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# DIGITAL CONVERGENCE AND CONTENT REGULATION

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**Abstract:** Distribution systems for broadcasting, Press and Internet journalism are converging: the same infrastructure can deliver all three historically separate services. Reception devices mirror this: the Connected TV, the tablet and the smart phone overlap in their functionality. Service overlaps are evident too, with broadcasters providing online and on-demand services and newspapers developing electronic versions. Does this mean that media regulation policies must converge too?

My argument is that they should, though only where historically different communications are now fulfilling a similar function, e.g. broadcaster online services and electronic versions of newspapers. Convergence requires a degree of harmonisation and, to this end, I advocate a review of UK broadcasting's 'due impartiality' requirement and of the UK's application of the public service concept. I also argue for independent self-regulation (rather than state-based regulation) of non-public-service broadcasting journalism. These proposals are UK-specific since, given the regulatory and cultural differences between countries, detailed policy changes are likely to be determined mainly at national level, but I note the wider European context. Moreover, the underlying principle is relevant internationally: as freedom of entry into the non-public service sector of broadcast and online journalism becomes closer to the historically much greater freedom of entry into the Press, so the regulation of freedom of expression in these converging fields should become more consistent – and, I would argue, less state-based.

**Keywords:** convergence, regulation, broadcasting, electronic newspapers, Internet

## 1 Introduction: Scope and Focus

Current patterns of regulation vary greatly from country to country: the U.S. First Amendment approach lies at one end of a wide spectrum and China's state ownership and control at the other. Even within the European Union (EU) major differences between member states are found:

- the size and shape of their media markets
- their media culture and history (with significant differences between east and west Europe)
- the degree to which their regulators have already responded to convergence (Finland, for example, has a Council for Mass Media which oversees both broadcasters and the Press)

- the extent to which their Press regulation is voluntary (in Denmark it is compulsory)
- the degree to which their broadcasting regulators are independent of government
- their different definitions of, and histories of, public service broadcasting
- their legal approach to issues around the protection of privacy (e.g. the contrast between France and the UK).

While the principle behind my argument has trans-national relevance, the focus of this paper is on the policies and institutions of the UK within its EU setting.

Even here the scope is limited in important ways. First, the paper relates primarily to electronic media – broadcasting, on-demand services and, importantly, the electronic versions of newspapers. Second, it focuses on editorially managed services provided to large audiences: so it does not cover news aggregation, which is not editorially managed in the same way, or social media, which are not communicated to large audiences on a comparable basis. Nor does it address the regulation of technical and commercial matters, including advertising. The focus is on freedom of expression and the justification for any legal and regulatory constraints which set the framework for digital journalism.

There are drawbacks with this limited approach – the excluded elements raise unanswered questions – but if the main answers are found for digital journalism the secondary questions can be addressed in the light of them.

## 2 Relevant Literature

While there is an extensive body of literature concerned with broadcasting regulation at national, European Union and international levels, the practical issue of adapting to the convergence of broadcasters' online journalism and the electronic versions of newspapers has only recently started to receive attention. It did not feature significantly, for example, in Lunt and Livingstone's 2012 study of *Media Regulation*.<sup>1</sup> However, Petros Iosifidis' *Global Media and Communication Policy*<sup>2</sup> has a full chapter on Regulatory Convergence, as does my own monograph *The Digital Television Revolution*.<sup>3</sup> Steven Barnett's *The Rise and Fall of Television Journalism*<sup>4</sup> expresses a healthy scepticism about convergence coupled with faith in the pre-multichannel approach to regulation. My thinking, though, has been informed primarily by the publications of governmental and regulatory institutions and Committees of Inquiry (detailed in the text below), and by Lara Fielden's pioneering study for the Reuters Institute for the Study of Journalism and City University, *Regulating for Trust in Journalism*<sup>5</sup> Earlier publications, notably by Harrison and Woods (2007)<sup>6</sup> and Georgios Terzis (editor, 2007 and 2008)<sup>7</sup>, show the broader context of media regulation in Europe.

## 3 Gold, Silver and Bronze

The current pattern of regulation has been conceptualised as a 'tiered' system, based on the means of distribution, with different regulators applying different rules and codes. In shorthand, we have a gold standard of content regulation for broadcasting, a silver standard for the Press and a bronze standard for Internet services.

