prevent pay-TV broadcasters, such as HBO, from bidding away the most appealing programs in sport, feature films, and other important events. If programs are siphoned away, they may be viewed by subscribers only and are unavailable for showing on free TV. In the United States, the FCC’s anti-siphoning rules were successfully challenged in *Home Box Office, Inc. v. Federal Communications Commission*.<sup>220</sup> The FCC did not try to enact such rules again.<sup>221</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> EUR. PARL. DOC. (COM 2006/459) § 3 (2006).

<sup>216</sup> See Kevin M. McDonald, *How Would You Like Your Television: With or Without Borders and With or Without Culture: A New Approach to Media Regulation in the European Union*, 22 *FORDHAM INT’L L.J.* 1991, 2015 (1999).

<sup>217</sup> *Id.* at 1995 (quoting Steven Greenhouse, *The Media Business: For Europe, U.S. May Spell TV*, *N.Y. TIMES*, July 31, 1989, at D1).

<sup>218</sup> See Kaplan, *supra* note 12, at 345–46 (arguing that in this respect, the confrontation between the United States and Europe is a “dialogue of the deaf”).

<sup>219</sup> EUR. PARL. DOC. (COM 2006/459) § 3 (2006).

<sup>220</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34 (D.C. Cir. 1977) (holding that the FCC’s regulation on siphoning and its restrictions on advertising in pay cable TV are not justified and are grossly overbroad). The FCC failed to show that the

In Europe, events that are regarded as being of major importance for society may not be broadcast exclusively on pay TV; these events are required to be accessible for the public on free TV.<sup>222</sup> Each European member state may draw up a list of such events and determine the extent of coverage on free TV.<sup>223</sup> In addition, any broadcaster has the right to access events of major interest for short news reports.<sup>224</sup> In Germany and Switzerland, the lists of events of major importance only contain sports events; some countries have added other cultural events as well.<sup>225</sup> Unfortunately, the only decision of the European Court of Justice regarding anti-siphoning rules was settled on formal grounds, resulting in a lack of European precedents.<sup>226</sup>

Anti-siphoning rules distort competition between pay-TV providers and providers of free TV, because pay-TV providers are not allowed to compete with free TV in bids for “major events”. There is not much empirical evidence as to whether pay TV would be able to siphon major events away from free TV. In the United States, the FCC has declared that the record for siphoning is insufficient to justify intervention.<sup>227</sup> Sports rights holders have several incentives to maximize their audience.

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objectives to be achieved by anti-siphoning rules are also objectives for which the Commission could legitimately regulate the broadcast media. *Id.*

<sup>221</sup> See *In re* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, 9 F.C.C.R. 3440, 3498 (1994), available at <http://www.fcc.gov/Bureaus/Cable/Orders/1994/orcb4014.txt>. “Based on our evaluation of the record, we conclude that siphoning or migration of sports programming is not sufficiently prevalent to justify intervention at this time. We therefore do not recommend adoption of siphoning legislation or regulations at this time.” *Id.*

<sup>222</sup> Council Directive 89/552, art. 3(i), 1989 O.J. (L298) 23 (EC), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>223</sup> See *id.* art. 3j.

<sup>224</sup> *Id.* art. 3k.

<sup>225</sup> For Germany, see 2000 O.J. (C277) 4 (EC); for Switzerland, see Verordnung des UVEK vom 5. Oktober 2007 über Radio und Fernsehen [UVEK Regulation on Radio and Television] Nov. 1, 2007, SR 784.401.11 (Switz.), available at [http://www.admin.ch/ch/d/sr/784\\_401\\_11/app2.html](http://www.admin.ch/ch/d/sr/784_401_11/app2.html). Only a few member states have opted to include cultural events into the list of reserved events. For a compiled list, see European Commission, Audiovisual and Media Policies, List of Major Events, [http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events\\_list/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm) (last visited Nov. 8, 2008).

<sup>226</sup> See Case T-33/01, *Infront WM AG v. Comm’n of the European Communities*, 2005 E.C.R. II-5897 (discussing *Infront’s* claim that the anti-siphoning rules infringe its existing rights to broadcast events of major importance for society).

<sup>227</sup> See *supra* note 221.

They might be ready to forego parts of their profits from exclusive broadcast licenses in order to generate, from the broad coverage of an event, higher profits from sponsoring. Most “major events” to be aired on free TV are not governmental functions, but are carried out by private, profit-maximizing entities. On this basis, European governments might want to ask themselves whether the guarantee of a “fundamental right to watch soccer” is really warranted.<sup>228</sup>

### G. *Must-carry and Channel Positioning*

For most of their channel capacity, cable operators and satellite providers in the United States decide freely on which programming to carry. However, cable operators are required to carry the signal of certain local commercial and noncommercial educational TV stations.<sup>229</sup> Further, these stations are entitled to privileged channel positions.<sup>230</sup>

DBS providers are subject to the must-carry obligations of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”).<sup>231</sup> SHVERA amends 47 U.S.C. § 338 and imposes, among other things, a “carry one, carry all” rule.<sup>232</sup> This rule requires satellite carriers, which choose to take advantage of the Act’s statutory copyright license by carrying one broadcast station in a local market, to carry all requesting stations within the market.<sup>233</sup> In order to reduce waste and to reuse frequencies, a satellite provider will need to place local channels on spot beams, narrowing the signal’s footprint.<sup>234</sup>

The member states of the European Union may impose must-carry obligations on providers of electronic communications networks used for the distribution of radio or TV broadcasts to the public.<sup>235</sup> All platforms, encompassing cable, satellites, as

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<sup>228</sup> Cf. Dirk Kurbjuweit, *Grundrecht Fußball [Fundamental Right to Soccer]*, DIE ZEIT, 43/1997, [http://www.zeit.de/1997/43/Grundrecht\\_Fussball](http://www.zeit.de/1997/43/Grundrecht_Fussball).

<sup>229</sup> 47 U.S.C. §§ 534–535 (2000); 47 CFR § 76.56 (2008); see *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (upholding rules); see also *supra* notes 48–49.

<sup>230</sup> 47 C.F.R. § 76.57 (2008).

<sup>231</sup> Pub. L. No. 108–447, 118 Stat. 2809 (2004). SHVERA was enacted as title IX of the Consolidated Appropriations Act of 2005.

<sup>232</sup> *Id.* at 3415.

<sup>233</sup> The rule was upheld in *Satellite Broad. & Comm’n Ass’n v. FCC.*, 275 F.3d 337, 343 (4th Cir. 2001).

<sup>234</sup> *Id.* at 350 n.5.

