

The Reform of the European Community Audiovisual Media Regulation: Television *Without* Cultural Diversity

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Abstract: In the profoundly changing and dynamic world of contemporary audiovisual media, what has remained surprisingly unaffected is regulation. In the European Union, the new Audiovisual Media Services Directive (AVMS), proposed by the European Commission on 13 December 2005, should allegedly rectify this situation. Amending the existing Television without Frontiers Directive, it should offer a “fresh approach” and meet the challenge of appropriately regulating media in a complex environment. It is meant to achieve a balance between the free circulation of TV broadcast and new audiovisual media and the preservation of values of cultural identity and diversity, while respecting the principles of subsidiarity and proportionality inherent to the European Community (EC). This paper examines whether and how the changes envisaged to the EC audiovisual media regime might influence cultural diversity in Europe. It addresses subsequently the question of whether the new AVMS properly safeguards the balance between competition and the public interest in this regard, or whether cultural diversity remains a mere political banner.

Thanks to the recently introduced Bluewin TV,¹ Swiss consumers are now able to use their fixed telephone line to comfortably enjoy the delights of a television offer encompassing more than 100 television (TV) channels, 70 radio channels, and 500 video-on-demand films, including additional gadgets such as an electronic program guide, a live pause function, and remote recording via mobile phone or

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the Internet. To the casual observer, this may seem like just another offer trying to lure customers into spending more money. However, the more careful observer notices some distinct features of Bluewin TV. One such notable characteristic is that Bluewin TV is not an offer made by a conventional TV, satellite, or cable TV distributor. Rather, it is a service provided by the Swiss telephony operator Swisscom AG, who as the former monopolist in the fixed telephony market, still enjoys a significant market position in the markets for communications networks and services in Switzerland.

Bluewin TV can indeed be construed as a most manifest (although certainly not an exclusive²) example of the practical implementation of digitization³ and convergence,⁴ particularly when one considers that it is based on the IPTV (Internet Protocol television⁵) platform developed by Microsoft. The Bluewin TV instance also clearly shows the degree of penetration of the digitization/convergence phenomena into our everyday lives and our decreasing defiance of the ubiquity of ones and zeroes.⁶

Before attempting an analysis of the regulatory implications of novel technological developments in the media, which is one of the objectives pursued by the present article, it should be noted that both digitization and convergence have progressed immensely in the last 5 years. As far as digitization is concerned, Moore's Law⁷ has remained valid and the potential of microprocessors has continued to increase at a rapid pace, allowing the processing and storage of vast amounts of information (be it audio, video, or text). Furthermore, almost all networks (in developed and even in developing countries) have become Internet protocol based,⁸ allowing for swift transmission of data and thereby changing existing business and consumer behavior patterns.⁹ As a process stemming from digitization,¹⁰ convergence has also reached a new level of advancement. The long-heralded merging of telecommunications, media and information technology services, networks, and market players has become reality in many respects (albeit not in the originally predicted shape and form¹¹). There is now a real *supply* and, what is more important, a *demand* for converged services.¹² Particularly on the broadband Internet, different media, such as video gaming, music, streamed radio, and online newspapers have proliferated and are widely accepted as substitutes for traditional analog media.¹³ Beyond this, there is a new generation of Internet-based services (such as social networking sites, blogs, and wikis): the so-called *Web 2.0*,¹⁴ which emphasize online collaboration and enrich and stimulate the communication environment.¹⁵

Among the various consequences of the advanced digitization/convergence, we consider the increased importance of *content* as the core.¹⁶ A second notable implication taken up in this discussion concerns the new ways of accessing and consuming content, which also lead to new ways of creating it. Although in the audiovisual media the progress of digitization/convergence has been less pronounced (especially if compared with the most advanced convergence platform of the Internet), the article argues that its repercussions could be the most far reach-

ing. The availability of multiple new channels for distribution of content (and of new content); the new opportunities for consumers to access and interact; and the repositioning of global market players along the entire value chain of content creation, packaging, and distribution strongly influence all media and their role in modern society. Such possibilities fundamentally change the character of communication and impinge on culture.¹⁷

In a world of profound changes and dynamism, what has remained surprisingly unaffected is regulation. Particularly in respect of the audiovisual media, the regulatory framework has remained literally unchanged since the onset of convergence and despite the substantial modifications in the parallel telecommunications regime.¹⁸ In the European Union (EU), the new Audiovisual Media Services Directive (AVMS), proposed by the European Commission on December 13, 2005,¹⁹ should allegedly rectify this situation. Amending the existing Television without Frontiers Directive (TVWF),²⁰ it should offer a “fresh approach”²¹ and meet the challenge of appropriately regulating media in a complex and dynamic environment. It is meant to achieve a balance between the free circulation of TV broadcast and new audiovisual media and the preservation of values of cultural identity and diversity, while respecting the principles of subsidiarity and proportionality inherent to the European Community (EC).²²

This article aims to examine whether and how the changes envisaged to the EC audiovisual media regime might influence cultural diversity in Europe and, subsequently, address the question of whether the new AVMS appropriately safeguards the balance between competition and the public interest in this regard.

The article tackles the aforementioned issues in four parts. With a few broad brushstrokes, the first part outlines the development of the EC audiovisual media regulation and its main tenets. The second part draws on this background and discusses the proposed changes thereto. Part three examines their potential impact on cultural diversity in Europe and questions the concept of cultural diversity used by the Commission as a policy goal. Part four draws conclusions and suggests that the AVMS does not appropriately address the new media environment and the balance between competition and cultural diversity as a legitimate public interest objective may be endangered through its implementation.

OVERVIEW OF THE DEVELOPMENT AND THE CURRENT STATE OF EUROPEAN COMMUNITY AUDIOVISUAL REGULATION

Broadcasting was not one of the original regulatory domains of the EC and was not covered by the Treaty of Rome establishing the European Economic Community in 1957. It was only with the Maastricht Treaty,²³ which entered into force on November 1, 1993, that the audiovisual sector was referred to explicitly, although arguably different rules of the emerging body of community law touched on diverse aspects of media regulation even before the change took place.²⁴

The attempts to shape a distinct EC audiovisual policy began before the Maastricht Treaty, however. They were triggered mostly by *endogenous* factors, which were epitomized by the development of satellite broadcasting, the proliferation of TV broadcasters, and the rapidly increasing deficit with the United States in audiovisual trade. The Green Paper on the Establishment of a Common Market in Broadcasting of 1984²⁵ marked the beginning of the Community's audiovisual media policy. The latter advanced in parallel to but independently²⁶ of the undertakings of the Council of Europe (CoE). The CoE had indeed had a longer established stance on media matters.²⁷ It was also the first to adopt a regulatory act to that effect with the Convention on Transfrontier Television (CTT).²⁸

The EC decided to follow the blueprint of the CTT.²⁹ Consequently, Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities,³⁰ which was adopted in 1989, mirrors to a great extent the structure and the basic provisions of the CTT.³¹ Since the beginning of the 1990s,³² this directive,³³ commonly known as the *Television without Frontiers Directive*, has provided the essential regulatory framework for television broadcasting and related activities at the Community level. As the prime EC regulatory tool for audiovisual media, the TVWF will be at the heart of this enquiry.

The TVWF can be best described as a liberalization measure. It is in essence a concretization of the freedom of services under the specific conditions of television, including a minimum level of partial harmonization,³⁴ which ensures the conditions necessary and sufficient for the consolidation of the single market for media services.³⁵ As a piece of secondary law, the directive follows the core principles of freedom to provide services and freedom of establishment.³⁶ Article 2(a) of the TVWF explicitly guarantees these freedoms and provides that no member state can restrict reception or retransmission of a broadcast from another member state for reasons falling within the areas coordinated by the directive. The TVWF regulates four major areas that cover the following:

1. Promotion of European works³⁷ and works by independent producers³⁸
2. Advertising, teleshopping and sponsoring³⁹
3. Protection of minors and public order⁴⁰
4. Right of reply⁴¹

The TVWF, in the amended version of 1997,⁴² ensures further that events, which are regarded by a member state as of major importance to society (such as, most manifestly, the Football World Cup), may not be broadcast in such a way (e.g., on pay TV only), as to deprive a substantial part of the population of that member state of the opportunity to watch them.⁴³

The core principle of application of the *lex specialis* TVWF rules is the so-called *country of origin* rule (also referred to as *home State* or *sending State* rule), whereby each member state must ensure that all television broadcasters under its jurisdic-

tion comply.⁴⁴ The member state's jurisdiction is defined through the principle of country of establishment with specific practical criteria applying to its precise determination (e.g., head office of the service provider; place where programming policy decisions are taken).⁴⁵ Each broadcaster falls under the jurisdiction of one member state *only*, and it is *sufficient* that the broadcasters comply with the law of the member state from which they emanate.⁴⁶ The receiving state cannot exercise secondary control⁴⁷ except under special, restrictively interpreted,⁴⁸ derogations (such as the protection of minors or prevention of incitement to hatred).⁴⁹ However, it should not be forgotten that the TVWF defines only a *minimum set* of common rules, and member states are free to impose more detailed or stricter rules on broadcasters under their jurisdiction.⁵⁰

With the benefit of hindsight and summarizing the 17 years of application of the TVWF, one can argue that the TVWF has clearly been a success. It has contributed to overcoming the existing fragmentation of national laws and, by facilitating the free circulation of television broadcasts, has fostered the European audiovisual media industry. The numbers contained in the recent Commission report on the implementation of the TVWF⁵¹ are unambiguous evidence in this regard: Whereas at the beginning of 2001, more than 660 channels with potential national coverage were broadcast via terrestrial transmitters, satellite, or cable,⁵² 3 years later more than 860 such channels were active in the EU15.⁵³ This should be compared to the fewer than 90 channels existing in 1989.⁵⁴ As the number of channels has grown, so have the revenues of broadcasters, which now make a substantial contribution to overall economic growth.⁵⁵

Yet, although these data show what the European Commission likes to describe as a flourishing content industry,⁵⁶ there is a flip side to the coin. Deregulation of TV markets has had multiple, less glamorous, effects.⁵⁷ The quantity of imported programs and their costs have soared.⁵⁸ Beyond this, and more importantly, the quality and the range of programs on offer have been radically altered.⁵⁹ The pursuit of a maximization of profits and a minimization of financial risks has resulted in much "imitation, blandness and the recycling of those genres, themes and approaches regarded as profitable."⁶⁰ The formats and contents of TV programs, films, and shows have become increasingly homogeneous.⁶¹ The traditional function of television, to inform, has been twisted and has become a "tabloidization of news"⁶² and infotainment.⁶³ The competitive pressure has also changed the position of public service broadcasters and initiated a process of convergence of the public and the commercial systems, in particular with respect to their programming output.⁶⁴

Against this backdrop, one could suggest that whilst the TVWF has clearly been a "victory for commercial forces and those who favoured anti-protectionist policies,"⁶⁵ it has done little for the achievement of *cultural* goals. Although, as mentioned earlier, the TVWF followed the CTT,⁶⁶ the two acts had essentially different bases. The latter initiative of the CoE had as its underlying rationale the freedom of expression, enshrined in article 10 of the European Convention of Human Rights

(ECHR),⁶⁷ while the act of the Community has been primarily a single market measure.⁶⁸ It is based on articles 47(2) and 55 EC (previously articles 57(2) and 66) and is a harmonization instrument meant to ensure that the free movements of establishment and services are not distorted.