1 Peter Lunt and Sonia Livingstone, *Media Regulation*, Sage, 2012

2 Petros Iosifidis, *Global Media and Communication Policy*, Palgrave Macmillan, 2011

3 Michael Starks, *The Digital Television Revolution*, Palgrave Macmillan, 2013

4 Steven Barnett, *The Rise and Fall of Television Journalism*, Bloomsbury, 2011

5 Lara Fielden, *Regulating for Trust in Journalism*, Reuters Institute for the Study of Journalism (in association with City University, London), 2011

6 Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy*, Cambridge, 2007

7 Georgios Terzis (ed.), *European Media Governance: National and Regional Dimensions*, Bristol, 2007, and *European Media Governance: the Brussels Dimension*, Bristol, 2008

- Broadcast content has to be licensed either by the government or by the regulator, on the basis that the scarcity of spectrum places a great deal of power and influence in the hands of a small number of broadcasters and their services intrude into the home.
- In the UK the Press freed itself from a government licensing system back in the 17<sup>th</sup> century, it has few barriers to entry, its publications are read as a deliberate act of choice, and thus it can operate under fewer restrictions. However, the UK's self-regulatory machinery of the voluntary Press Complaints Commission (PCC) was judged seriously inadequate in the wake of a major scandal in 2011 (detailed more fully below) and is being replaced, amid lingering controversy, by a system designed to be independent of the industry as well as of the state.
- The Internet, by virtue of its academic origins and its international scope, is largely unregulated, with national interventions reflecting different cultural and political attitudes to freedom of expression. Some governments try to block criticism they find threatening. In the UK pragmatic action is taken to curtail breaches of the law.

#### 4 Adaptations to Date Are Not Enough

Some adaptations to this system of regulation have been made to take account of convergence. Thus, under the EU Audio-Visual Media Services (AVMS) Directive the broadcasting gold standard is applied to scheduled television services regardless of their means of distribution and reception, while a lighter version governs 'television-like' on-demand services. In the UK Ofcom regulates television services and an industry-based co-regulatory organisation ATVOD (the Association for TV On-Demand) administers editorial rules related to the laws on incitement to hatred and obscene publication for on-demand services. Electronic versions of newspapers and magazines, however, are exempted from the AVMS Directive, lest the Press be brought within the scope of the state: their regulation in the UK has historically been under the Press Complaints Commission.

The intellectual foundations of this regulatory pattern are being eroded. Scarcity of spectrum no longer restricts the number of broadcasters, many of whom do not even directly require spectrum. The idea that broadcasting intrudes into the home has been undermined by the increase from five to between 50 and 500 channels, with conscious channel selection via an Electronic Programme Guide. Child protection remains a real public concern but many parents are more concerned about Internet services invited into the child's bedroom than about TV channels uninvited into the family living-room. Broadcasters' websites and electronic newspapers have strong similarities, as do broadcast films and 'over-the-top' Internet film services. Local TV, local radio and local newspapers increasingly share content. Foreign broadcasters, like Iran's Press TV, struggling to satisfy the UK's broadcasting regulatory requirement of 'due impartiality,' can find an alternative route to the viewer via the Internet. As broadband increases its spread and its capacity, IPTV (Internet Protocol Television) is likely to have a growing role in seamlessly delivering electronic media content to the consumer.

#### 5 Political Acknowledgement

This erosion of the existing pattern of regulation has been recognised politically. Politicians show a reluctance to alter the framework for broadcasting, not least because the public remains supportive of its familiar arrangements, but they have been willing to open up the debate. In 2011 Jeremy Hunt, then Secretary of State at the Department for Culture, Media and Sport (DCMS), **told the Royal Television Society** that:

**It cannot be sensible that at the moment newspaper operators find that their newsprint is regulated by the PCC, their video-on-demand is regulated by ATVOD and any TV content they do is regulated by Ofcom.<sup>8</sup>**

<sup>8</sup> Jeremy Hunt, Speech to the Royal Television Society, 14 September, 2011, [www.culture.gov.uk/news/ministers\\_speeches/8428.aspx](http://www.culture.gov.uk/news/ministers_speeches/8428.aspx)

Since then the European Union has published a **Green Paper** envisaging possible changes to the AVMS Directive,<sup>9</sup> while the UK government's Department for Culture, Media and Sport (DCMS) addressed the subject in **Connectivity, content and consumers**, indicating an intention to reform the 2003 Communications Act piecemeal.<sup>10</sup>