<sup>235</sup> Council Directive 2002/22, art. 31(1), 2002 O.J. (L108) 51 (EC). Although a restraint of free trade in services, the European Court of Justice upheld must-carry



well as Internet, that are used by a significant number of end-users as the principal means to receive radio and TV broadcasts may be subject to must-carry.<sup>236</sup> These obligations shall meet clearly defined general interest objectives and shall be proportionate and transparent.<sup>237</sup> Germany has chosen to impose a strict must-carry regime. According to new rules entering into force in September 2008, platform providers for broadcast and similar audiovisual media must use a third of their digital capacity to distribute public service broadcasters, private broadcasters with local news, local broadcasters, and open access channels.<sup>238</sup> The next third of capacity must be filled with programmers on the basis of diversity considerations.<sup>239</sup> The platform provider is free to make use of any remaining capacity, subject to further requirements on the state level.<sup>240</sup> In Switzerland, public service broadcasters, in particular domestic public service broadcasters, local broadcasters, and some foreign public service broadcasters, are entitled to must-carry and privileged channel positions, as in the United States.<sup>241</sup>

In the United States, must-carry rules seek “to protect free local broadcasting from the perceived threat of elimination by cable.”<sup>242</sup> In Europe, must-carry rules seek to protect the public service broadcasters’ cultural mission of balanced programming and promotion of cultural diversity.<sup>243</sup> Must-carry rests on the assumption that significant numbers of broadcasters will be refused carriage on cable systems, and that these broadcasters will either deteriorate or fail.<sup>244</sup> Refusal of carriage is deemed to be based almost always on anticompetitive behavior of the cable

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requirements. *See* Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, art. 49, 2006 O.J. (C 321) 1, 62; Case C-250/06, *United Pan-Europe Commc’ns Belg. SA v. Etat Belge*, 2008 O.J. (C51) 16 (EU).

<sup>236</sup> Council Directive 2002/22, art. 31(1), 2002 O.J. (L 108) 51 (EC).

<sup>237</sup> *Id.*

<sup>238</sup> *Interstate Broadcast Treaty*, *supra* note 111, art. 52b(1)(1).

<sup>239</sup> *Id.* § 52b(1)(2).

<sup>240</sup> *Id.* § 52b(1)(3).

<sup>241</sup> *Bundesgesetz über Radio und Fernsehen [RTVG]* [Swiss Federal Law on Radio and Television] Mar. 24, 2006, SR 784.40, arts. 53, 59, 62, 63(2) (Switz.).

<sup>242</sup> Lutzker, *supra* note 48, at 477.

<sup>243</sup> *See, e.g.*, *Botschaft zur Totalrevision des Bundesgesetzes über Radio und Fernsehen [RTVG]* [Report on the Revision of the Federal Law on Radio and Television], Dec. 18, 2002, BBl. at 1569, 1636, 1638.

<sup>244</sup> *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997).

operator.<sup>245</sup> The statute, as well as the Supreme Court, completely ignore the possible legitimate reasons to drop a local broadcast channel, such as its lack of attractiveness to the viewers.<sup>246</sup> The historically strong position of cable systems as distribution platforms makes it look prone to abuses of market power. However, with the emergence of competing platforms like DBS, TV over telephone, and TV over the Internet, it seems quite unreasonable to assume that cable operators would drop popular broadcasters for less attractive cable channels.<sup>247</sup> In contrast to ownership limits protecting diversity, there is no apparent reason why antitrust laws could not deal with any abuses of market power with regard to carriage decisions, if any.<sup>248</sup> Further, existing must-carry rules hardly take into account that carriage of additional local broadcasters substitutes and silences a cable program. The “right” to speak of such TV stations seems as strong as the right of any other programmer. Must-carry provisions are always discriminatory and award benefits that are not based on competitive merits. Given the rather weak constitutional basis of must-carry<sup>249</sup> and the dramatic progress of alternative platforms for distributing content, the arguments supporting must-carry need to be revisited soon.

Closely related to must-carry is the regulation on channel positioning. Regulators have grasped that the first few channel positions are the programs most likely to be tuned into by the

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<sup>245</sup> *Id.* at 232–33 (O'Connor, J., dissenting).

<sup>246</sup> *Id.* at 233 (“It is undisputed that the broadcast stations protected by must-carry are the ‘marginal’ stations within a given market . . .”).

<sup>247</sup> In Europe, with public broadcasters aggregating a market share of over thirty percent, it seems even more unlikely that cable system operators might drop these channels. *See supra* Part II.A.

<sup>248</sup> *See, e.g.,* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605–11 (1985) (involving a refusal to continue a joint marketing arrangement); *cf. United States v. Terminal R.R. Ass'n. of St. Louis*, 224 U.S. 383, 408–09 (1912) (denying other railroads access to the only existing bridge usable for railroads crossing the Mississippi and terminating in St. Louis).

<sup>249</sup> *See, for instance,* the D.C. Circuit's decisions before the enactment of the 1992 Cable Act in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985) (holding that the FCC had failed to justify the regulations by sufficient record), and *Century Communications Corp. v. FCC*, 835 F.2d 292, 303 (D.C. Cir. 1987) (holding that the FCC's assertion that cable operators would drop local broadcasts in the absence of must-carry requirements was contradicted by the operators' behavior during the period between the *Quincy* decision and adoption of the new, modified must-carry rules).

audience.<sup>250</sup> Innocent readers would regard the first few channel positions on a cable or satellite system as an asset, which could be auctioned off.<sup>251</sup> Economists would argue, most probably, that a front channel position should be owned by the TV station making most use of it, that is, the TV station most ready to pay. To regulate channel positions means to provide the audience with incentives to tune into “desirable” channels, in other words, to consume “desirable” content. The regulation of channel positions discriminates between speakers and is deeply paternalistic, if not unconstitutional. If distribution platforms like cable and satellite systems are regarded as public forums, current rules on must-carry and channel positioning combined amount to preference of one type of speakers (local stations or public service broadcasters) over others (large networks, private broadcasters).<sup>252</sup>

#### H. Subsidies

CPB’s federal appropriation in the Fiscal Year 2008 amounts to \$400,000,000 and is paid from general revenues.<sup>253</sup> CPB submits an annual request for Federal funding of public broadcasting stations and programming; in the past, decisions on the amount of federal support for public service broadcasting have been made two years ahead of the fiscal year in which the funding is allocated in order to reduce politically motivated

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<sup>250</sup> *But see* Owen, *supra* note 19, at 693 (arguing that every TV outlet available to the community has equal potential as a source of ideas). For this assumption to hold, however, perfect rationality of the audience seems to be required.

<sup>251</sup> The question of whether such remuneration would be handed on to consumers is mostly determined by the market power of the platform in question. A strong platform provider rather can afford to keep earnings from channel auctions to itself.

<sup>252</sup> *Cf.* Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (holding that denying a church access to school premises for public viewing of an allegedly religious film was in violation of free speech); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (access to state fair grounds); *Widmar v. Vincent*, 454 U.S. 263 (1981) (access to university meeting facilities); *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976) (speakers at school board meeting); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (access to municipal theater).