The intrinsic duality of audiovisual services as having both an economic and a cultural nature, albeit repeatedly stated by the Community institutions, could not be properly reflected at the EC level. The conflicting values and objectives belonging to distinct differentiated societal spheres⁶⁹ could not be appropriately resolved through the chosen legal model. This became apparent not only in the provisions of the TVWF, but was also later revealed by the failed attempt to adopt a directive regulating media ownership⁷⁰: “Tensions between ‘the economic aims of completing the single market [and] ... the concern to protect cultural identity and a pluralist media’ further complicate the more conventional EU conflicts between interventionists and liberalisers, and between integrationalist and intergovernmental approaches.”⁷¹ Furthermore, they render a coherent media regulation at the Community level unattainable. Paradoxically, it has been the EC competition rules (in the sense of economic regulation), applying both in the fields of media and telecommunications,⁷² that by fighting the concentration in media markets, safeguarded a certain level of content diversity.⁷³ The next sections investigate whether the new EC act regulating audiovisual media will be better able to meet the public interest goal of protecting the diversity of cultural expressions and whether the Community has indeed properly defined this goal.

THE NEED FOR A CHANGE AND STEPS LEADING TO THE AVMS

The TVWF directive incorporated an obligation for the Community to review it by 2002.⁷⁴ However, this was not the sole reason that prompted the revision. Neither can the reason be found in some of the shortcomings of the TVWF as an instrument for regulating European audiovisual media, as hinted earlier. Rather, the reason for a change was exogenous to the legal model and endogenous to the audiovisual environment. The development and application of digital technologies, combined with strong convergence effects, as sketched at the beginning of this article, have radically and irreversibly transformed the media landscape. They have also triggered some specific developments in broadcasting markets, such as increased pay-per-view, new nonlinear services delivery (e.g., video-on-demand), peer-to-peer exchanges of audiovisual content, changed viewer habits, and new advertising methods. Together, these phenomena and processes called for a modernized legal framework to fit the new reality of European broadcasting.⁷⁵

Despite the wide agreement on the need for a change, the revision of the TVWF has been a rough ride. It was an essential part of the overall reform, launched by the Green Paper on Convergence in 1999,⁷⁶ toward the turbulently developing, technologically driven sectors of telecommunications, information technologies

and audiovisual media. The reform of the media sector was indeed the last building block in this major undertaking of the Community, which is also endowed with a specific role in the context of the Lisbon strategy to establish the EU as the “most competitive and dynamic knowledge-based economy in the world.”⁷⁷

The actual review process of the TVWF commenced with the Fourth Communication on the Application of the TVWF Directive for the period 2001 to 2002.⁷⁸ In an annex to this communication, the Commission proposed a work program for the modernization of audiovisual services rules and a timetable of future actions.⁷⁹ The subsequent efforts⁸⁰ focused on six priority areas, namely (1) rules applicable to audiovisual content services (scope); (2) cultural diversity and promotion of European and independent audiovisual production; (3) media pluralism; (4) commercial communications; (5) protection of minors and human dignity, right of reply; and (6) rights to information and short reporting.⁸¹

Procedurally, the adoption of the AVMS was subject to the codecision formula set out in article 251 EC, which involves the Commission, the Council, and the European Parliament (EP). Key documents in this process are the original proposal of the Commission of December 13, 2005;⁸² the Report of the Committee on Culture and Education;⁸³ the text adopted by the EP in first reading⁸⁴ and the subsequent Commission’s amended proposal.⁸⁵ This analysis refers to the consolidated text.⁸⁶

MAIN TENETS OF THE ENVISAGED REFORM

Of the various changes that the AVMS will bring about, we focus our attention on three of the novel (and most contentious) solutions, which are likely to have substantial effect on the media ecosystem in Europe and on the diversity of cultural expressions therein. These key issues are scope of the AVMS, rules on advertising, and product placement.

Extended Scope of the AVMS

The first and most groundbreaking element of the reform involves a readjustment of the scope of the directive. The Commission’s crucial argument in this respect is that, given the impact that audiovisual media services have on the economy and society, the AVMS rules should apply to *all* content services, irrespective of the technology that delivers them. This is in stark contrast to the current situation, where the different delivery modes receive different regulatory treatment and cause regulatory asymmetries.

To remedy this situation, a broader, generic definition of *audiovisual media service* was proposed, which also implies a larger scope for application of the AVMS. Pursuant to article 1⁸⁷ thereof, an audiovisual media service is identified through six essential elements, which must be simultaneously present: (1) a *service* within

the meaning of the Treaty provisions (articles 49 and 50 EC); (2) provided under *editorial responsibility* of a media service provider;⁸⁸ (3) the principal purpose of which is the *provision of programs* consisting of moving images with or without sound;⁸⁹ (4) *to inform, entertain or educate*; (5) to the *general public*; (6) by *electronic communications networks*.⁹⁰ Pursuant to this definition, it is apparent that any content service of commercial nature⁹¹ will be caught by the AVMS.

Linear and Nonlinear Audiovisual Media Services

Under the all-encompassing category of audiovisual media services, two subcategories are defined, which as discussed in the following text are treated differently under the AVMS regime. The first subcategory is that of *television broadcast* or *linear service*. It covers audiovisual media services “provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.”⁹² The second subcategory comprises *on-demand* or *nonlinear services*, which are offers of audiovisual content “for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider.”⁹³

On the basis of these definitions, one can say that the rule-of-thumb for delimitating the categories of linear/nonlinear services is the possibility of *choice and control* the user can exercise and also the *impact* they have on society (being “pushed” to everyone or “pulled” individually).⁹⁴

Taken together, the broader definition of audiovisual media service and the delineation of the two categories have three important effects:

1. The overarching idea of platform-neutral content regulation is properly reflected, and the transport technology does not lead to the exclusion of any content services from the reach of the AVMS.
2. Most importantly, the *country of origin* principle, as the core to the EC audiovisual media regulation regime, is extended to all content services, including the nonlinear. This minimum level of harmonization guarantees a functioning single market and prevents the emergence of an uneven playing field laden with diverging national rules: Indeed, although it is often said that nonlinear services were previously unregulated, 19 out of the 25 member states do already have some form of regulation.⁹⁵ The rules at the Community level allegedly also contribute to legal certainty, which supports the convergence of linear and nonlinear on the supply side and creates a beneficial environment of consumer trust and product awareness.⁹⁶
3. Some flexibility is preserved, which allows for a less stringent approach to new media services. The regulation of conventional television broadcast (or linear media services) remains almost unchanged (with some relaxation of the rules on advertising and product placement, as discussed below). Nonlinear services are subject to a much lighter regime and would have to satisfy only a basic tier of rules. These rules cover the protection of minors and human dignity,

right of reply, identification of commercial communications, and minimum qualitative obligations regarding commercial communications.

The overall effect aspired to by the above-outlined reform was, in the words of the European Commission, to increase choice, diversity, and investment in the European audiovisual media leading to a “vibrant ‘audiovisual content without frontiers’ industry that is strongly rooted in the EU.”⁹⁷ Yet, this aspiration may remain unfulfilled. In practical terms, the effects of the changes made cannot be unequivocally framed as positive. Although the TVWF affected only licensed broadcasters, the AVMS now covers a much broader range of stakeholders, who formerly were, if not *unregulated*, at least *less regulated*⁹⁸ (e.g., by generic rules such as the e-Commerce Directive⁹⁹). Although the providers of nonlinear services only must comply with the laws of their own member state, the regulatory burden on them is substantial and may be detrimental.¹⁰⁰ Innovation and entry of new market players may be seriously hampered.¹⁰¹ User-generated content as an emerging feature of broadband use and the related business models such as Google and YouTube, which support the insertion of advertising into the more popular pieces of content, are affected: the content producer, who chooses to accept advertising, is subject to the AVMS as a nonlinear provider, even though the advertising itself is chosen by the site host.¹⁰² This may be prohibitive for furthering the Web 2.0 effects of user-generated and distributed content, which is often central to consumers’ Internet experience,¹⁰³ and may suppress this new type of creativity.

New linear operators (e.g., new channel providers) also face relatively heavy regulatory burdens (in contrast to the incumbent linear operators for whom the nominal burden is small). In seeking a reduction in sunk costs and realization of positive network effects, content providers have the stimulus to consolidate, which reinforces concentration in the broadcasting markets¹⁰⁴ and thus has a negative impact on the diversity of cultural expressions in the European media environment.

“Cultural” Quotas for Nonlinear Services?

An immediate concern in the context of this new, broader definition of audiovisual media services and cultural diversity is whether the existing quota mechanisms for European works (article 4 TVWF) and for independent productions (article 5 TVWF) are preserved under the AVMS regime. In the framework of TVWF, article 4(1) prescribed that member states ensure “where practicable and by appropriate means, that broadcasters reserve for European works *a majority proportion of their transmission time*, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping.”¹⁰⁵ This proportion was to be achieved progressively, on the basis of suitable criteria.¹⁰⁶ Article 5(1) TVWF provided further that, where practicable and by appropriate means, broadcasters reserve at least 10% of their transmission time, or alternatively, 10% of their programming budget, for European works created by producers who are independent of broadcasters.