However, convergence did not feature prominently in a major overhaul of the UK's Press regulation. A new system of independent self-regulation has now been developed for the Press, and by extension for electronic versions of newspapers, amid some controversy over whether this requires recognition by a politically-designed oversight body. This followed an industry crisis over illegal phone-hacking by tabloid journalists in 2011. The *News of the World* was shut down after it was found to have hacked into the phone of a murdered schoolgirl and a major inquiry, chaired by Lord Justice Leveson, was held to investigate the ethics and regulation of the Press. The Press Complaints Commission was abolished. The Leveson report recommended the formation of a new independent self-regulatory commission, with a wider remit and effective sanctions, whose performance would need to be validated by an oversight body. After much dispute Parliament set up a Royal Charter to provide a framework for this. Meanwhile a new Independent Press Standards Organisation (IPSO) has been launched by the industry and does not acknowledge the case for any such oversight.

## 6 Regulatory Acknowledgement

In its evidence to the Leveson Inquiry, Ofcom made very clear its view that it did not wish to become responsible for Press regulation. However, speaking to the Oxford Media Convention in 2012, its Chief Executive, Ed Richards, addressed the convergence issue and called for a simple regulatory system, which might be "underpinned by a common set of principles."<sup>11</sup> While he pictured the tiered approach to regulation lasting with minor changes for some time to come, as it meets ingrained public expectations, he later acknowledged that:

In the longer run, it is certain that the means of distribution will be almost irrelevant for these purposes, and that the (reception) device itself won't matter much either. We will reach a point where consumers will be so familiar with watching content that looks and feels like TV, but is internet-delivered to all sorts of connected devices, that these distinctions in audience expectations will probably gradually wither and die. We will then be facing a point when existing models really do not work any longer and a significant evolution will be necessary.<sup>12</sup>

## 7 Rethinking the Principles

China's approach to a rethink of digital content regulation, taking account of the long-term migration of the printed Press to electronic distribution, is simple. In 2013 it merged the state's General Administration of Press and Publication (GAPP) with the State Administration of Radio, Film and Television (SARFT), creating the new State Administration of Press, Publication, Radio, Film, and Television (SAPPRFT).<sup>13</sup> Western liberals, faced with the awkward dilemma of reconciling state regulator-licensed broadcasters and their websites with an unlicensed Press and its websites, without creating a state-based super-regulator, have had to work harder at solving the convergence problem.

9 European Union, *Preparing for a Fully Converged Audiovisual World*, COM (2013) 231 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>

10 DCMS, *Connectivity, Content and Consumers*, 30 July 2013, <https://www.gov.uk/government/publications/connectivity-content-and-consumers-britains-digital-platform-for-growth>

11 Ed Richards, Speech to the Oxford Media Convention, 25 January, 2012, Ofcom

12 Ed Richards, Speech on broadcasting regulation in a converged world, 16 October, 2013, Ofcom

13 Yu Zhao, 'The content management of media in China', *International Journal of Digital Television*, 4, 3, 2013, 321

Two attempts have been made recently to design a framework of regulation for electronic journalism based on content and its potential impact on consumers, rather than on the means of distribution.

#### I) Australia's Convergence Review

Australia established a Convergence Review Committee, which reported in 2012.<sup>14</sup> It proposed basing a new system on principles and abolishing broadcast licensing. Regulatory obligations, covering ownership, content standards including news standards and the protection of children, and Australian and local content, would be applied to major technology-neutral 'content service enterprises.' These would be organisations (TV stations and newspapers), which had professional control over their content and exceeded a certain threshold in terms of users and revenue.

A new regulator would be established to enforce statutory obligations. A separate industry-led body would be created to set up and administer a code of journalistic standards, which would no longer be within the orbit of the state. Smaller content providers, below the size threshold, could opt to follow this code or develop their own.

Neither the Australian government that received the Commission's report nor its successor elected in 2013 has made any move to implement this radical redesign, though some of the minor recommendations have been picked up. A stumbling block has been opposition from major newspapers.

#### II) UK's Reuters Institute for the Study of Journalism

As noted earlier, in 2011 the Reuters Institute for the Study of Journalism jointly published with City University a study by Lara Fielden of the implications of convergence for regulation. This called for a new UK Communications Act. The goal was to create an evolutionary framework moving towards regulatory distinctions based on values and not on the means of distribution.