<sup>253</sup> *See* Corporation for Public Broadcasting, Purpose, Benefits and Backgrounds, <http://www.cpb.org/aboutcpb/financials/appropriation>.

interference.<sup>254</sup> Nevertheless, CPB seems very vulnerable to political meddling due to possible funding cuts.<sup>255</sup>

The constitutional guarantees for public broadcasting in Germany include guaranteed funding.<sup>256</sup> Funding cuts, if permissible, must not be based on programming decisions of a public service broadcaster.<sup>257</sup> Legislators in Germany are free to determine the sources from which public broadcasters may draw funds such as subsidies, fees, and advertisements. According to the German Constitutional Court, however, a complete withdrawal of subsidies would create a dependency on market forces—a need to fill advertisements slots—and a threat to diversity.<sup>258</sup> Currently, the principal source of funding for public service broadcasters is a mandatory levy on TV set owners; other sources of funding are rather of secondary importance.<sup>259</sup> In 2006, the levy on TV set owners yielded €7,286,239,960 (\$11,553,790,700).<sup>260</sup> The amount of the levy must be set at a sufficient level to cover all the expenses of basic service.<sup>261</sup> Public

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<sup>254</sup> *Id.*

<sup>255</sup> See Howard A. White, *Fine Tuning the Federal Government's Role in Public Broadcasting*, 46 FED. COMM. L.J. 491, 492–93 (1994); Oscar G. Chase, *Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution*, 9 U. MICH. J.L. REFORM 62, 76–78 (1975); see also Chris Johnson, Comment, *Federal Support of Public Broadcasting: Not Quite What LBJ Had in Mind*, 8 COMMLAW CONSPECTUS 135, 138–41 (2000) (arguing that public broadcasting is a product of government control and is subject to numerous political interests).

<sup>256</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 22, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 60 (91) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 27, 1987, 74 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 297 (324, 342) (F.R.G.).

<sup>257</sup> See BVerfG, Mar. 27, 1987, 74 BVerfGE 297 (342) (F.R.G.).

<sup>258</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 5, 1991, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 238 (311) (F.R.G.); see also GERSDORF, *supra* note 108, at 26.

<sup>259</sup> Interstate Broadcast Treaty, *supra* note 111, § 13.

<sup>260</sup> See GEZ [COLLECTION AGENCY FOR THE LEVY ON TV SETS], GESCHÄFTSBERICHT 2006 [ANNUAL REPORT 2006] 37, available at <http://www.gez.de/e160/e161/e331/gb2006.pdf>.

<sup>261</sup> Interstate Broadcast Treaty, *supra* note 111, § 12(1); see also BVerfG, Feb. 22, 1994, 90 BVerfGE 60 (93-94); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 6, 1992, 87 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 181 (203) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 5, 1991, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 238 (298, 310) (F.R.G.) (noting that basic service includes broadcasts with focus on a selection of specific topics or spectators);

service broadcasters file their funding request with an independent commission (*Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten*), which assesses whether the requested funds are necessary to carry out the broadcaster's programming.<sup>262</sup> The commission is not allowed to assess whether the scope of basic service does cover the entire broadcaster's programming;<sup>263</sup> this restriction on scrutiny severely limits its scope of supervision. Legislators approving the funding requests are constitutionally bound to stick with the assessment of the commission, which has only a small leeway for deviations.<sup>264</sup> Because legislators, like the commission, are not allowed to challenge public broadcasters' programming decisions,<sup>265</sup> public broadcasters are quite free to determine their scope of operations without jeopardizing funding. Private broadcasters do not share in this mandatory levy.<sup>266</sup> Most European governments allow public service broadcasters to seek additional funds by selling, to a limited extent, time slots for commercials.<sup>267</sup> Such "dual funding" poses a threat to competition (siphoning of marketing budgets, predatory pricing for advertising space), but is sanctioned by Interpretative Protocol No. 32 on public broadcasting, annexed to the Treaty establishing the European Community.<sup>268</sup>

Public service broadcasting is highly subsidized in Europe. In Switzerland, a country with a population of only 7.5 million, a levy similar to Germany generates CHF 1.2 billion for the benefit

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Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 4, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (158) (F.R.G.).

<sup>262</sup> Interstate Broadcast Treaty, *supra* note 111, § 14(1); Rundfunkfinanzierungsstaatsvertrag [RfinStV] [Interstate Treaty on Broadcast Funding], Aug. 16–Sept. 11, 1996, *amended by* Vertrag, Mar. 1, 2007, GVBl. I at 206, §§ 1(1), 3(1) [hereinafter Treaty on Broadcast Funding].

<sup>263</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 22, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 60 (93–94, 103); Treaty on Broadcast Funding, *supra* note 262, § 3(1).

<sup>264</sup> Treaty on Broadcast Funding, *supra* note 262, § 7(2).

<sup>265</sup> BVerfG, Feb. 22, 1994, 90 BVerfGE 60 (94) (F.R.G.); Treaty on Broadcast Funding, § 3(1).

<sup>266</sup> Interstate Broadcast Treaty, *supra* note 111, § 43.

<sup>267</sup> *See supra* Part II.D.

<sup>268</sup> Interpretative Protocol (No. 32) On the System of Public Broadcasting in the Member States, Annexed to the Treaty Establishing the European Community, 2006 O.J. (C 321) 1, 313.

of a single public broadcasting company.<sup>269</sup> Thus, the amount of the levy is nearly twice the amount appropriated in the United States, which contains a population of approximately 300 million. Regulators in Switzerland have abused convergence to extend the levy on all technical devices capable of receiving audiovisual programming, including mobile phones and computers with Internet connection.<sup>270</sup> With this levy paid, regardless of actual use of public service programming,<sup>271</sup> the levy shows characteristics of a general tax.

We would assume that public broadcasters use the levy to produce and air programs, which have no possibility of obtaining funding or which do not attract sufficient advertising from private companies. This includes programming, which is not sought by the consumer, but which nevertheless is deemed by the broadcaster to be of cultural value.<sup>272</sup> Unfortunately, European broadcasters do not spend the subsidies on such cultural projects alone; they use the funds to compete with private broadcasters for audience and content.<sup>273</sup> Taking into account its size, the subsidy has highly distorting effects on competition in audiovisual media markets. This argument is easily illustrated by some examples.

ARD and ZDF, the two largest public broadcasters in Germany, have invested €71,200,000 (\$112,901,840) in online platforms, thereby creating one of the largest news gateways in Germany.<sup>274</sup> Their platforms threaten traditional print media,

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<sup>269</sup> See Federal Office of Communications, Amount and Use of Reception Fees, [http://www.bakom.ch/themen/radio\\_tv/00630/00631/index.html?lang=en#](http://www.bakom.ch/themen/radio_tv/00630/00631/index.html?lang=en#) (last visited Nov. 8, 2008).

<sup>270</sup> See Billag [Collection Agency for the Levy on TV Sets], Details About Device, [http://www.billag.ch/web/de/fragen\\_und\\_antworten/geraet.html](http://www.billag.ch/web/de/fragen_und_antworten/geraet.html) (last visited Nov. 8, 2008).

<sup>271</sup> *Id.*

<sup>272</sup> See Goodman, *supra* note 82, at 1394, 1404–15 (calling for a proactive media policy altering the consumer).