Articles 4 and 5 TVWF were the only tools at Community level that were intrinsically meant to serve cultural goals, ensuring a balance of offerings in the EC broadcasting markets. Regardless of the implementation option chosen by the individual member states,¹⁰⁷ the impact study prepared for the TVWF review¹⁰⁸ showed that the measures to promote European and independent productions have indeed had considerable impact. The average ratio of European works in the qualifying transmission time of the channels increased from 52.1% in 1993 to 57.4% in 2002. The average proportion of independent productions increased from 16.2% in 1993 to 20.2% in 2002 and the share of recent independent productions from 11.3% to 15.7%.¹⁰⁹ The impact study suggested further that, taking into account these developments, there is no need to change¹¹⁰ either the majority share for European works or the minimum share for independent productions: Articles 4 and 5 TVWF were deemed to already be achieving their cultural aims “*inasmuch* as ... [they] have increased the proportion of European works and independent productions broadcast by channels in the EU.”¹¹¹

The EU Commissioner for Information Society and Media, Viviane Reding was delighted by the high share of airtime devoted to European works and stated that, “This is proof of the high quality of Europe’s home-grown audiovisual content and of the vitality of an audiovisual industry that draws upon Europe’s rich cultural diversity.”¹¹² It is arguable to the contrary that the higher share of European productions is by no means a sign of increased (or existing) diversity of cultural expressions. The definition of what qualifies as *European work* is neither based on originality and quality criteria nor does it require a particular expression of national and European themes.¹¹³ It is based merely on the construct that most of its authors and workers reside in one or more member states and comply with one of the three conditions: (1) the work is made by one or more producers established in a member state or states party to the CTT; (2) the production is supervised and controlled by producer(s) established in one or more of those states; or (3) the contribution of coproducers of those states to the total coproduction costs is preponderant and the coproduction is not controlled by producer(s) established outside those states.¹¹⁴

Indeed, in this shape and form, the cultural diversity rationale for the promotion of European works is barely distinguishable from a protectionist one, aiming to secure a certain amount of airtime for works produced with European money.¹¹⁵ It is noteworthy that the impact study could not prove that, in the absence of articles 4 and 5 TVWF, the trade deficit with the United States¹¹⁶ would have been larger and that the measures to promote the circulation of programs within the EU have also promoted exports.¹¹⁷ We deem that such a definition of European works and the related policy measures do little to prevent the increasing homogenization of content and deteriorating quality of programs.¹¹⁸ A “Big Brother” type of TV show financed with European money qualifies perfectly as both a European work and an independent production.

The question of whether the quota mechanisms will be translated into the domain of nonlinear audiovisual services was key in the discussions of the AVMS. They exposed yet again the existing divergences between the Community institutions and between the Community and the member state levels, as well as the profound conflict between the simultaneous pursuit of economic and cultural goals.¹¹⁹ Most agreed that the quota system, as contained in the TVWF, will be preserved under the AVMS but will apply only to linear (television broadcasting) services. With regard to nonlinear services, there was a strong conviction that a quota rule would be burdensome and in any case, difficult to install and track. The AVMS does include a soft-law provision, however, which creates an obligation for the member states to ensure that media service providers under their jurisdiction “*promote, where practicable and by appropriate means, production of and access to European works.*”¹²⁰ The European Commission is further obliged to report to the Parliament and the Council every 3 years on the application of this provision, taking into consideration the market, technological developments and the objective of cultural diversity.¹²¹

Interestingly, the AVMS also mentions that, at least technically, a quota mechanism is possible despite the entirely different characteristics of nonlinear audiovisual services: The quotas may be based on the products on offer (instead of on broadcasts as with linear services). They could take the form of a minimum share of European works proportionate to economic performance, a minimum share of European works in video-on-demand catalogs, or the attractive presentation of European works in electronic program guides.¹²²

The question is therefore not so much whether imposing quotas is still doable. It is more fundamental: Has the increase in consumer choice and multichannel capacity rendered the rules on broadcasting quotas obsolete? And related to this: Is there a need for a new legal model ensuring the diversity of cultural expressions in the new audiovisual media settings?

Before looking into these questions, one needs to acknowledge a few things pertinent in this context. Firstly, that the linear and nonlinear market segments do compete, at least indirectly.¹²³ In the long term, nonlinear audiovisual media services have the potential to partially replace linear services, a fact also admitted by the European legislator.¹²⁴ Secondly, the effects of a quota mechanism for nonlinear services are quite unpredictable and may even have diametrically opposed outcomes. A first option is that consumers (empowered by technology) would simply *not* choose European works and thus render any investment/catalog quota ineffective. Another rather different option is an application of the so-called *Long Tail* theory.¹²⁵ This means that in the new environment of indefinitely diverse media, the consumer selection constantly discovers niche products and/or generates new ones (similarly to the Amazon bookselling platform¹²⁶). Consumers are stimulated to consume products otherwise unavailable to them (because of the scarcity of time slots in TV schedules) and thus induce markets to develop new types of content, such as archived European content, original works, documentaries, or

director's cuts.¹²⁷ This may ultimately lead to a higher share of available and effectively consumed European works, which, if realized, will be a genuine expression of cultural diversity.

As a tentative conclusion based on the aforementioned text and as an answer to the questions raised, the European legislator took a rather unimaginative approach in addressing cultural policy objectives at the Community level in the face of new technological developments, changed business, and consumer behavior patterns. Preserving the status quo quota system for linear services and creating soft-law stimulus for nonlinear services is by no means an adequate answer to the dynamic and complex environment of audiovisual media and the redefined need to safeguard some diversity in it. Quota mechanisms based on the existing definition of European works are in any case of dubious cultural value. However, the parties involved in the AVMS legislative process seemed unwilling to take up and pursue the controversial *cultural* questions and reignite the latent conflicts between integrationists and intergovernmentalists, interventionists, and liberalizers when other, notably *economic*, interests were at stake.

Audiovisual Commercial Communications

The second major reform brought by the AVMS is in the area of advertising, or what is now referred to as *audiovisual commercial communications*. This is indeed a most crucial area of media regulation, because advertising is the main source of revenue for European television broadcasters and likely to remain so.¹²⁸ The gross television advertising market has consistently expanded and reached €25.7 billion for the EU15 in 2004, which is a 7.2% increase in relation to 2003.¹²⁹ As far as new media are concerned, Internet advertising and computer games revenues are the fastest growing share of media spending and expected to continue growing considerably.¹³⁰

Similarly to the *audiovisual media service* definition, the concept of *audiovisual commercial communication* is a broad one. It is a notion taken from the e-Commerce Directive with an almost identical content¹³¹ and is meant to encapsulate *all* rules related to advertising. It is defined as follows:

Images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, tele-shopping and product placement.¹³²

In the so-defined domain of audiovisual commercial communications, the first objective of the reform undertaken was to secure a basic tier of rules at the EC level, which would provide legal certainty across all member states. Thus, pursuant to the AVMS, all audiovisual commercial communications must comply with

the principles laid down in the Charter of Fundamental Rights of the European Union and, in particular they must not prejudice respect for human dignity; include any discrimination on grounds of race, sex or, nationality; offend religious or political beliefs; encourage behavior prejudicial to health or safety; or encourage behavior grossly prejudicial to the protection of the environment.¹³³ Further, all forms of commercial communications regarding cigarettes and other tobacco products, medicinal products, and medical treatment available only on prescription are prohibited.¹³⁴ Special care has also been taken for the protection of minors.¹³⁵

The second objective of the TVWF review in the field of audiovisual commercial communications was to *deregulate* them and adopt a lighter, flexible approach allowing more possibilities for broadcasters and content providers to increase the value of advertising time, which would also properly reflect the more multifaceted media environment.¹³⁶ According to the principles of flexibility and simplicity pursued, the European Commission introduced two blocks of changes:

1. A relaxation of the rules on the insertion of advertising in TV programs and daily advertising limits
2. New regulation of product placement

The following text looks into these and contemplates their justifications and potential effects on cultural diversity.

Rules on Advertising

The AVMS removes some of the existing quantitative limits on advertising. The current 3-hours-per-day limit on advertising is dropped, because practical experience has shown that in fact no TV channel comes close to it. The 12-minute upper limit on all advertising in any given hour is maintained, however.¹³⁷ As to the insertion of advertising, the European Commission was eager to grant broadcasters more freedom to choose the most suitable moment for advertisements within the programs. Yet, the EP was adamant in this regard and insisted on the principle that advertising and teleshopping spots can be inserted only *between* programs. In its amended proposal after EP's first reading, the Commission avoided an explicit formulation of this rule and stated only that, member states must ensure, "where advertising or teleshopping is inserted *during* programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme" is not prejudiced.¹³⁸

The frequency of advertising breaks was a hot topic in the discussions of the AVMS. In its initial proposal, the European Commission foresaw a minimum of 35 minutes between the advertisements inserted in films made for television (excluding series, serials, light entertainment programs, and documentaries), cinematographic works, and children's and news programs. The proposal of the EP Committee on Culture and Education reversed this to the TVWF benchmark of

45 minutes and included concerts, theater plays, and operas in the provision. Interestingly, the text adopted by the Parliament at first reading ignores the proposal of its own committee and even goes below the minimum suggested by the Commission. The rule is now that films made for television (excluding series, serials and documentaries), cinematographic works, and news programs may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes.¹³⁹

Thus, although the EP has normally put brakes on the European Commission's spur to liberalize advertising in audiovisual media, it is apparent here that the willingness to allow more freedom to broadcasters has prevailed. This will undoubtedly give better opportunities for broadcasters and content providers to monetize but will also speed up the already advanced commercialization of television.¹⁴⁰ Trying to show the programs of greatest appeal in the most valuable time slots to attract advertising naturally leads to marginalization of specific, original programs and those that otherwise diverge from the mainstream.