Fielden envisaged a continuing tiered structure with the possibility of content providers moving flexibly between the tiers over time. Tier 1 for broadcasters and Tier 3 for video-on-demand providers would have statutory standards enforced by a regulator with statutory power, while Tier 2 for newspapers would have requirements "framed by industry, administered and enforced by a regulator recognised in statute, but whose powers derived from voluntary acceptance of its jurisdiction by Tier 2 members."<sup>15</sup>

Perpetuating the tiered framework seems at odds with the report's analysis: the protection of an individual against unfair treatment or invasion of privacy by a journalist would surely warrant the same safeguards whether that journalist worked for Channel Five or the *Daily Express*. In the any event the Lara Fielden prescription ran into Press and other opposition to a newspaper regulator recognised in statute.

## 8 Is Regulation Required At All?

In the world of digital abundance it might seem possible in theory to dismantle all content regulation and rely solely on the criminal and civil law, together with locking mechanisms on reception equipment, leaving media organisations to manage their own affairs without any further regulation. However, even in the United States, which is perhaps closest to this deregulated model, **the Federal Communications Commission (FCC) regulates licensed broadcasters** to penalise rigged news distortion, obscenity and profanity and to uphold equal opportunities for election candidates.<sup>16</sup>

<sup>14</sup> Australian Government, Department of Broadband, Communications and the Digital Economy, *Convergence Review: Final Report*, 2013

<sup>15</sup> Lara Fielden, op.cit., p.126

<sup>16</sup> Federal Communications Commission, *The Public and Broadcasting*, 2008, <http://www.fcc.gov/guides/public-and-broadcasting-july-2008>

Neither in the UK nor in Europe is there public support for full-scale deregulation. The public is clearly concerned to protect children from exposure to harmful video material and websites and to see better protection for the individual from sharp practices by the Press, with a fair, swift and low-cost independent complaints system.

So, notwithstanding the growing number of media outlets, there remains a need for some framework of regulation for content that is not self-evidently illegal but warrants a prompt and swift appraisal to balance the three-way tension between freedom of expression for journalists, the public interest and the rights of individual citizens. This is the territory of journalistic Codes of Practice, with sanctions to penalise breaches but an ethos of support for freedom of expression.

## 9 Finding a Way Forward

The fact that two forms of digital communication can be received on the same reception device does not mean that they should be identically regulated: telephone calls and television news clips sit side-by-side on the smart phone. However, where two electronic communications are in effect fulfilling the same function – a broadcaster website with text and video clips and a newspaper website with text and video clips, for example – then consistency is needed.

While points of regulatory difference can arise between scheduled and on-demand TV (e.g. the TV schedule concept of the watershed) and between text, audio and video (e.g. over the handling of swearing), this should not obscure the need for consistency at the level of principle. Accuracy in news, fair treatment of individuals, protection of children, respect for privacy and for grief, rights of reply, independent judgment in assessing serious complaints – these should surely apply in principle regardless of legacy systems of distribution.

The way forward lies in harmonising an independent regulatory approach for appropriately similar content without (certainly at this stage) trying to bring broadcasters, ‘television-like’ on-demand services and newspapers under the same regulatory body.

Harmonisation is preferable to a ‘big bang,’ such as Australia’s Convergence Review Committee considered. In the UK time needs to be allowed for the move of the Press from self-regulation to *independent* self-regulation to be fully and credibly established and the migration of newspapers from print to electronic distribution is still in its early stages. However, content regulation needs a strategy reflecting the direction of media evolution.

## 10 Building on Existing Consistency

Consistency across the different forms of electronic journalism already exists to a large extent. Television and radio, broadcaster websites, on-demand services and the electronic versions of newspapers operate within a framework of criminal and civil law – national implementation of the European Convention on Human Rights, laws against discrimination and ‘hate speech’ and, of course, the laws of libel and defamation.