<sup>273</sup> See Ariño & Ahlert, *supra* note 32, at 405 (raising the question whether public broadcasters are acting within their public service remit and whether they are “unfairly using public money in new online services and excluding competitors” by providing “a wide array of online services with public funding”); see also Jan Freitag, *Ich Weiss, Was Schlecht für Dich Ist [I Know What's Bad for You]*, SPIEGEL ONLINE (F.R.G.), Mar. 25, 2008, <http://www.spiegel.de/kultur/gesellschaft/0,1518,543405,00.html>.

<sup>274</sup> See KOMMISSION ZUR ERMITTLUNG DES FINANZBEDARFS DER RUNDFUNKANSTALTEN [KEF] [COMMISSION ON FINANCIAL REQUIREMENTS OF BROADCASTING CORPORATIONS], 16. BERICHT [16TH REPORT] 209–10 (D2007)

which have struggled to regain customers lost to the Internet by building up online presence.<sup>275</sup> While the portals of ARD and ZDF are subsidized, the portals of state-independent print media are not. Driving out the free press of the Internet seems, however, hardly a helpful strategy to maintain diversity in media markets.

Further, ARD and ZDF have used most of their transmission time for information on politics and society.<sup>276</sup> However, the largest chunk of their money was spent on sports rights, rendering sports the category of shows with the highest production cost per transmission time.<sup>277</sup> Sports have eminent significance for society and reports about sports are part of a basic service in audiovisual media.<sup>278</sup> Nevertheless, in most sports, public broadcasters bid for transmission rights in competition with private TV stations, which mostly would air the program without charging the audience.<sup>279</sup> As a consequence, public service broadcasters do not merely supplement TV service (for example, by broadcasting unpopular sports); they use their subsidy to drive out private providers from functioning markets. Entertainment and sitcoms are other dominant categories of programming with a high cost/time ratio.<sup>280</sup> In contrast to small regional public service broadcasters,<sup>281</sup> the large public broadcasters in Germany do not distinguish themselves from private TV stations; they do not fill niches, but compete for market shares like private actors. Not surprisingly, the

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[hereinafter COMMISSION ON FINANCIAL REQUIREMENTS], *available at* [http://www.kef-online.de/inhalte/bericht16/kef\\_16bericht.pdf](http://www.kef-online.de/inhalte/bericht16/kef_16bericht.pdf).

<sup>275</sup> See ROBIN MEYER-LUCHT, NACHRICHTENSITES IM WETTBEWERB [COMPETITION BETWEEN NEWS SITES] 113–22 (2005) (providing a competitive analysis of four major news sites on the Internet).

<sup>276</sup> *Id.* at 30.

<sup>277</sup> *Id.* In the aftermath of the Olympics, commentators ridiculed German Public Broadcasting for sending more journalists to Beijing than athletes. See *Scharfe Kritik an ARD und ZDF* [*Severe Criticism of ARD and ZDF*], SPIEGEL ONLINE (F.R.G.), Aug. 24, 2008, <http://www.spiegel.de/kultur/gesellschaft/0,1518,574016,00.html>.

<sup>278</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 11, 1997, 1 BvF 1/91 (110) (F.R.G) (holding that the significance of sports does extend to realms beyond mere entertainment). Sports are an important part of local and national identity and form a broad base for interaction within the population.

<sup>279</sup> For a compilation of current sports rights holders in Germany, see KEK Online, <http://www.kek-online.de>.

<sup>280</sup> See COMMISSION ON FINANCIAL REQUIREMENTS, *supra* note 274, at 30.

<sup>281</sup> *Id.* at 32.

acquisition of sports rights by public broadcasters was subject to a European Commission investigation into the practice in Germany.<sup>282</sup> Germany's defense emphasized that a public broadcaster, in order to fulfill its basic service mission, needs to build up a brand to stay attractive to a larger audience.<sup>283</sup>

Vague definitions of the public service remits, lack of transparency and accountability, and the distorting effects of the financing regime described have induced the European Commission to launch a public consultation on a future framework for state funding of public service broadcasting; the consultation ended on March 10, 2008.<sup>284</sup> The Commission aims to replace the current communication on state aid to public service broadcasting<sup>285</sup> with a more stringent framework. Still, the European Commission will probably continue to accept wide definitions of the public service remits, such as "providing balanced and varied programming," "fulfilling the democratic, social and cultural needs," or "guaranteeing pluralism, including cultural and linguistic diversity."<sup>286</sup> Also, the European Commission provides no hint as to how to accomplish the balancing act of monitoring performance of public service broadcasters with regard to their mission without undue interference in programming and protected speech.<sup>287</sup> The United States' funding system does not address this problem in any better way.<sup>288</sup> However, public service broadcasting takes

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<sup>282</sup> European Commission, Financing of Public Service Broadcasters in Germany, (April 24, 2007), available at [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/E-3-2005-WLWL-en-24.04.2007.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/E-3-2005-WLWL-en-24.04.2007.pdf).

<sup>283</sup> *Id.* ¶ 104 (detailing Germany's defense to the allegation of illegal state aid, which implicitly confirms the role of public broadcasters, not as supplemental to, but as competitors of private TV stations).

<sup>284</sup> European Commission, Review of the Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting 1–2 (January 10, 2008), [http://ec.europa.eu/comm/competition/state\\_aid/reform/broadcasting\\_comm\\_questionnaire\\_en.pdf](http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_questionnaire_en.pdf).

<sup>285</sup> Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting, 2001 O.J. (C 320) 4, 5–11.

<sup>286</sup> *Id.* at 8.

<sup>287</sup> *Id.* at 9 (arguing that "it is not for the Commission to judge on the fulfillment of quality standards: it must be able to rely on appropriate supervision by the Member States").

<sup>288</sup> *See supra* Part II.A (pointing out that the funding from general revenues in the United States is prone to political meddling and that public service broadcasters in the United States have a very vague public service remit).



place on a much smaller scale,<sup>289</sup> thereby diminishing the scale of the conflict as well as the effects on free speech.

### III. ALTERNATIVE STRATEGIES

#### A. *Effects of Convergence in Audiovisual Media on Current Regulatory Frameworks*

Strict licensing regimes,<sup>290</sup> restraints on private TV stations,<sup>291</sup> and subsidies<sup>292</sup> have served perfectly to secure the competitive position of local and public service programmers, at least when space on transmission platforms was limited. Today, the media markets provide huge amounts of content, in diverse forms and on diverse platforms. Cable systems and satellites carry an abundance of channels. Entry barriers into audiovisual media markets have nearly disappeared: While building a traditional broadcast station still asks for a large investment,<sup>293</sup> it is possible to “Broadcast Yourself” on the Internet at negligible cost. Video on Demand over cable or Internet introduces even more choice and has freed the audience from others’ programming decisions.<sup>294</sup> TV, as Elihu Katz points out, “no longer serves as the central civic space; one can no longer be certain that one is viewing together with everybody else or anybody else.”<sup>295</sup> Thus, the preferential treatment of certain

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<sup>289</sup> *Id.*

<sup>290</sup> *See supra* Part II.B.