Rules on Product Placement

The second important change in the domain of audiovisual commercial communications is the newly formulated attitude toward product placement.¹⁴¹ Product placement is defined as "any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within audiovisual media services, normally in return for payment or for similar consideration."¹⁴²

In the Commission's original proposal, product placement was fully *legitimized* and taken as an essential element of advertising techniques. The opposition was too strong, however. The compromise reached is to preserve the ban on product placement, but it is no longer an outright ban.¹⁴³ Product placement is now permitted in cinematographic works, films, and series made for audiovisual media services, light entertainment, and sports programs.¹⁴⁴ Such programs must respect certain conditions; they should never affect or jeopardize the editorial responsibility and independence of the media service provider, nor should they "directly encourage the purchase or rental of goods or services" or give "undue prominence to the product in question."¹⁴⁵ Following the general rule of separate and clearly identifiable commercial communications,¹⁴⁶ viewers are to be appropriately informed of the existence of product placement at the start and at the end of the program, and when a program resumes after an advertising break.¹⁴⁷ In any event, product placement for tobacco products, cigarettes, or medicinal products and medical treatments available on prescription only is not allowed.¹⁴⁸

It is imperative to note here that, although the EP limited the scope of the legitimization of product placement, what is allowed is *not* negligible; indeed, the major audiovisual formats of cinematographic works, films, and series made for television and sports broadcasts do allow product placement.

The Commission argues that by providing a clear framework for product placement, new revenues for the European audiovisual industry would be secured. This would increase its competitiveness, especially vis-à-vis the U.S. media industry,¹⁴⁹ where product placement accounts for 1.7% of the total advertising revenues of free-to-air broadcasters and increased by an average of 21% per year between 1999 and 2004.¹⁵⁰ More oddly, the Commission also believes that the new rules on product placement will “help to boost our creative economy and thus reinforce cultural diversity.”¹⁵¹ Indeed, both the rules on advertising and the rules on product placement are seen as “further instruments safeguarding cultural diversity.”¹⁵²

Although the less restrictive EC regime on product placement may be somewhat justified in view of its value as a financial source for content providers and to prevent the emergence of multiple national rules distorting the single market, it is difficult for us to see *how* product placement contributes to cultural diversity.

The nature of product placement is such that it is an integral part of the fictional work or sports event.¹⁵³ Because of this essential characteristic, the viewer cannot simply skip the advertisement or switch channels until the commercial break is over. Furthermore, often part of the story line of fictional works and thus part of the *reality* they represent as product placement’s attractant effect may be much stronger than that of conventional advertising in commercial breaks. The commercial intention of product placement is indeed partly concealed and therefore less obtrusive or even not realized at all by the recipients, who cannot avoid this type of integrated advertising easily.¹⁵⁴ With the advances in technology enabling consumers to *pull* content individually, the incentives to include product placement will increase for the content providers as well as the companies whose products and services are advertised. This will naturally lead to an increase in the quantity and quality of product placement (in the sense that its intertwining with the plot will be perfected thus multiplying its effects¹⁵⁵). Thereby, the commodification of artistic productions¹⁵⁶ will be strongly intensified and diversity of cultural expressions smothered rather than stimulated.

CONCLUSION ON THE IMPACT OF THE AVMS ON CULTURAL DIVERSITY

As already noted, the precise effects of the regulatory changes undertaken and the development of the diverse audiovisual media markets are hard to predict.

The extreme nature of the predictive challenge is due to the unusual volatility of content markets and citizen tastes in media consumption, which rely on network effects to a great extent (especially in non-linear demand patterns) as well as having extreme economies of scale because of the perfect reproducibility of digital content.¹⁵⁷

The concrete implications for the diversity of cultural expressions are even harder to predict because cultural diversity itself is a dynamic parameter.

Despite the constraints of prediction, some trends in the development of European audiovisual media are already discernible. The completely new landscape described in the beginning of this article is likely to continue its transformation gradually but profoundly.¹⁵⁸ The multiplication of channels for content distribution is likely to go on. By 2010 to 2014 (i.e., within the projected lifetime of the AVMS), most member states will have completed the transition to digital signal.¹⁵⁹ On this transition, every household will receive between 20 and 40 free TV channels.¹⁶⁰ This growth in channel choice will reduce the total audience share of the primary channels¹⁶¹ and the share of individual primary channels in each member state. Audience fragmentation will put revenue pressure on the primary channels (especially commercial ones) and undermine the public funding of leading public primary channels.¹⁶² Furthermore, the new media distribution channels, above all broadband, will draw consumers away from traditional entertainment media, further reducing the audience share of primary channels.¹⁶³ *Pulling* individual content through digital TV or Internet channels is an emergent consumer behavior pattern likely to change the business models of content providers, distributors, and advertisers and further fragment the media environment. Whichever pattern of access to and use of audiovisual content prevails,¹⁶⁴ it is apparent that the split between multichannel and analog households, already a reality, will become more pronounced.¹⁶⁵ If Internet penetration is to stabilize at 65% to 75% by household and mobile phone penetration at 85%,¹⁶⁶ this means that a substantial proportion of people will remain offline. This minority is “both the most vulnerable in society and least likely to change (typically comprising the most elderly, non-formally qualified and/or poorest quartiles).”¹⁶⁷

The broader picture of the European media landscape will thus be one of increased fragmentation of audiences and increasing gap between the digital *haves* and *have-nots*. At the same time, a concentration among the diverse market players, both horizontally and vertically, is expected, so they can make better use of all the existing channels (e.g., by placing a single video clip on broadband, mobile, and digital TV networks) and benefiting from economies of scale. Such an environment makes the design of an appropriate regulatory model extremely difficult, in particular where the objective of catering for public interest is concerned. The focus of this article is on only one of these objectives, namely the sustainability of the diversity of cultural expressions in audiovisual media.

Cultural diversity has always been defined as one of the vital justifications for European audiovisual media policy. At its very onset, epitomized by the Rhodes Summit of the European Council, the Council stressed that the future TVWF initiative should “provide an opportunity of demonstrating the richness and diversity of European culture”¹⁶⁸ and “contribute to a substantial strengthening of a European cultural identity. . . .”¹⁶⁹ Later, when formulating the principles of the Community’s audiovisual strategy for the digital age, the European Commission stated the following:

The audiovisual industry is . . . not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry *par excellence*. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities.¹⁷⁰

In the AVMS, the Parliament was particularly insistent on the amendment of recital 3, which, pursuant to the EP's formulation, held the following:

Audiovisual media services are as much cultural goods as they are economic goods. Their growing importance for societies, democracy—in particular by ensuring freedom of information, diversity of opinion and media pluralism—education, and culture justifies the application of specific rules to these services, and the enforcement of those rules, notably in order to preserve the fundamental rights and freedoms laid down in the Charter of Fundamental Rights of the European Union, the European Convention for Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Freedoms, and in order to ensure the protection of minors and vulnerable and disabled people.¹⁷¹

Despite these lengthy deliberations and handsome rhetoric, this examination of the major provisions of the AVMS found no concrete solutions addressing cultural diversity considerations or any of the values innate to cultural identity and diversity. The *future-proof* broad definition of audiovisual media services would allow for increasing the reach of the Community media framework and an extension of the economically beneficial country of origin principle. However, the regulation of nonlinear services may be onerous for smaller market players or individual providers of content, which may in turn create a barrier to newly emerging creativity and online content distribution. The preservation of the *status quo* regarding quotas for European works and independent productions, which remain applicable to television broadcast but not to nonlinear services, is a mere political compromise, which disregards the new technological developments and the increasing fragmentation of audiences. In its present form, one can argue that it bears no real relation to cultural policy objectives; and even if achieved, the quotas do not reflect cultural diversity. With respect to advertising and product placement, it can also be argued that the liberalizing rationales have prevailed and there are no genuine considerations of protecting and promoting the diversity of cultural expressions.

The amazing gap between the rhetoric of the European legislator and the reality of the regulatory instruments adopted in the AVMS also reveals no real understanding of what cultural diversity in audiovisual media is. Indeed, this at times frivolous waving of the banner of cultural diversity may undermine the very value of this notion.

Pursuant to the definition given by UNESCO in its Convention on the Protection and Promotion of the Diversity of Cultural Expressions,¹⁷² *cultural diversity* is defined as

the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution, and enjoyment, whatever the means and technologies used.¹⁷³

This all-encompassing concept of cultural diversity and the inherent complexity of the notion of culture¹⁷⁴ admittedly make it hard to delineate clear-cut contours of cultural diversity in audiovisual media. The tendency to give different connotations to the concept of cultural diversity in different contexts (e.g., ethnocentric in the UNESCO Convention on Cultural Diversity,¹⁷⁵ as cultural multiplicity in the context of the protection of traditional cultural expressions in societies with indigenous and immigrant communities,¹⁷⁶ or as media pluralism¹⁷⁷) is not very helpful either.

It should have been precisely the task of the European legislator to find the contours of cultural diversity and then to examine the regulatory options. In the concrete setting of audiovisual media, such an endeavor could follow the basic lines:

Diverse is such a cultural landscape, where next to the big commercial productions, which pursue above all maximisation of viewers' numbers, there is the possibility for existence of other productions—productions that depart from the “mainstream” through, for instance, the original touch of their author, their “low budget” production costs, experimental or avant-garde nature, or due to other reasons, which stimulate the fantasy and thoughts of the public.¹⁷⁸

Looking at the *markets* for audiovisual media services, the Community legislator may then examine possible *objective* parameters for *measuring* diversity. Moreau and Peltier suggest, for example, three dimensions of diversity: *variety*, *balance*, and *disparity*.¹⁷⁹ By quantifying them, they attempt an analysis of national film markets,¹⁸⁰ thereby allowing for an assessment of the efficiency of the different cultural policy measures taken.¹⁸¹ The EC is undoubtedly free in its choice of approaches but not, we argue, free to simply protect European media under the disguise of cultural diversity policy.