Key areas of consistency also exist between, on the one hand, the **AVMS Directive**<sup>17</sup> and the **Ofcom Code**<sup>18</sup> for television and on-demand service providers and, on the other, the **Editors’ Code of Practice**<sup>19</sup> under which newspaper websites operate. The need for accuracy in news and for fairness in the treatment of individuals, with remedies where a breach occurs, is common ground. Ofcom’s Code states that “significant mistakes in news should normally be acknowledged and corrected on air quickly. Corrections should be appropriately scheduled.” The Editors’ Code for the

<sup>17</sup> European Union, *Audiovisual Media Services Directive*, 10 March, 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

<sup>18</sup> Ofcom, *The Ofcom Broadcasting Code*, 21 March, 2013, <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcasting-code2011.pdf>

<sup>19</sup> Independent Press Standards Organisation (IPSO), *The Editors’ Code of Practice*, 8 September 2014, <https://www.ipso.co.uk/IPSO/cop.html>

Press calls for care in not publishing “inaccurate, misleading or distorted information” and requires that any breach be corrected “promptly and with due prominence” with an apology where appropriate. Similarities of approach apply in the areas of privacy, harassment and intrusion into grief – and also in the field of crime reporting.

In respect of harm and offence, the greater risks from video material are relevant. The AVMS Directive requires member states to exclude television programmes “which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.” The Ofcom Code on Harm and Offence deals with offensive language, discrimination, violence, suicide and self-harm, exorcism and hypnosis, while its Code on Protecting the Under-Eighteens also encompasses coverage of sexual and other offences involving under-18s, drugs, smoking and alcohol. The Editors’ Code of Practice for the Press, rooted in print history, is much narrower in range and focuses on the issues surrounding the interviewing of children and the identification of children in sex cases. However, the underlying aims are similar: there is no obvious obstacle to cross-media collaboration to ensure that common principles apply where appropriate.

The UK, however, has three conspicuous areas of inconsistency: broadcasting’s impartiality obligation, the application of the public service concept and regulatory accountability.

## 11 Due Impartiality

The UK’s broadcasting regulation restricts editorialising, in that programmes “must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy.” This restriction applies to all broadcasting services based, or operating, in the UK, including foreign satellite channels. The aim is to prevent excessive political influence over the public agenda and was certainly appropriate in the analogue era when a small number of broadcasters were granted scarce spectrum giving access to very large audiences. In an all-digital environment this undoubtedly remains an appropriate obligation for public services with ‘public good’ obligations to citizens.

However, no such requirement is laid down in the EU AVMS Directive. In the digital world of 50 to 500 TV channels, the case for applying the ‘due impartiality’ requirement beyond the sphere of public services is more questionable: the alternative approach to preventing excessive political influence by powerful media organisations lies in ownership restrictions. The greater the plurality of media sources, the less the justification for a blanket regulation restricting hundreds of channels, most of which have tiny audiences and little influence.

In the United States the FCC used to have a ‘Fairness Doctrine’ obliging broadcasting stations to cover controversial issues of public importance fairly by airing rival views, but in 1987, as satellite and cable TV spawned a growing multiplicity of channels, that rule was abolished. The change has been criticised for opening the door to radio ‘shock-jocks’ and opinionated cable channels like Fox News, but the US Constitution’s First Amendment protecting free speech prevails.

In the UK, the ‘due impartiality’ requirement could be removed from purely commercial services, with legal safeguards for election coverage and political advertising. In this scenario, it is not obvious that Sky News would emulate Fox News – its place in the UK market is different from Fox News’ position in the US market and it also positions itself as a potential news provider to duly impartial public service channels. Moreover, a slight absurdity is that Ofcom actually regards Fox News as sufficiently ‘duly impartial’ to be licensed for broadcasting within the UK.

Another anomaly was highlighted by the controversy over whether Iran’s Press TV was sufficiently duly impartial to qualify for a licence to broadcast in the UK, given that Press TV can be received anyway, without having to undergo any such test, via the Internet.

In the end the regulators themselves may come to accept the inappropriateness of applying a ‘due impartiality’ test as part of the licence for every foreign broadcaster, a process the UK would clearly resist on a reciprocal basis. Is it



sensible for a UK state-appointed regulator to monitor whether *Russia Today*'s coverage of the 2014 Ukraine crisis is duly impartial, with the intention of fining it or, in the last resort, depriving it of its licence, if the answer is 'No'? Surely its small viewership wants to know how Russia sees, and portrays, the situation, even if this is far from impartial from a UK perspective?

This is a complex area warranting a fresh review of the scope of, and justification for, the 'due impartiality' requirement. It should plainly remain an obligation for public service broadcasters but there may be limits to its wider application, while ensuring regulatory intervention in cases of rigged news distortion and hoaxes – plus, of course, enforcement of the laws on incitement and obscenity. Reducing the scope of the 'due impartiality' rule would produce greater consistency across the field of electronic journalism.

