HOW MUCH SHOULD THE INTERNET BE REGULATED?•

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On the regulation of the internet

In the past, when a new medium became widespread, sooner or later the distinct regulations providing for the operation of that medium appeared (press laws, radio law and, later on, the regulation of electronic media), while in the case of the internet no such distinct regulatory system has emerged in the western world in the more than two decades that have passed since its proliferation. The scientific position, according to which the nature of (media) technology defines its legal regulation (i.e. that it is the law that adapts to technology) has become widely accepted since the eighties of the previous century. From this notion it follows that, since the regulation of the internet is rather cumbersome (due to issues of jurisdiction, execution and liability), it is therefore not necessary to regulate it at all. Perhaps surprisingly, the internet carries little novelty, in the sense that it has inherited many of the problems of the 'traditional' media, or, to put it more precisely, has renewed them and even reproduced them in the new environment on a larger scale. These include the possibility of arbitrary state intervention, the inequalities in the effectiveness of communicating and the chances of accessing opinions, as well as the problem of commercialisation. Beyond this, the internet also generated new, unexpected problems through the new modes of private restrictions jeopardising the pluralism of opinions, the increased possibility of infringements of privacy and the erosion of the economic bases of quality journalism. Far from being a lawless space, the legal provisions with general scope (civil law, criminal law) apply to the content available on the internet, too, and several internet-specific issues have been settled legally - usually on the level of the European Union - (electronic commerce, electronic communications, on-demand media services, the right of reply, copyright issues, etc.), nevertheless there is no true, independent 'Internet Act', and by their very nature the application of the existing legal provisions cannot be as effective as it is in the 'traditional' media world.

Des Freedman points out that it is a fallacy to regard anything related to the internet as "predestined by technology". According to Freedman, the internet is a technological system which simultaneously serves private and public interests - and as such, it is not the first of its kind in history. Accordingly, it is perfectly legitimate to propose that, in respect of the

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internet, when recognising the public interest, democratic states may resort to regulation with the aim of providing better accessibility and accountability for their citizens.

The technical difficulty of regulation is not an argument, or, at least, not a convincing argument against regulation. Rather, the main question is what it is that we want from the internet. If it should contribute to the operation of democratic publicity, the diversity of opinions, the democratisation of access to such opinions and the elimination of the economic and political inequalities seen in the offline media world then it is quite legitimate to ask the question whether legal regulation could further the achievement of these objectives. If we notice that some of these objectives are, in fact, jeopardised by certain phenomena related to the internet then the possibility of preventing such harm by legal means should also be investigated.

According to Nunziato, the public forum doctrine, well established in US constitutional law, should be applied to the internet as well. According to this doctrine, communal spaces (parks, streets, etc.) are legitimate fora for the expression of opinions, which may only be restricted for good cause. Nunziato argues that the internet should be looked upon as such a public forum, despite the fact that today most of the assets operating its infrastructure are in private property.

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

Several actors’ interests are vested in the media market and these interests may collide with each other. When all is said and done, all these parties have the ability to facilitate the access of their users or audiences to democratic public sphere. These interested parties are, among others, the device manufacturers (producers of television sets, computers, tablets, smartphones, set-top boxes, game consoles and media players), the internet service providers, the ‘traditional’ media service providers (mainstream, free to air and pay-tv service

providers), over-the-top service providers and content producers, social media sites and software developers. They are not only allies but also competitors of each other; with regard to each of them the question arises as to what extent it is worthwhile/necessary to regulate them.

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

In respect of media service distributors, such a legal obligation (must-carry) has been in existence for a long time; in the future, obligations intended to promote access may be prescribed for the operators of smart platforms, and search engines and internet service providers may also be regulated. This does not mean that these carrier agents become 'full-fledged' subjects of the freedom of the press, therefore the related obligations may not be applied to them in full (e.g. compliance to the requirement of the right of reply);, rather, they will assume the role of holders of a certain 'limited scope' right of the freedom of the press.

On the other hand, these agents must respect the right of others to the freedom of the press, and must ensure the free distribution of content and opinions during the course of their activities. Today, the 'traditional' subjects of the freedom of the press need not only be wary of the state when they safeguard their freedom from external intervention, but also of these

agents. Dawn Nunziato presents a host of concrete examples to illustrate how such agents interfere with the free flow of opinions. According to her, in contrast with common belief, the major American internet enterprises do this not only on the basis of their business interests, with the intention of increasing their revenues, but also in respect of political opinions, applying a sort of private censorship (this goes for internet service providers who are able to restrict sending emails or public access to certain content, for news aggregators who are in a position to omit certain, otherwise important, news items and for search engines that can restrict access to certain types of content). In this respect, the task of the state is not only to refrain from intervention into the exercise of the freedom of the press (apart from defining and operating the necessary legal framework), but also to eliminate or, at least, to minimise the possibility of intervention by private parties.