<sup>291</sup> *See supra* Part II.D.

<sup>292</sup> *See supra* Part II.H.

<sup>293</sup> *See* National Telecommunications and Information Administration, Television Station Construction Costs, [http://www.ntia.doc.gov/ptfp/application/EquipCost\\_tv.html](http://www.ntia.doc.gov/ptfp/application/EquipCost_tv.html) (Last Visited Nov. 8, 2008).

<sup>294</sup> *See* Brian Seth Hurst, *Kiss Convergence Goodbye, Welcome Exploitation*, MULTICHANNEL NEWS, May 15, 2000, at 117 (arguing that “[i]n the digital democracy,” the viewer “exercises choice and control”; therefore, “the future of media will belong to those who know how to deliver relevant programming, information and services to where the audience is living”); *see also* Phil McRae, *The Death of Television and the Birth of Digital Convergence: (Re)shaping Media in the 21st Century*, STUD. MEDIA & INFO. LITERACY EDUC., May 2006, at 1 (pointing out that digital convergence “has the potential to shift the power dynamics of television from viewing (passive) to engaged participation (active) within a converged medium” and that with interactive online TV, “the viewer has more control over what they watch . . . and how they choose to engage with the media”).

<sup>295</sup> Elihu Katz, *And Deliver Us from Segmentation*, in A COMMUNICATIONS CORNUCOPIA 99, 101 (Roger F. Noll & Monroe E. Price eds., 1998); *see* Goodman, *supra* note 82, at 1458.

programming by broadcast and cable regulation is thwarted by technological improvements. Governments try to channel the dispersed audience towards preferred types of programming by regulation on must-carry and channel positioning.<sup>296</sup> However, traditional linear programming or TV as we know it, which is subject to these regulations, is on the decline. For example, ABC already distributes popular episodes like "Lost" on-demand over the Internet, ready for download just after the program has aired on its linear channel.<sup>297</sup> Many shows are available for illegal download on BitTorrent sites, anyway.<sup>298</sup> New possibilities for distribution like on-demand offers on the Internet will not supplant traditional TV, but will alter it.<sup>299</sup> Traditional linear TV will remain a significant platform for content, such as the transmission of live events like the Super Bowl. However, there is hardly any reason to force the audience into a fixed schedule of linear programming when it comes to recorded shows like feature films and sitcoms. In fact, the new on-demand offers of traditional TV stations on the Internet acknowledge that the consumer can already record and cut out commercials on his or her Blu-ray or DVD recorder.

The described technological developments will further impair the effectiveness of the current broadcasting regime, with all its "spillovers" on cable and satellite platforms. In Europe, the new Audiovisual Media Services Directive will put emerging TV gateways on the Internet at a competitive disadvantage, because local regulators will try to impose must-carry rules and rules on preferential channel positioning on these providers.<sup>300</sup> It seems

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<sup>296</sup> See *supra* Part II.G.

<sup>297</sup> ABC, Full Episode Player, <http://abc.go.com/player/> (Last Visited Nov. 8, 2008). Recently, MTV Networks joined in these developments and put nearly all the episodes of South Park on the web. See South Park Episode Player, <http://www.southparkstudios.com/episodes> (Last Visited Nov. 8, 2008).

<sup>298</sup> See Jim Finkle, *BitTorrent Moves from Piracy to Video Streaming*, REUTERS (U.K.), Oct. 9, 2007, <http://uk.reuters.com/article/technologyNews/idUKN0833530820071009>.

<sup>299</sup> Cf. Moritz Leuenberger, *Heute der Trend, Morgen die Wahrheit [Today Trends, Tomorrow Truth]*, UVEK, Oct. 25, 2007, <http://www.uvek.admin.ch/dokumentation/00476/00477/01407/index.html?lang=de> (claiming that new forms of media never supplants, but alters traditional forms of conveying content); see also Craig Dwyer, *The Changing Face of Broadcasting: As Broadcast Converges with Telecoms and IT Technology, New Opportunities Are Being Opened Up for Content Delivery*, INT'L BROADCAST ENGINEER, July 1, 2003, at 20.

<sup>300</sup> See *supra* Part II.G. European regulation allows the imposition of must-carry obligations on all providers regardless of the platform used. Council Directive

grotesque that a broadcast regulator in Germany or France could impose must-carry obligations for local channels on a worldwide operating TV gateway on the Internet. Due to lack of jurisdiction over the Internet, the FCC's own must-carry regulations will be limited severely in scope as soon as new Internet gateways become significant transmission platforms. Taking into account the influx of other unregulated media in markets for video on-demand, the FCC's regulations are set to fail as an instrument to promote local and public service broadcasting.

On the face of it, lower barriers for market entry in audiovisual services are certainly welcome for enhancing diversity and promoting culture in audiovisual markets.<sup>301</sup> Enhanced diversity provides a prima facie case for deregulation. Legislators, thus, urgently need to reassess their arguments for continued governmental intervention. Traditional market failure justifications for intervention in audiovisual media markets such as the "special nature" of media products, the qualification of content as public good, or the assertion of ruinous competition<sup>302</sup> are obsolete in times of channel abundance.<sup>303</sup> Other social justifications for intervention such as disregard for minority interests and inferior quality apply to virtually all cultural

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2002/22, art. 31(1), 2002 O.J. (L108) (EC). It also requires providers to display European works more prominently. Council Directive 89/552, 1989 O.J. (L298), amended by Council Directive 1997/36, 1997 O.J. (L202) 60 (EC), and Council Directive 2007/65, 2007 O.J. (L332) 27 (EC).

<sup>301</sup> Communication from the Commission, *supra* note 285, at 5.

<sup>302</sup> Such ex ante market failure assessments have even served to deny TV stations access to broadcast markets on grounds that a second TV outlet may result in economic injury to the existing, monopolistic provider. *See Carroll Broad. Co. v. FCC*, 258 F.2d 440, 442–43 (D.C. Cir. 1958).

<sup>303</sup> In C. Edwin Baker's static view of competition, even monopolistic ownership of local broadcast channels may produce, in certain conditions, more beneficial results than competition. *See generally* Baker, *supra* note 12, at 313–44. Baker bases his argument on a market structure with three competing stations and three programming categories, of which "70% of the audience strongly prefer type A, 20% type B, and 10% type C." *Id.* at 241. He concludes that each of "the three competitors are likely to provide type A, with each on average getting one-third of 70% (23-1/3%) of the audience." *Id.* Moreover, "if a monopolist controlled all three channels, [with] no incentive to compete with itself, it could introduce a different type of programming on each channel . . . to increase its total audience. It would gain those viewers who prefer B and C but do not bother to watch A," and, thus, increase consumer welfare. *Id.* However, the result is completely different if only one competitor is added: with four channels, each station would drop to an average audience of below twenty percent, providing incentives to reach out to type B consumers, as well. *See id.* Eventually, with at least eight stations, it is rational to also provide broadcasting for type C consumers.