COMMITMENTS OF THE EUROPEAN COMMUNITY TO THE PROTECTION OF CULTURAL DIVERSITY

An almost perfect justification for the lack of real provisions on the protection and promotion of cultural diversity in the AVMS is that the European Community has no explicit regulatory competence on these issues. Indeed, the relatively fuzzy definition of the scope of the Community competences in article 151 EC¹⁸²

and above all the principle of subsidiarity, leave little room for the Community action. The member states are meant to pursue their own cultural policy goals as they see fit, and the Community has repeatedly confirmed the conformity of measures intended to their achievement with EC law. In addition to the derogations to the free movements explicitly formulated in article 30 EC, it was in *Cassis de Dijon*¹⁸³ that the Court of Justice developed an open-ended list of mandatory requirements (also known as *imperative requirements* or *overriding requirements in the public interest*).¹⁸⁴ Cultural policy measures implemented in the audiovisual sector fall within this category and “constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.”¹⁸⁵ Thus, the creation of the single market, while certainly being the more dominant goal of the Community policies, allows the parallel existence of other objectives, including within the domain of culture.¹⁸⁶ It is important to note, however, that the Community courts have been protecting these public interest goals only *negatively*, in the sense of an exception from the freedom to provide services, rather than in the *positive* manner of the European Court of Human Rights when interpreting and applying the freedom of speech provision of article 10 ECHR.¹⁸⁷

The new audiovisual media environment, elements of which previously described, calls however for a *positive* and *comprehensive* approach at the Community level. A puzzle of fragmented measures at the member state level would not work properly in an ecosystem of increasingly fragmented audiences, multiple channels, and sophisticated technologies enabling consumer’s choice and control. Subsidized programming and national rules of origin will affect a continually diminishing slice of the average household’s content alternatives.¹⁸⁸ Furthermore, the measures taken at the national level often appear to be pursuing more protectionist than cultural goals, thereby leading to both distortion of the market mechanisms and devaluation of the cultural objectives.¹⁸⁹

Furthermore, as parties to the UNESCO Convention on Cultural Diversity, the EC member states and the European Community itself¹⁹⁰ have clearly taken, if not legally binding obligations,¹⁹¹ at least an engagement with regard to the protection and promotion of cultural expressions and need to meet these aims.¹⁹²

SUMMARY

A revision usually entails a correction, improvement and/or an update. The AVMS is an update but hardly an improvement on the previous TVWF regime, in particular as far as its contribution to cultural diversity in the European media is concerned. The AVMS also reveals that, at the Community level as well as in the member states, “cultural policy making is in a profound state of transition as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modelling in which it emerges as a service industry in a ‘digital economy.’”¹⁹³

When examining the provisions of the AVMS, we exposed a wide gap between the cultural diversity rhetoric and the real instruments put in place by the Community legislator. The lack of a clear and comprehensive vision of how to approach the new dynamic multifaceted audiovisual environment and the misunderstanding and/or ignoring of new phenomena and processes is also apparent. This may have unintended consequences in numerous directions, such as reduced creativity or wrong incentivizing of European content producers. Isolated actions such as the promotion of coproductions may have also dubious effects, and may even lead to a loss of cultural diversity as producers focus on the lowest common cultural denominator and move from unique concepts to the development of formats for the global marketplace.¹⁹⁴

Furthermore, it is obvious that the EC legislator in its cultural policy endeavors still tends to stick to versions of international relations theory stressing the competitiveness of nations vis-à-vis others as the primary governance problem.¹⁹⁵ The High Level Group on Audiovisual Policy was deeply convinced, for example, that:

At the heart of the matter is the question of whether the predicted explosion in demand for audiovisual material will be met by European productions or by imports.... The danger is that the channel proliferation brought about digital technology will lead to further market fragmentation, making it more difficult for European producers to compete with American imports.¹⁹⁶

To put it simply, it is argued in contrast that cultural diversity in European media is certainly not a question of whether the European production of “Big Brother” will be replaced by a U.S. production of “Big Sister.”

We deem that in its present form the AVMS, while securing a competitive environment and also providing for legal certainty for new media, does not actively contribute to the diversity of cultural expressions in European audiovisual media. In the new audiovisual media landscape and taking account of the changed patterns of viewers’ and businesses’ behavior, a set of new priorities is emerging, which should be carefully considered and reflected in the overall Community framework of audiovisual media policy. In no particular order, these involve the following:

1. Make full use of the phenomena of digital media distribution and content creation in the sense of prolonging the Long Tail, which may include *inter alia* efforts to digitize all European content, facilitate the search of such content,¹⁹⁷ and create public awareness in this respect.
2. Stimulate the Web 2.0 effects in user-generated content creation and harness the new creativity.
3. Reduce the asymmetry of information between the digital *haves* and the digital *have-nots*: Provision of diverse content in nondigitized form and active promotion of media literacy. The latter may be a vital asset to actively choosing, filtering, consuming, and creating media, thus shaping communication and culture.

4. Rethink the role of public service broadcasters in the new media setting.
5. Create proper incentives for the production of European works using criteria not simply based on their origin.

Admittedly, the EC has been already taking steps in some of these directions (e.g., media literacy,¹⁹⁸ content online,¹⁹⁹ and content production with the Media 2007 program²⁰⁰), but there is a significant lack of coherence and prioritization. Although “coherence has never been the strongest aspect of EU audio-visual policy,”²⁰¹ it may become indispensable in the new digital media environment.

ENDNOTES

1. See *Neue Zürcher Zeitung*, “Bluewin-TV von Swisscom geht auf Sendung,” October 31, 2006. See also <http://www.tv.bluewin.ch/> (accessed May 18, 2007).

2. A perhaps more infamous example of convergence from the recent past is the purchase of YouTube (<http://www.youtube.com>) by Google (<http://www.google.com>), which brought together a popular online platform for posting audiovisual content and the most used search engine. See for example, Andrew Ross Sorkin, “Dot-Com Boom Echoed in Deal to Buy YouTube,” *New York Times*, October 10, 2006; and *Economist*, “Two Kings Get Together,” October 12, 2006.

3. In its simplest form, a digital code is a binary bit or digit indicating one of two alternatives (represented as either 0 or 1) to denote the presence or absence of an electrical signal or two different voltage levels. Binary bits can be grouped in various combinations to represent numbers, alphabetical characters, symbols, or any other type of information. Through a combination of microprocessors and sophisticated algorithms, these bit streams can then be compressed to manageable lengths, therewith allowing a wide range of content to be stored, retrieved, and transported electronically in the form of encoded text, audio, and video traffic over any digital network.

4. On convergence, see Blackman, “Convergence,” 163ff; Longstaff, “New Ways to Think”; Organisation for Economic Co-operation and Development [OECD], *The Implications of Convergence*; Geradin and Luff, *The WTO and Global Convergence*; Mueller, “Convergence: A Reality Check,” 311ff; Larouche, “Dealing with Convergence,” 390ff.

5. On IPTV, see Horlings et al., *Contribution to Impact Assessment*, 5; Marsden et al., *Assessing Indirect Impacts*, 55ff.

6. See for example, OECD, *The Future Digital Economy*.

7. Gordon Moore of Intel postulated in 1965 that the transistor density on a single integrated circuit microchip would double approximately every 18 months. This rule showing the incredible pace of technological advance became known as Moore’s Law. On Moore’s Law, see for example, Rob Frieden, *Managing the Internet-Driven Change*, 17ff.

8. OECD, *Information Technology Outlook 2006*.

9. OECD, *Information Technology Outlook 2006*.

10. Mueller, “Digital Convergence and its Consequences.”

11. Longstaff, “New Ways to Think.”

12. Bluewin TV is a clear consequence of this development, where operators offer the so-called *quadruple play* (i.e., a bundled package of fixed and mobile telephony, broadband Internet access, and multichannel television, including on-demand services) and distribute it through any network. The lack of demand for converged services was one of the reasons for the bursting of the dot-com bubble in 2001. See *Economist*, “Beyond the Bubble,” October 9, 2003.

13. Horlings et al., *Contribution to Impact Assessment*, 6.

14. Web 2.0 is a phrase coined by O’Reilly Media (<http://www.oreilly.com/>) in 2004. Proponents of the Web 2.0 concept say that it differs from early Web development (labeled Web 1.0) in that it

moves away from static web sites, the use of search engines, and surfing from one web site to the next and moves toward a more dynamic and interactive World Wide Web. See O'Reilly, "What Is Web 2.0?"; OECD, *Participative Web*.

15. See Benkler, *The Wealth of Networks*; Jenkins, *Convergence Culture*.

16. See for example, OECD, *Information Technology Outlook 2006*; OECD, *Digital Broadband Content*.

17. Castells, *The Information Age*, 356. Castells noted, "The potential integration of text, images, and sounds in the same system, interacting from multiple points, in chosen time (real and delayed) along a global network, in conditions of open and affordable access, does fundamentally change the character of communication. And communication decisively shapes culture. . . ."

18. On the developments of EC telecommunications law, see Nihoul and Rodford, *EU Electronic Communications Law*; Walden and Angel, *Telecommunications Law*.

19. European Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, COM(2005) 646 final, December 13, 2005. See also Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, SEC(2005) 1625/2, December 13, 2005.

20. Council Directive 89/552/EEC of October 3, 1989, on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 298/23, October 17, 1989.

21. European Commission, Proposal for a Directive Amending Council Directive 89/552/EEC, COM(2005) 646 final, December 13, 2005, 2.

22. See article 5(3) of the EC Treaty and the Protocol on the Application of the Principles of Subsidiarity and Proportionality Attached to the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, OJ C 340/1, November 10, 1997.

23. Treaty on European Union, adopted in Maastricht, OJ C 191/1, July 29, 1992. The Maastricht Treaty inserted a new Title IX into the structure of the Treaty of Rome. It bore the broad rubric of "Culture" and included one article: article 128, which is now, since the Amsterdam renumbering, article 151 EC. Article 151 entails an obligation for the Community to "contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity." Following the principle of subsidiarity, the Community is to encourage cooperation between member states but could, if necessary, supplement their action in certain fields, notably, "artistic and literary creation, including in the audiovisual sector." Article 151(4) EC specifies further that the Community must take cultural aspects into account in its action under other provisions of the treaty. For a comprehensive analysis of article 151 EC, see Craufurd Smith, *Culture and European Union Law*. On the duties of the EC institutions in the field of culture, see de Witte, "Trade in Culture," 237ff.

24. The European Court of Justice played an important role in expanding the scope of activities falling under the Community's prerogative. Since *Sacchi*, it is clear that the broadcasting of televised messages falls under the rules of the treaty relating to the provision of services. See Case 155/73 *Guisepppe Sacchi*, ECR [1974] 409. See also case 52/79 *Procureur du Roi v. Marc J V C Debauxe and others* [1980] ECR 860; case 62/79 *Coditel v. Ciné-Vog Films (Coditel I)* [1980] ECR 881 and case 262/81 *Coditel v. Ciné-Vog Films (Coditel II)* [1982] ECR 3381.

25. European Commission, Television without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM(84) 300, May 1984. For the developments leading to the adoption of the TVWF, see Levy, *Europe's Digital Revolution*, 41ff.

26. Graber, "Kulturpolitische Auswirkungen," 995.

27. The endeavors of the CoE to adopt a binding legal instrument covering certain cultural aspects of transfrontier broadcasting began in the early 1980s. Various steps followed, which found

expression in a number of recommendations. For an account, see Explanatory Report to the European Convention on Transfrontier Television (ETS No. 132), Strasbourg, May 5, 1989, as amended by the provisions of the Protocol (ETS No. 171), which entered into force on March 1, 2002.