As the majority of them lack exact and detailed regulation, the new types of services give rise to several novel issues and questions. Although within the EU the single market provides all European service providers with protection and opportunity (although the service providers of an economically weaker Member State will never compete on an equal footing with British, German or French enterprises), it is unable to provide protection against enterprises outside the Union (which usually come from the USA). Surveys of the Hungarian media market indicate that content aggregators (e.g. Google) and social media (e.g. Facebook) pose a threat to the existence of national content producers by siphoning off their vital resource, advertising revenues, while over-the-top services (e.g. Netflix) that are also mainly American make market entry *ab ovo* difficult for the media market actors of the Member States.

Over-the-top services and smart platforms

OTT media services pose several legal questions that are related to the definition of the freedom of the press. First of all, it is questionable how these services should be defined on the basis of the current legal regulations (as media services, as media service distribution, as electronic communications services or, perhaps, as something entirely different). It is this uncertainty that leads to doubts surrounding the question of just what regulatory burdens apply to them.

Several further important issues arise in relation to access. The menu, the ‘application environment’ of the smart devices used for the consumption of media content plays an increasingly important role in the ecosystem of digital content deployment. The operators of these menu systems, application environments, play an editorial role similar to that of the media service distributors: it is they who decide the applications of which (not only media)

service providers are included in the menu and in what position. (This could result in a violation of the principle of equal access, nor is there even any guarantee of at least the transparency of inequality.) At present, however, by contrast with 'traditional' media service distributors, they are not bound by either the *must carry* or the *must offer* rules.

Furthermore, several content regulation (advertisements, protection of minors, media pluralism, etc.) and competition law, copyright law, privacy and consumer protection issues also arise, as does the question of what will happen to the privileged status of public media service providers in the future (e.g. the adaptation of their *must carry* rights to the new environment).

Search engines

Search engines are information services, and – according to the late prof. Jakubowicz – "they pose special challenges and significant threats" to a number of values important in the context of press freedom, as well as to the effective application of regulations such as the exclusion of access to infringing contents, discrimination between various types of content and influencing the exercise of the freedom of opinion and preventing the fragmentation of public life and the distortion of market competition.

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

Google's algorithm used to rank search results is not public. What we can know about it is that Google's business interests influence the search results, i.e. companies pay Google to ensure that their websites end up at the top of the list (in principle, this is only true for the first

three places in the ranking of search results on the basis of Google's AdWords service; however, the listing system is not entirely transparent). At the same time, the service provided by search engines may not only serve business, but political interests as well.

Just one example: the most popular, state-owned Chinese search engine, for example, does not list websites that stand for the creation of democracy in China. According to the Manhattan District Court, by acting in this way, the search engine is simply exercising its right protected by the First Amendment, i.e. such peculiar "editing" enjoys the protection of the freedom of speech and the freedom of the press.

Similarly to the paradigm of net neutrality, the concept of search neutrality also exists. According to James Grimmelmann, these principles include equality between the various websites, the production of results that objectively conform to the search terms entered, restraint from bias, the suspension of the self-interest of the search engines and the transparency of the search algorithms.

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

If we wish to have a properly working democratic public sphere that serves the cause of democracy then we need regulation. At the same time, the desire for regulation should be carefully kept within the appropriate limits. On the one hand, the legal solution is, at best, a useful prop for achieving the objectives of public interest and, on the other hand, state intervention in the still fluid, never predictable, continuously changing internet is in itself a risky venture, since its effectiveness is doubtful and it may even bring about greater damage than it was intended to avert. Moreover, due to the very nature of the internet, its regulation can hardly be the task of individual states; if such regulation is to be effective, it should operate on a European or even on a 'universal' level.

The task of (EU and Member State level) media regulation will include the creation of truly equal conditions for the media services accessible in Europe (as well as the other actors within the value chain of the media market), and the definition of the various levels of regulation as they relate to the different types of services. We have to accept that providers of several new types of services are now amongst the stakeholders of the freedom of the press. If we are to uphold our earlier principles related to the democratic tasks of the media, besides providing them with rights we may also prescribe duties for them. The extent to which the regulatory burdens and solutions that could be realistically implemented, even in the near future (obliging internet service providers to refrain from discriminating between content, prescribing transparent operation for search engines, settlement of the issues of copyright with

regard to content aggregation and sharing, reinterpretation of the must-carry rules, state support of the ‘quality press’) will actually contribute to the operation of democratic public sphere and the other possible avenues for the state to act in the interest of the media - these are questions for the future.