industries. Such social justifications, as a consequence, provide a rationale for intervention in either all media markets or none of them.<sup>304</sup> Even if assuming that today's media markets work inefficiently, provide inferior quality, and produce negative externalities on democratic values,<sup>305</sup> there is not much reason to believe that governments or appointed officials would be in a better position to judge quality than the audience. Assuming that the quality of audiovisual content can be improved by government intervention, regulators would still have to find ways to compel or persuade the audience to watch the high-quality content. This could be achieved by turning back the wheel and promoting a monopolistic or oligopolistic market structure; the scale of such an intervention is beyond anything permissible under the First Amendment.<sup>306</sup>

Because of the FCC's fragmentary regulatory powers, the United States is set to be the testing ground for a deregulated, pluralistic, partly atomistic audiovisual media market; it will take years to assess the effects of this new market structure on the quality and cultural diversity of audiovisual programming. On the other side of the Atlantic, the technology-neutral European approach is still bound to preserve the traditional

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<sup>304</sup> Madison Square Garden, for example, provides a venue for Alicia Keys on June 18, but is not required by law to host "Stevie Wonder's Piano," a New York City local rock band, as well. Madison Square Garden, thus, is not subject to a rule mandating must-carry of local content. Neither is Ticketmaster required to lure basketball fans into browsing through the current opera schedule before providing them with an opportunity to buy tickets for the next Knicks game (Ticketmaster, thus, is not required to privilege content by channel positioning).

<sup>305</sup> See, e.g., Baker, *supra* note 12, at 414–15 (arguing that, beyond subsidies, policies directed at encouraging the allocation of control over content creation to people with commitments to quality rather than merely to the bottom line would make media entities more responsive to the market); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 502–04 (2000) (arguing that public interest requirements for broadcasters still make sense where channels abound, that the concept of consumer-sovereignty is ill-suited to communications markets, and that an unregulated media market cannot promote the aspiration to deliberative democracy).

<sup>306</sup> Unless, of course, intervention is based on the assumption that the consumer might be altered or "elevated," and that the consumer will ask only for high quality content in the long run. See, e.g., Goodman, *supra* note 82, at 1404–14; Sunstein, *supra* note 305, at 523 ("In any case it is likely that some people would watch the resulting [public interest] programming and develop a taste for it . . ."). There is no empirical study on the elevation of the consumer by public interest programming over a prolonged period of time; it is far more likely that such public interest programming would serve to nourish content producers meeting insufficient demand for their products.

system of strong public service broadcasters. The European community tries to reach this goal by expanding the scope of its regulatory framework to new transmission platforms like the Internet and to on-demand services.<sup>307</sup> Unfortunately, the European Commission has only just started to reassess the role of public broadcasters within converging audiovisual media markets.<sup>308</sup> The new European Audiovisual Media Services Directive leaves jurisdiction with regard to public service broadcasting with the individual member states, with highly distorting effects in the media markets.<sup>309</sup>

Public service broadcasting, in particular, in Europe, is a remnant of previously limited availability of broadcasting frequencies and high barriers to entry.<sup>310</sup> A large part of the new Audiovisual Media Services Directive is motivated by changes in technology and consumer behavior and merely attempts to protect the traditional public service broadcast system.<sup>311</sup> In an attempt to preserve public service broadcasting, European legislators have lost focus of the ultimate goal of state intervention: the promotion of freedom of speech by maintaining cultural diversity and localism.<sup>312</sup> Regulators and courts recite pluralism and diversity like a mantra<sup>313</sup>, but do not question the instruments used to achieve these goals. It is widely acknowledged that the state, as the ultimate guarantor of pluralism and diversity, needs to implement a regulatory framework to protect its guarantee of freedom of speech.<sup>314</sup> The state, being both the guarantor and potential aggressor to freedom of speech<sup>315</sup>, is required not to burden speech any more

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<sup>307</sup> See *supra* Part II.D.

<sup>308</sup> See *supra* notes 284–285 and accompanying text.

<sup>309</sup> Council Directive 2007/65, *publ.* ¶ 9, 2007 O.J. (L332) 27, 29 (EC) (referring to the Council Resolution on Public Service Broadcasting, 1999 O.J. (C 30) 1, 2–3 (EU), and its affirmation of the member states' competence concerning remit and funding).

<sup>310</sup> Communication from the Commission, *supra* note 285, at ¶ 1.

<sup>311</sup> *Id.* at ¶¶ 1–3 (emphasizing that technological changes have promoted pluralism, but have also made it necessary to implement rules to protect and maintain public service broadcasting).

<sup>312</sup> See *supra* Part I.

<sup>313</sup> See, e.g., Interpretative Protocol, *supra* note 268, ¶ 5; Council Resolution on Public Service Broadcasting, *supra* note 124.

<sup>314</sup> See *supra* Part I.A.

<sup>315</sup> See Owen, *supra* note 19, at 674 (arguing that the idea of government promoted information “is grounded in the image of government as a benign force in a world beset with such evils as ignorance and prejudice”). Owen emphasizes that

than is necessary for implementing its framework.<sup>316</sup> Although the European Commission started to challenge member states' audiovisual media regulations on the grounds of excessive state subsidies, the otherwise sweeping regulatory framework at European and at state level shows limited self-restraint on the side of the legislators.<sup>317</sup> Legislators just assume that the intrusive instruments described are still necessary to promote diversity.

When transmission platforms and available channels are abundant, the state does not generally look like a good choice for acting as gatekeeper for content providers or for guaranteeing fair and balanced programming. It is a longstanding democratic principle that the government should have "no power to restrict expression because of its message, its ideas, its subject matter, or its content".<sup>318</sup> The government is generally unfit to categorize protected speech into more or less preferable forms.<sup>319</sup> The

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First Amendment values "were established in an era, perhaps not yet fully behind us, where government tyranny was the principal threat." *Id.*

<sup>316</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984) ("[T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . ."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377, 396 (1969); see also *Informationsverein Lentia v. Austria*, 36 Eur. Ct. H.R. 75 (2002) (holding that a public broadcast monopoly imposes the greatest restrictions on freedom of speech, namely the total impossibility of broadcasting otherwise than through a national station). The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need. *Id.* The court continued that justification for these restrictions can no longer be found in considerations relating to the number of frequencies and channels available, as a result of the technical progress made over the last decades. *Id.*

<sup>317</sup> See *supra* notes 284–285 and accompanying text.

<sup>318</sup> *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (striking down an ordinance prohibiting picketing near school buildings while school was in session, because the ordinance made an impermissible distinction between labor picketing and other peaceful picketing, thereby violating the Equal Protection Clause of the Fourteenth Amendment).

<sup>319</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 55 (1988) (holding that a public figure may not recover damages for emotional harm caused by the publication of an parody which was offensive to him). In *Hustler*, the Supreme Court stated:

If it were possible by laying down a principled standard to separate the one from the other [political cartoon], public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one. 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard

government is thus on thin ice when it continues to promote single categories of broadcasters, even more so since access to transmission platforms has become easier and abuses of market power by platform providers less likely.