28. Council of Europe, European Convention on Transfrontier Television (ETS No. 132), Strasbourg, May 5, 1989. The CTT was opened for signature by the CoE Member States and other States Party to the European Cultural Convention (ETS No. 018), Paris, December 19, 1954.

29. See European Council Decisions of December 2–3, 1988, Rhodes, in *Bulletin of the European Communities*, No. 12/1988, para. 1.1.9.

30. OJ L 298/23, October 17, 1989.

31. The CTT provides a minimum of common rules in fields such as programing, advertising, and the protection of certain individual rights. It entrusts the transmitting states with the task of ensuring that the TV program services transmitted comply with its provisions. In return, freedom of reception of program services is guaranteed, as well as the retransmission of the programs which comply with the minimum rules of the convention.

32. Pursuant to article 25 TVWF, member states were obliged to bring their laws, regulations, and administrative provisions into conformity with the directive by October 3, 1991.

33. Updated and revised through directive 97/36/EC of the European Parliament and of the Council of June 30, 1997 Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 202/60, July 30, 1997. This article refers to the consolidated version of Directive 89/552/EEC and directive 97/36/EC.

34. Cases C-34/95, C-35/95, and C-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop I Sverige AB*, ECR [1997] I-03843, para. 32. See also Drijber, “The Revised Television without Frontiers Directive,” 92. On the different types of harmonization in EC law, see Slot, “Harmonisation,” 378ff.

35. See case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, ECR [1995] I-179, paras 28–29 and cases C-34/95, C-35/95, and C-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop I Sverige AB*, ECR [1997] I-3843, paras 24–28. See also Wheeler, “Supranational Regulation,” 351ff.

36. See articles 43 and 49 EC Treaty.

37. Articles 4 and 6 TVWF.

38. Article 5 TVWF.

39. Articles 10–20 TVWF.

40. Articles 22, 22(a) and 22(b) TVWF.

41. Article 23 TVWF. Teleshopping rules were added by the 1997 amendment of the TVWF.

42. Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 202/60, July 30, 1997.

43. Article 3(a) TVWF.

44. Article 2 TVWF.

45. See Article 2(3)–(5) TVWF. For the relevant case law, see Drijber, “The Revised Television without Frontiers Directive,” 92ff.

46. See case C-11/95 *Commission v. Belgium* [1996] ECR I-4115, para. 34 and case 14/96 *Criminal Proceedings against Paul Denuit* [1997] ECR I-2785, paras. 32–34. For the limitations of the transmitting state principle, see cases C-34/95, C-35/95, and C-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop I Sverige AB*, ECR [1997] I-3843, paras. 33–35.

47. Cases C-34/95, C-35/95, and C-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop I Sverige AB*, ECR [1997] I-3843.

48. See for example, see case C-348/96 *Calfa* [1999] ECR I-0011, paras. 21 and 23. For a more extensive overview of the case law, see Drijber, “The Revised Television without Frontiers Directive,” 98ff; and Stuyck, Annotation on Cases C-34/95, C-35/95, and C-36/95.

49. See article 2(a)(2) TVWF.

50. See article 3(1) TVWF.
51. European Commission, Fifth Report on the Application of Directive 89/552/EEC "Television without Frontiers," COM(2006) 49 final, February 10, 2006.
52. Fifth Report on the Application of Directive 89/552/EEC "Television without Frontiers," COM(2006) 49 final, February 10, 2006, referring to the European Audiovisual Observatory, 2001 Yearbook.
53. Fifth Report on the Application of Directive 89/552/EEC "Television without Frontiers," COM(2006) 49 final, February 10, 2006, referring to the European Audiovisual Observatory, 2004 Yearbook.
54. Papathanassopoulos, *European Television in the Digital Age*, 14.
55. Public service broadcasters in the EU25 zone had total revenues of €29.1 billion in 2003, whereas private broadcasters recorded revenues totalling €18.3 billion. Pay TV and package subscriptions increased their revenues to an overall amount of €13.6 billion in 2003. See European Commission, Fifth Report on the Application of Directive 89/552/EEC "Television without Frontiers," COM(2006) 49 final, February 10, 2006, referring to the European Audiovisual Observatory, 2005 Yearbook.
56. European Commission, Commission Proposal for a Modernisation of the Television without Frontiers Directive, MEMO/06/208, Brussels, May 18, 2006, 1.
57. For an overview, see Papathanassopoulos, *European Television in the Digital Age*, 9ff.
58. Papathanassopoulos, *European Television in the Digital Age*, 17ff.
59. Papathanassopoulos, *European Television in the Digital Age*, 18ff, referring to Blumler, "Vulnerable Values at Stake," 22ff; Achile and Miège, "The Limits of Adaptation Strategies," 31ff.
60. Papathanassopoulos, *European Television in the Digital Age*, 19, referring to McQuail, "Commercialisation and Beyond," 119ff; Ouilette and Lewis, "Moving Beyond," 96. See also Webster, *Theories of Information Society*, 22. On the *multichannel paradox*, whereby despite the diversity of channels, there is no actual diversity of content, see Ariño, "Competition Law and Pluralism," 98ff.
61. For a critique of the cultural industries and on the homogeneity of content, see Graber, *Handel und Kultur*, 18ff. For counter arguments, see Romano, "Technologische, wirtschaftliche und kulturelle Entwicklungen," 4ff.
62. Papathanassopoulos, *European Television in the Digital Age*, 20ff. See also Esser, "'Tabloidization' of News," 291ff.
63. Franklin, *Newszak and News Media*, 4.
64. Papathanassopoulos, *European Television in the Digital Age*, 19, referring to Pfetsch, "Convergence through Privatization?" 428.
65. Negrine and Papathanassopoulos, *The Internationalisation of Television*, 76.
66. The European Court of Justice has even held that the CTT and its explanatory memorandum can be used to clarify the interpretation of the TVWF. See joined cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94, C-339/94 *Reti Televisive Italiane SpA (RTI), Radio Torre, Rete A Srl, Vallau Italiana Promomarket Srl, Radio Italia Solo Musica Srl and Others, and GETE Srl v. Ministero delle Poste e Telecomunicazioni* [1996] ECR I-6471, para. 33.
67. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950, as amended by Protocol No. 11, ETS No. 155.
68. Graber, "Kulturpolitische Auswirkungen," 996ff.
69. See Fischer-Lescano and Teubner, "Regime-Collisions," 999ff.
70. Levy, *Europe's Digital Revolution*, 50ff. See also Westphal, "Media Pluralism and European Regulation," 461ff. On media ownership, see Baker, "Media Concentration," 873ff.
71. Hitchens, "Identifying European Community Audio-Visual Policy," 71ff, as referred to by Levy, *Europe's Digital Revolution*, 40. See also in the same sense, Wheeler, "Supranational Regulation," 349ff.
72. An example is the recent decision of the Commission to refer Sweden to the European Court of Justice for its failure to change rules giving the state-owned company Boxer TV Access a monopoly over the provision of access control services in the Swedish digital terrestrial broadcasting network. The case is based on Commission Directive 2002/77/EC of September 16, 2002, on Competition in the Markets for Electronic Communications Networks and Services, OJ L 249/21, September 17,

2002. See European Commission, “Competition: Commission Takes Sweden to Court for Failure to End Broadcasting Services Monopoly,” Press Release, IP/06/1411, October 17, 2006.

73. See Commission Decision of April 2, 2003, Declaring a Concentration to be Compatible with the Common Market and the EEA Agreement (case no. COMP/M. 2876—*Newscorp/Telepiù*), C(2003) 1082 final, April 2, 2003. Previous cases on media concentration include case no. IV/M.110, *ABC/Generale des aux/Canal+/WH Smith*, OJ C 244/06, September 10, 1991; case no. IV/M.469, *MSG Media Service*, OJ L 364, November 9, 1994; case no. IV/M.490, *Nordic Satellite Distribution*, OJ L 53, July 19, 1995, case no. IV/M.553, *RTL/Veronica/Endemol*, OJ L 294, November 19, 1996; case no. IV/M.993, *DFI/Premiere*, OJ C 374/4, 20 December 1997.

74. See article 25(a) TVWF.

75. Horlings et al., *Contribution to Impact Assessment*, 3ff.

76. European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Towards an Information Society Approach, COM(97) 623 final, December 3, 1997. See also European Commission, Communication on Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, COM(1999) 657 final, December 14, 1999.

77. European Council, Presidency Conclusions, Lisbon, March 23–24, 2000, para. 5. See also European Commission, i2010—A European Information Society for Growth and Employment, COM(2005) 229 final, June 1, 2005.

78. European Commission, Fourth Report on the Application of Directive 89/552/EEC “Television without Frontiers,” COM(2002) 778 final, January 6, 2003.

79. In the period up to the adoption of the new directive, legal certainty in the changing environment of European media has been guaranteed through an interpretative communication on television advertising, in particular new advertising techniques (split screen, virtual, and interactive advertising) and update of the recommendation on the protection of minors and human dignity. See European Commission, Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising in the “Television without Frontiers” Directive, OJ C 102/2, April 28, 2004, and Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and the Right of Reply in Relation to the Competitiveness of the European Audiovisual and Information Services Industry, OJ L 38/72, December 27, 2006.

80. There were particularly intensive discussions, which involved manifold stakeholders. All stakeholders’ opinions from the diverse hearings are available at http://ec.europa.eu/comm/avpolicy/reg/twvf/modernisation/proposal_2005/index_en.htm (accessed May 18, 2007).

81. See European Commission, Fourth Report on the Application of Directive 89/552/EEC “Television without Frontiers,” COM(2002) 778 final, January 6, 2003, Annex, 33ff. See also the six Issue Papers of July 2005 at http://ec.europa.eu/comm/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf (accessed May 18, 2007).

82. European Commission, Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, COM(2005) 646 final, December 13, 2005.

83. Report of the Committee on Culture and Education, Rapporteur: Ruth Hieronymi, A6–0399/2006, November 22, 2006.

84. European Parliament, Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, P6_TA-PROV(2006)0559, December 13, 2006.

85. Amended proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcast-

ing Activities (“Audiovisual Media Services without Frontiers”), COM(2007) 170 final, March 29, 2007.