*B. Urgent Need for Reform in Audiovisual Media Regulation*

The list of public interest concerns affected by audiovisual media is lengthy. It encompasses, for example, the need for educational programming for children, closed-captioning, diversity (that is, fighting homogenous programming), protection of children from excessively violent or pornographic programming, and sufficient news coverage (for example, international news, news on political candidates).<sup>320</sup> Some items on the list are easily defended (protection of minors from obscene programming; closed captioning), others raise strong First Amendment concerns (public interest obligations with regard to, e.g., diversity; preference for local or public broadcasters).

Some public interest concerns may not be served alone by some broadcasters because their functioning relies on the cooperation of all broadcasters. In particular, this is true with regard to the protection of minors from indecent or obscene programming. Current regulation charges most or all programmers with public interest obligations concerning minors.<sup>321</sup> In times of convergence, however, it seems futile to protect children from indecent programming in broadcast and cable, while pornographic material is readily accessible on the Internet.<sup>322</sup> Regulating pornographic on-demand offers on the Internet merely makes providers move to less rigid jurisdictions,

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thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

485 U.S. at 55. In *R.A.V. v. City of St. Paul*, the Court gave examples of categorized speech, such as “the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government,” or “a city council could [not] enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government.” 505 U.S. 377, 384 (1992); *see also* Owen, *supra* note 19, at 695 (arguing that the localism policy fastens on a specific category of ideas, which runs afoul of First Amendment values, such as discouraging national voices by forcing them to speak through numerous local outlets).

<sup>320</sup> *See* Sunstein, *supra* note 305, at 509–11.

<sup>321</sup> *See supra* Part II.D.

<sup>322</sup> *See* BYRON, *supra* note 206, at 49–50.

rendering the domestic law largely ineffective. Keeping in mind that space for further regulatory impediments at the source is limited because of First Amendment requirements, legislators need to shift their focus to the receiving ends of communications, that is, on technical and legal measures to support and encourage parents and guardians to protect their children, and on international support for their efforts.<sup>323</sup>

A second category of public interest concerns does not directly relate to the protection of the audience from physical and psychological harms. They do not need to be imposed on all programmers in order to fulfill their functions. Obligations like closed-captioning provide “a critical link to news, entertainment, and information for individuals who are deaf or hard-of-hearing,”<sup>324</sup> and serve important public interests. However, the costs of providing closed-captions increase the barriers to market entrance for small-content producers and small TV stations. At the same time, it seems sufficient if larger audiovisual media providers, defined by a certain threshold, provide closed captions in their programming.<sup>325</sup> The European Audiovisual Service Directive lacks an exemption for small media corporations from public interest obligations like closed captioning.<sup>326</sup> The FCC’s regulation provides for an exemption if compliance with the closed captioning requirement results in an undue burden.<sup>327</sup> However, the FCC only grants exemptions on the basis of an extensive review process, which must be supported by sufficient evidence and by an affidavit.<sup>328</sup> Thus, regulation lacks general exemptions based on the size and financial capabilities of an audiovisual media provider.

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<sup>323</sup> See *id.* at 5–6.

<sup>324</sup> FED. COMM’NS COMM’N CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FCC CONSUMER FACTS: CLOSED CAPTIONING 1 (2008), available at <http://ftp.fcc.gov/cgb/consumerfacts/closedcaption.pdf>.

<sup>325</sup> See 47 C.F.R. § 79.1(d)(12) (2008) (stating that for channels which produce revenues under \$3,000,000 are not required to expend any money to closed captioning; however, the channel must pass through programming which is already close-captioned when received).

<sup>326</sup> See Council Directive 89/552, 1989 O.J. (L298) 23 (EC), as amended by Council Directives 97/36 and 2007/65 (applicable to all audiovisual media services).

<sup>327</sup> 47 C.F.R. § 79.1(f) (2008).

<sup>328</sup> See FED COMM’NS COMM’N CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, EXEMPTIONS TO THE CLOSED CAPTIONING REQUIREMENTS ON THE BASIS OF UNDUCE BURDEN (2008), available at [http://ftp.fcc.gov/cgb/dro/caption\\_exemptions.html](http://ftp.fcc.gov/cgb/dro/caption_exemptions.html). *But see* 47 C.F.R. § 79.1(d) (2008) (providing automatic exemptions for certain programs and providers).



A third category of public interest concerns addresses issues relating to, according to some commentators, externalities created by “public good” characteristics of content.<sup>329</sup> These issues mostly relate to the quality of the programming, in particular the neglect of democratic and cultural needs. Some commentators aim to impose quality requirements on all programmers, in accordance with the current European approach.<sup>330</sup> This approach would continue the persistent discrimination between audiovisual broadcast media and other media. Theoretically, convergence would require authors to write better books and newspaper articles as well. Some commentators seek to implement complex trading schemes, which would allow media providers to trade their public interest obligations in the same way as emission trading schemes. Such trading would be less intrusive, and would permit some TV stations to increase their public interest programming for remuneration, while other stations would be able to pursue their purely commercial programming.<sup>331</sup> It is indisputable that such a trading scheme would raise complex questions regarding pricing. For example, public interest programming during prime time seems more valuable than public interest programming during the night. Further, public interest programming might differ in quality and production cost, which should be considered in pricing. Finally, implementation, monitoring, and enforcement of such a trading scheme seem costly. As a consequence, an increase in public interest programming and programming flexibility might not be worth the effort of setting up the trading scheme in terms of costs and inefficiency.

There are simpler ways to provide services of public interest. Existing public service broadcasters should be first in line to supplement current market offers with public interest programming. Currently, public service broadcasters are not designed to fulfill this role in the United States or Europe. In the United States, small budgets let public broadcasters starve, making it difficult for them to continuously reach large mass audiences with “programs of high quality, diversity, creativity,

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<sup>329</sup> See Baker, *supra* note 12, at 316, 319; Goodman, *supra* note 82, at 1415–19.

<sup>330</sup> See Sunstein, *supra* note 305, at 544.

<sup>331</sup> See *id.* at 545.

excellence, and innovation . . . .”<sup>332</sup> Thus, U.S. public service broadcasters appear too weak to make a significant difference to overall programming. Stable and adequate funding for public service broadcasters in the United States, however, will meet resistance from legislators while public service broadcasters are not accountable for their performance. In contrast, public service broadcasters in Europe have been nourished by huge, constitutionally protected subsidies.<sup>333</sup> The established accountability mechanisms with regard to the quality of their programming and the general scope of their activities (for example, in traditional markets of the printing press) have proven to be rather weak. Their market power<sup>334</sup> and the regulatory framework protecting them<sup>335</sup> have made European public service broadcasters a threat to diversity, rather than its promoter.