86. Draft Audiovisual Media Services Directive, Consolidated Text, including EP First Reading Amendments Accepted in full and the Amended Commission Proposal, nonbinding text provided by the European Commission, http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm (accessed May 18, 2007).

87. “‘Audiovisual media service’ means a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council. Such audiovisual media services are either television broadcasts as defined in paragraph (c) of this Article or on-demand services as defined in paragraph (e) of this Article and/or audiovisual commercial communication.”

88. Media service provider is defined in article 1(b) AVMS as “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.”

89. The concepts of *programs* and *editorial responsibility* were introduced by the EP in pursuit of a clearer delineation from other audiovisual services. *Program* is defined as “a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting” (article 1(aa) AVMS). *Editorial responsibility* is the “responsibility for the composition of the schedule or compilation of programmes intended for the general public, in a professional capacity, in order to deliver the media content within a set time frame or to allow it to be ordered from a catalogue” (article 1(kd) AVMS).

90. Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002, on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), OJ L 108/33, April 24, 2002. Article 2(a) thereof defines electronic communications networks as “transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.”

91. In recital 13 AVMS, it was stressed that the economic element must be significant to justify the application of the directive. Accordingly, the scope “does not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest. The definition excludes all services not intended for the distribution of audiovisual content, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.” See also recitals 14–16 AVMS.

92. Article 1(c) AVMS. The AVMS clarifies in its recital 16 that the notion of simultaneous viewing also entails quasi simultaneous viewing because of the variations in the short time lag, which occurs between the transmission and the reception of the broadcast because of technical reasons inherent in the transmission process.

93. Article 1(e) AVMS.

94. Recital 28 AVMS.

95. All of the member states had some requirements on advertising, protection of minors and human dignity. None had rules regarding European or independent productions and only one member state had some regulation of advertising limits. See Horlings et al., *Contribution to Impact Assessment*, 16ff.

96. Horlings et al., *Contribution to Impact Assessment*, 75.

97. European Commission, The Commission Proposal for a Modernisation of the Television without Frontiers Directive, MEMO/05/475, Brussels, December 13, 2005.

98. Marsden et al., *Assessing Indirect Impacts*, vi.

99. Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the internal market (directive on electronic commerce), OJ L 178/1, July 17, 2000.

100. This was a major contentious issue during the AVMS adoption process. See for example, Bob McDowall, "The Television without Frontiers Directive: Another "Directive Too Far," *IT Analysis*, May 5, 2006, <http://www.it-analysis.com/business/content.php?cid=8476> (accessed May 18, 2007) and *Economist*, "Regulation without Frontiers," October 12, 2006.

101. Marsden et al., *Assessing Indirect Impacts*, *passim*.

102. Marsden et al., *Assessing Indirect Impacts*, 25.

103. Benkler, *The Wealth of Networks*.

104. Marsden et al., *Assessing Indirect Impacts*, 130.

105. Emphasis added. "European works" were defined pursuant to criteria set out by article 6 TVWF.

106. Article 4(1) TVWF.

107. For an overview of the national legislation put in place in the diverse member states, see Graham et al., *Impact Study of Measures*, Chapter 6. Although most member states have transcribed the definitions directly into national legislation, France and Germany apply stricter definitions. France distinguishes between audiovisual works and cinematographic works. Germany defines what is included as qualifying hours: feature films, television movies, series, documentaries, and comparable productions. Six member states—Finland, France, Italy, The Netherlands, Spain, and the United Kingdom—apply higher percentage requirements than those contained in TVWF on some or all of their broadcasters. For example, in France, legislation requires all broadcasters to reserve at least 60% of their qualifying hours for European audiovisual and cinematographic works.

108. Graham et al., *Impact Study of Measures*. See also European Commission, Seventh Communication on the Application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers," as Amended by Directive 97/36/EC for the Period 2003–2004, COM(2006) 459 final, August 14, 2006.

109. Graham et al., *Impact Study of Measures*, 14. The more prescriptive a member state is in the way that it implements articles 4 and 5, the higher the average ratio of European works to qualifying transmission hours in that country. Member states with a national average for European works greater than the EU average—such as Finland, France, Greece, Italy, and Luxembourg—are also among the most prescriptive in the way that they apply articles 4 and 5 (section 8.1).

110. The impact study noted, however, that the *where practicable* mode, which offers an exemption from the requirements of articles 4 and 5 TVWF, compares unfavorably with other legislation (despite the existing reporting obligation), where general rules are established and the exemptions clearly defined, leaving less room for avoidance. It was further considered that the use of this exemption may need to be reviewed because secondary channels take a greater share and often become part of larger multichannel conglomerates. Graham et al., *Impact Study of Measures*, 181 and section 8.2.5.

111. Graham et al., *Impact Study of Measures*, 181 (emphasis added) and section 4.6.3.

112. European Commission, "European Works' Share of TV Broadcasting Time Now Stable Over 60%," IP/06/1115, Brussels, August 22, 2006.

113. Graber, *Handel und Kultur*, 253ff.

114. Article 6(2) in conjunction with 6(1)(a) and (b) TVWF.

115. Such a rationale is apparent from recital 20 TVWF: "Whereas it is therefore necessary to promote markets of sufficient size for television productions in the member states to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions where practicable and by appropriate means a majority proportion in television programmes of all Member States." See Donaldson, "Television Without Frontiers," 90ff.

116. Although it was found that, “there is a greater appetite for US programming among European audiences than for programmes produced in other Member States . . . [because] US programme storylines have broad appeal, whereas European production has a national cultural appeal which does not travel well.” See Graham et al., *Impact Study of Measures*, 18 and section 9.3.3. For an interesting comment on the global power of American popular culture (influencing through attraction rather than coercion), see Rosendorf, “Social and Cultural Globalization,” 117ff.

117. Graham et al., *Impact Study of Measures*, section 8.5.

118. There is evidence that primary channels have reduced the proportion of European works that are stock programs (generally more expensive) and increased the proportion of (generally cheaper) flow programs. See Graham et al., *Impact Study of Measures*, section 7.3.4.

119. These conflicts are not new and arose every time the TVWF was discussed. See Drijber, “The Revised Television without Frontiers Directive,” 90. For a parallel with the EC film domain, see Anna Herold, “EU Film Policy.”

120. Article 3(f)(1) AVMS (emphasis added).

121. Article 3(f)(4) AVMS.

122. Article 3(f)(1) and recital 35 AVMS. See also Horlings et al., *Contribution to Impact Assessment*, 52.

123. Horlings et al., *Contribution to Impact Assessment*, 47.

124. Recital 35 AVMS.

125. Marsden et al., *Assessing Indirect Impacts*, 22ff; Anderson, *The Long Tail*. See also Shirkey, “Power Laws,” 46ff.

126. Brynjolfsson, Hu and Smith, “Consumer Surplus in the Digital Economy”; Brynjolfsson, Hu and Smith, “From Niches to Riches.”

127. Horlings et al., *Contribution to Impact Assessment*, 66. See in this respect, European Charter for the Development and the Take-up of Film Online, initiated in May 2005 by Commissioner Reding and endorsed by film makers and business leaders on May 23, 2006, at the Europe Day of the 59th Cannes Film Festival, http://ec.europa.eu/comm/avpolicy/docs/other_actions/film_online_en.pdf (accessed May 18, 2007).

128. European Commission, Fifth Report on the Application of Directive 89/552/EEC “Television without Frontiers,” COM(2006) 49 final, February 10, 2006, 4.

129. Fifth Report on the Application of Directive 89/552/EEC “Television without Frontiers,” COM(2006) 49 final, February 10, 2006, 4, referring to the European Audiovisual Observatory, 2005 Yearbook. See also Graham et al., *Impact Study of Measures*, section 3.2.1.

130. Horlings et al., *Contribution to Impact Assessment*, 9, referring to Zenith Optimedia, Advertising Expenditure Forecasts, July 2005, <http://zenithoptimedia.com> (accessed May 18, 2007).

131. Directive 2000/31/EC on electronic commerce (OJ L 178/1, 17 July 2000) defines in its article 2(f), “commercial communication” as “any form of communication by electronic means designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.”

132. Article 1(f) AVMS.

133. Article 3(g) AVMS.

134. Article 3(g), points (d) and (f) AVMS.

135. Article 3(g), points (e) and (g); Article 3(g)(2).

136. Horlings et al., *Contribution to Impact Assessment*, 79.

137. Article 18 AVMS reads: “The proportion of short forms of advertising such as advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.” See also European Commission, Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising in the “Television without Frontiers” Directive, OJ C 102/2, 28 April 2004, paras. 9–13.

138. Article 11(1) AVMS (emphasis added).

139. Article 11(2) AVMS. The provision clarifies further that the transmission of children’s programs may be interrupted by advertising and/or teleshopping once for each scheduled period of at

least 30 minutes, provided the scheduled duration of the program is greater than 30 minutes. No advertising or teleshopping may be inserted during religious services.

140. See Graber, *Zwischen Geist und Geld*, 151ff.

141. The notion of product placement is not entirely new. The Unfair Commercial Practices Directive mentions in its provisions “legitimate product placement” and the Commission Communication interpreting the TVWF Directive allows product presentation for the purposes of identifying the sponsor. See directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending council directive 84/450/EEC, directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), OJ L 149/22, June 11, 2005, recital 6.

142. Article 1(k) AVMS.

143. Surreptitious advertising remains fully banned. See articles 1(h) and 3(g)(a) AVMS. See also recitals 40 and 45 AVMS.

144. As well as in cases where no payment is made but certain goods or services are merely provided free of charge. See article 3(i)(2) AVMS.

145. Article 3(i)(3), points (a)–(c) AVMS. “Undue prominence,” as clarified by recitals 46 and 46(b), is prominence, which is not justified by the editorial requirements of the program, or the need to lend verisimilitude. Undue prominence is given when the repeated representation of the brand, good, or service or the nature of its presentation is such as to give undue prominence to products in the context of production props or product placement, taking account of the content of the programs in which they appear.

146. Article 3(g)(a) AVMS. See also Article 10(1) AVMS.

147. Article 3(i)(3)(d) AVMS.

148. Article 3(i)(4) AVMS.

149. The EU has notoriously vast deficit vis-à-vis the United States, which amounts to about €4.1 billion. See Graham et al., *Impact Study of Measures*, section 3.3.1.

150. See Carat and Koan, *Comparative Study on the Impact of Control Measures*, 60ff.

151. European Commission, Commission Proposal for a Modernisation of the Television without Frontiers Directive, MEMO/05/475, Brussels, December 13, 2005.

152. Commission Proposal for a Modernisation of the Television without Frontiers Directive, MEMO/05/475, Brussels, December 13, 2005.

153. There are different types of product placement. One can distinguish between product placement per se, where branded goods are presented, either visually (if the product is shown) or verbally (if it is mentioned or described). Endorsement is an intensification of the verbal placement, when the media representative mentions certain positive features of the product. One may also distinguish different degrees of product integration: on-set placement where the product is only part of the requisite scenery *versus* creative placement where the product plays an active role in the plot.

154. Rössler and Bacher, “Transcultural Effects of Product Placement,” 99.

155. It has been established that stronger placement effects can be expected when the placement is presented as a natural part of the story. See Rössler and Bacher, “Transcultural Effects of Product Placement,” 101.

156. For the classical critique of the cultural industries, see Adorno, *Aesthetic Theory*. On the relationship between art and money, see Graber, *Zwischen Geist und Geld*; Graber and Teubner, “Art and Money,” 61ff.

157. Horlings et al., *Contribution to Impact Assessment*, 4ff.

158. In the midterm (2009–2010) and even for some time thereafter, no complete overhaul of the European audiovisual media is foreseen. See Horlings et al., *Contribution to Impact Assessment*, 5. The same position is shared by Graham et al., *Impact Study of Measures*, section 3.5.4.

159. Horlings et al., *Contribution to Impact Assessment*, 13.

160. Graham et al., *Impact Study of Measures*, section 3.5.1.

161. These are defined as channels with audience share equal to or greater than 3%. See Graham et al., *Impact Study of Measures*, section 7.

162. Graham et al., *Impact Study of Measures*, section 3.5.5.

163. Graham et al., *Impact Study of Measures*, section 3.5.1.

164. RAND Europe outlines three plausible scenarios for the digital future of audiovisual media: (i) *Linear Continuum*: where the citizen behaviour will change at the margins, but media consumption will remain a largely linear experience; (ii) *Digital Content Divide*: where the digital “haves” will experience greatly increased interactive media use, while an equal number of “refuseniks” will continue exactly as before to rely on offline media and public service broadcasters; (iii) *Time Shifting Linear Consumption*: where the majority of the population will use broadband and mobile or in-home devices to time-shift their media to suit their schedule instead of that of the broadcaster. See Horlings et al., *Contribution to Impact Assessment*, 8. The same scenarios have been reiterated in Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, SEC(2005) 1625/2, December 13, 2005.

165. Horlings et al., *Contribution to Impact Assessment*, 8.

166. Horlings et al., *Contribution to Impact Assessment*, 6, referring to the Oxford Internet Survey (OxIS), February 2005, <http://www.oii.ox.ac.uk/> (accessed May 18, 2007). See also PEW Internet and American Life Project, *The Future of the Internet II*.

167. Horlings et al., *Contribution to Impact Assessment*, 6.

168. European Council Decisions of December 2–3, 1988, Rhodes, Rhodes, in *Bulletin of the European Communities*, No. 12/1988.

169. European Council Decisions of December 2–3, 1988, Rhodes, Rhodes, in *Bulletin of the European Communities*, No. 12/1988.

170. European Commission, Communication on Principles and Guidelines for the Community’ Audiovisual Policy in the Digital Age, COM(1999) 657 final, December 14, 1999, 8. See also Council Resolution of January 21, 2002, on the Role of Culture in the Development of the European Union, OJ C 32/2, February 5, 2002, and Council Conclusions of December 19, 2002, on the “Television without Frontiers” Directive, OJ C 13/1, January 18, 2003, recital 3.

171. The amended Commission’s proposal, while preserving the above text, substantially shortened it. Recital 3 now reads, “Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy—in particular by ensuring freedom of information, diversity of opinion and media pluralism—education and culture justifies the application of specific rules to these services.”

172. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, October 20, 2005, entered into force March 18, 2007 (hereinafter UNESCO Convention on Cultural Diversity). On the UNESCO Convention, see Graber, “The New UNESCO Convention on Cultural Diversity.” On cultural diversity, see Graber, *Handel und Kultur*, 73ff; Smiers, *Arts under Pressure*; Graber, Girsberger, and Nenova, *Free Trade versus Cultural Diversity*.

173. Article 4(1) of the UNESCO Convention on Cultural Diversity.

174. It was in 1952 that Kroeber and Kluckhohn compiled a list of more than 200 different definitions of culture (Kroeber and Kluckhohn, *Culture: A Critical Review*). Since then the concept has only gained in complexity and controversies despite the ample literature discussing it.

175. For a critique, see Aylwin and Coombe, “Cultural Pluralism Protects Traditional Knowledge.”

176. See for example, WIPO, *Traditional Cultural Expressions*, para. 4.

177. On the meaning of media pluralism and the different existing notions in the community acts and case law, as well as in the academic literature, see Westphal, “Media Pluralism and European Regulation,” 467ff.

178. Graber, *Handel und Kultur*, 74. In the original: “Vielfältig ist eine Kulturlandschaft, in der neben kommerziellen Grossproduktionen, bei denen die Maximierung der Zuschauerzahlen allem andern vorgeht, auch solche existieren können, die sich z.B. durch die eigenwillige Handschrift ihrer Autoren vom ‘mainstream’ abheben, mit einem ‘low budget’ produziert wurden, experimenteller oder

avantgardistischer Machart sind oder aus anderen Gründen einen eigenen Aufwand des Publikums an Phantasie oder Gedanken erfordern" (translation by the author).

179. Variety refers to the number of categories into which a certain quantity can be partitioned (e.g., types of programs). Balance refers to the pattern in the distribution of that quantity across the relevant categories. As for disparity, it refers to the nature and the degree to which the categories themselves are different from each other. The greater the variety, the balance and the disparity of a system are, the larger its diversity.

180. Moreau and Peltier, "Cultural Diversity in the Movie Industry." Moreau and Peltier examine the EU15, France, Hungary, South Korea and Mexico and refer to both supplied and consumed diversity.

181. Moreau and Peltier, "Cultural Diversity in the Movie Industry."

182. For a critique, see Craufurd Smith, "Article 151 EC and European Identity," 277ff.

183. Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

184. See Scott, "Mandatory or Imperative Requirements"; Spaventa, "On Discrimination and the Theory of Mandatory Requirements," 457ff. These mandatory requirements apply only to indistinctly applicable measures (case 113/80 *Commission v. Ireland (Irish Souvenirs)* [1981] ECR 1626, para. 11; case 177/83 *Ringelhan* [1984] ECR 3651, para. 19; case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft v. Weinvertriebs-GmbH* [1983] ECR 1217, para. 11; case C-21/88 *Du Pont de Nemours* [1990] ECR I-889, para. 14; joined cases C-1 and 176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151). And only in the absence of harmonization (case 120/78 *Cassis de Dijon*, para. 8).

185. Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, ECR [1991] I-4007, para. 23. See also case C-353/89 *Commission v. the Netherlands*, ECR [1991] I-4069, para. 30; C-148/91 *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, ECR [1993] I-487, paras. 9–10 and case C-23/93 *TV10 SA v. Commissariaat voor de Media*, ECR [1994] I-4795, paras. 18–19.

186. Graber, "Kulturpolitische Auswirkungen," 997.

187. Graber, "Kulturpolitische Auswirkungen," 998.

188. Mueller, "Convergence: A Reality Check," 322.

189. The impact study points out, "The additional content requirements on broadcasters to reflect linguistic or cultural specificities of a particular Member State, intentionally or otherwise, ... act as barriers to cross-border trade in programmes and channels because (a) they set conditions on programme content that only domestic programme producers can meet; and (b) they lead to channel schedules that are specific to a Member State, thereby limiting the appeal of these channels in other markets." See Graham et al., *Impact Study of Measures*, section 6.4.3.

190. The EC itself is a party to the convention. See Council Decision of May 18, 2006, on the Conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ L 201/15, August 25, 2006.

191. See in particular articles 7–11 of the UNESCO Convention on Cultural Diversity. For a critique of the lack of binding obligations in the Convention, see Acheson and Maule, "Convention on Cultural Diversity," 243ff.

192. Although not a very solid instrument, the UNESCO Convention on Cultural Diversity provided recognition of the significance of cultural diversity at the international level and an impetus for actions. The role of the EC can be crucial in this regard for elaborating comprehensive nonprotectionist action plans for the protection and promotion of diversity of cultural expressions, which would also strengthen the value of the UNESCO convention. Such activities, although in an early stage, are already underway. See <http://www.unesco.de/> (accessed May 18, 2007).

193. O'Regan and Goldsmith, "Making Cultural Policy," 88.

194. Horlings et al., *Contribution to Impact Assessment*, 56.

195. O'Regan and Goldsmith, "Making Cultural Policy," 69, referring to Schlesinger, "Television Production, Audio-Visual Policy and the Creative Industries." On the flaws of the competitiveness argument in general, see Paul Krugman, *Pop Internationalism*, 3ff.

196. High Level Group on Audiovisual Policy, *The Digital Age: European Audiovisual Policy*, Chaired by Commissioner Marcelino Oreja, November 26, 1998.

197. See Brynjolfsson, Hu, and Smith, "From Niches to Riches," who stress the importance of search as enhancing choice and prove that the facilitation of search changes the distribution of sales.

198. Recital 26(a) AVMS states, "Media literacy refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people will be able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They will be better able to protect themselves and their families from harmful or offensive material. Therefore development of media literacy in all sections of society should be promoted and monitored." See also European Commission, "Making Sense of Today's Media Content: Commission Begins Public Media Literacy Consultation," press release, IP/06/1362, Brussels, October 6, 2006. On the media literacy initiative, see http://ec.europa.eu/avpolicy/media_literacy/index_en.htm (accessed May 18, 2007).

199. European Charter for the Development and the Take-up of Film Online, http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm (accessed May 18, 2007).

200. Decision no. 1718/2006/EC of the European Parliament and of the Council of November 15, 2006, Concerning the Implementation of a Programme of Support for the European Audiovisual Sector (MEDIA 2007), OJ L 327/12, November 24, 2006.

201. Levy, *Europe's Digital Revolution*, 40.

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