Reforming public service broadcasting means establishing sufficient accountability and defining limits to the scope of operations. Direct state supervision, for constitutional reasons, is restricted, and states must not interfere in programming even of public service broadcasters. In deviation from traditional monitoring and enforcement, an independent performance benchmark might be sufficient to hold public service broadcasters accountable. A cost benchmark may be easily established by introducing competitive elements in the provision of public interest programming. Bidding for subsidies would drive down costs of public interest programming to efficient levels, while opening public service provision to all market participants.<sup>336</sup> There is no reason why subsidies should remain tied to public service broadcasters instead of individual, independent content producers.<sup>337</sup> Further, comparative assessments of the market

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<sup>332</sup> 47 U.S.C. § 396(g)(1)(A) (2000 & Supp. IV 2004); *see, e.g.*, Baker, *supra* note 12, at 414.

<sup>333</sup> *See supra* Part II.H.

<sup>334</sup> *See supra* Part II.A.

<sup>335</sup> *See supra* Part II.B–H.

<sup>336</sup> *See* Goodman, *supra* note 82, at 1464 (arguing that “[t]he use of subsidies . . . permits government to pursue media policy goals . . . with far less formidable First Amendment constraints” than by using regulation); *cf.* Sunstein, *supra* note 305, at 542–43 (proposing a tax on undesirable programming instead of subsidies, which both have the same effect from an economic perspective).

<sup>337</sup> *See, e.g.*, Broadcasting Act 1989, [1989] No. 025, § 36 (N.Z.). The Broadcasting Commission of New Zealand (“NZ On Air”) promotes content which reflects and develops identity and culture, in particular, Maori language and culture.

appeal of individual public interest programs, that is, market shares in relevant target groups such as children, could add a performance element to the benchmark. Benchmarking public interest programming with other public interest programming frees public service broadcasting from mimicking commercial broadcasters. It provides criteria for the allocation of funds to public service providers, and therefore, also provides the means to punish poor performance without giving rise to political meddling.<sup>338</sup> The role of government, if any, would be limited to choosing the categories of programming to be supported: educational, local, or other programming. Such channeling of subsidies to specified categories of programming will also put an end to the expansion of public service broadcasters to markets traditionally served by the private printing press, in particular to the formation of news-platforms on the Internet.

#### CONCLUSION

Diversity of opinions is the overarching goal of media regulation. Policies to promote localism, cultural expressions, and quality of programming may be qualified as sub-goals of a broader diversity policy. Progress in technology has vastly increased the amount of available transmission platforms and available channels for audiovisual media content. Such abundance promotes diversity and constitutes a *prima facie* case for deregulation of audiovisual media, in particular broadcast media. Attention of the audience, however, is scarce;<sup>339</sup> also, the audience may not be willing to invest large amounts of time in seeking out new offers in the audiovisual landscape. It is very likely that even an unlimited amount of channels will not result, *eo ipso*, in a vivid marketplace of ideas or diversity of opinions.<sup>340</sup>

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*See id.* § 36(a)(ii); Karl-Jascha Schneider-Marfels, *Auslandsmedien: Heimatschutz oder Wettbewerb? [Foreign Media: Protectionism or Competition?]*, 125-I ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 339, 342 (2006). *But see* Mary Debrett, *Branding Documentary: New Zealand's Minimalist Solution to Cultural Subsidy*, 26 MEDIA CULTURE & SOC'Y 5, 5–20 (2004).

<sup>338</sup> *See* Hettich, *supra* note 104, at 247–51 (arguing that benchmarking instead of monitoring postal providers supersedes the need for regulators).

<sup>339</sup> *See* Simon, *supra* note 30, at 40–41.

<sup>340</sup> *See* Ingber, *supra* note 32, at 38 (arguing that “monopolistic practices, economies of scale, and an unequal distribution of resources have made it difficult for new ventures to enter the business of mass communications”). The marketplace of ideas’ inevitable bias supports entrenched power structures, supporting those ideas appealing to the self-interest of individuals who manage the media. *Id.* at 39.

On this basis, the government may still justify intervention in audiovisual media markets. However, any government scheme has to be justified by clearly improving diversity or "aggregate" free speech, as compared to the status quo.

Largely the same instruments of governance are applied in audiovisual media markets in the United States and in Europe. Licensing schemes and ownership limits seek to guarantee a broad distribution of available content outlets. Behavioral restraints aim to protect minors, but also impose public interest requirements on audiovisual media providers, predominantly in Europe. The attention of the audience is channeled to preferred content, that is to content produced by local TV stations and public service broadcasters. Public service broadcasters are mandated to raise the quality of content to an acceptable level, to shine as bright stars within a landscape of dull and uninteresting commercial programming. The European Union recently decided to refine the use of these instruments. Its new Audiovisual Media Services Directive extends the existing regulatory framework to all transmission platforms, including the Internet. The FCC, as well, seems unlikely to abandon broadcast regulation with all its spillovers to cable, satellite, etc. in the near future.

Current regulation is designed for, and favors, providers of classical linear programming. Regulators have chosen to ignore imminent changes in market structure and the way TV is provided. With increasing capacity of transmission platforms, we may expect increased market entry in audiovisual media markets and growth of on-demand services. In these circumstances, current regulation will no longer succeed in directing the audience's attention to preferred content providers. Although regulatory failure is at hand within a few years, to date no regulator has proposed forcing its preferred providers' content onto audiences in order to protect those providers and to prevent audience dispersion. In the upcoming market transformation, current regulation will still have distorting effects on competition between content providers and may hamper the development of new audiovisual media services. In the worst case scenario, audiovisual media regulation might disturb other media markets, particularly those served by the printing press, which are facing convergence with audiovisual media markets.

Convergence confronts regulators with the choice of either abandoning broadcast regulation or extending their grip to unregulated media markets, running the risk that their regulation remains fragmentary and limited in its effectiveness. This Article suggests that the scale of regulatory intervention needs be matched with the importance of public interests involved. Regulation needs to be applied equally to all audiovisual media irrespective of the technology or distribution platform involved. There are public interest concerns, which should be respected by all audiovisual media providers, regardless of their size. In particular, these public interests relate to the protection of minors from obscene or violent programming; however, the international nature of the Internet will also require regulators to refocus their attention, from regulation of the source, to regulation of the receiving ends of communication. Other programming requirements, such as the provision of closed-captions, should apply only to programmers whose market share or financial capabilities meet certain thresholds.

Requirements regarding the content and quality of programming, such as provisions aiming to increase the share of children's programming or decreasing the share of commercials, however, are inappropriate when applied exclusively to traditional TV-like media. In times of convergence, public interest requirements would have to be applied to all audiovisual media or none. Regulatory standards for content and quality standards for all media would force a role on the government, which it is not entitled to hold by virtue of the First Amendment. Thus, governments wishing to increase the quality of programming or to promote certain categories of programming are left with the option to provide financial incentives for such programming, by subsidizing either public service broadcasters or producers of content. This Article argues in favor of a combination of subsidies to public service broadcasters, as well as to independent producers of content. While public service broadcasters provide for an easily accessible transmission platform, enjoyment of freedom of expression has rendered them largely unaccountable to the public. By introducing a scheme of competitive bidding for subsidies, a benchmark revealing

cost-efficient levels of public interest programming is established. Some subsidies should be allocated according to the relative performance or success of public interest programmers in the past, thereby partly removing the need for selective judgments by government entities.