## 12 The 'Public Service' Concept

Another inconsistency lies in the existence of public services in broadcasting and, by extension, in broadcasters' online services, and their absence from the wider world of electronic journalism. The place of public services in a digital system of communications should continue to be central and it is here that positive regulation with 'public good' objectives should continue to apply. This is the foundation for services of high quality, offering a wide range of programmes of minority as well as majority appeal, which inform democratic processes, enhance citizen understanding, celebrate and build on national and regional cultural traditions, educate as well as entertain children, and communicate national values around the globe.

Public service communicators need to be held to account not just for maintaining accuracy and avoiding harm, but for positively doing good. They are granted public resources, ultimately by the state via a supervisory system that protects their editorial independence. It is vital to sustain and develop the public service concept and, in the UK, to maintain the distinctive regulatory framework provided by Ofcom and (pending any re-examination at Charter review time) the BBC Trust.

However, a framework of public, and ultimately political, regulation and accountability is not appropriate for every organisation engaged in electronic journalism. It is debatable whether all the former analogue TV channels should continue to be classified as 'public services' forever, and whether (with the prospect of BBC-3 moving to online distribution) only broadcast channels are seen as qualifying for 'public service' status. Back in 2004, in the course of its **Review of public service television broadcasting**, Ofcom floated the notion of a new multi-media Public Service Publisher.<sup>20</sup> Here too greater consistency across the historically separate distribution systems could be achieved.

## 13 Independent Self-Regulation

The remaining major inconsistency lies in the administration and enforcement of the journalistic Codes of Practice. Ofcom does this for non-public-service broadcasters, as well as for most public service broadcasting, and, while it does so with admirable independence of government, the line of accountability still runs back to the state. However, for electronic versions of newspapers, the administration and enforcement of the Editors' Code lies, as it does for the printed Press, with the newly emerging system of independent self-regulation. For the Press the principle of independence from the state remains sacred.

As we have seen, the Code of Practice obligations are in most respects similar and could sensibly become more so. The sanctions backing up enforcement are also similar: serious breaches of the Codes result in fines. In practice Ofcom

<sup>20</sup> Ofcom, *Ofcom review of public service television broadcasting – Phase 2, meeting the digital challenge*, 2004, p.81 [http://stakeholders.ofcom.org.uk/binaries/consultations/psb2/summary/psb\\_phase2.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/psb2/summary/psb_phase2.pdf)

is reluctant to deprive a licensed broadcasting organisation of its licence for breaching its Code. For patently illegal activity, of course, the processes of the criminal or civil law apply.

It would not therefore involve a major upheaval if responsibility for administering and enforcing the editorial Code of Practice for non-public-service broadcasters were transferred to a properly constituted and funded independent self-regulatory body. Even in its current form the AVMS Directive allows for self-regulation to be adopted by Member States as a complementary alternative to legislation, provided the national legislator still meets its own obligations. While compliance with the laws relating to inciting hatred and pornography requires state-backed sanctions, assessing the accuracy or fairness of news and upholding carefully judged journalistic standards are different matters.

The non-public-service broadcasters should be quite capable, given the option, of organising the necessary support for their own industry regulator with a majority of independent members. Since they already fund Ofcom's regulation, proportionate funding could transfer. Essentially, the change would be a privatisation of a small area of the editorial work of Ofcom's Content Management Board, whose members would be obvious candidates for an independent body.

The Ofcom Code works well and is respected so, in terms of the impact on the work of journalists, very little would change. However, an important principle would be established. Within the law non-public-service journalism, regardless of its means of distribution, would no longer have its content managed under a licence from a regulator appointed by the state. It is a principle that should resonate in some other European countries where the regulator's independence of government is less convincing than it is in the UK.

This change would not abolish licensing, as the Australian Convergence Review had in mind. Licences would still be required for the use of spectrum and for a full range of legal and technical purposes. Nor would it diminish Ofcom's role and importance as the UK's major communications regulator. Its responsibilities would remain very broad, including spectrum management, telecommunications, competition, regulation of the commercial public services, and oversight of the postal service. Detailed oversight of non-public service journalism is a minor part of its role.

In due course, when the importance of electronic newspapers begins to rival that of the printed versions, appropriate consistency will need to be achieved across the field of electronic journalism. Freedom of expression would be better served by shifting non-public service broadcasters on to an independent self-regulatory basis than by pulling electronic newspapers into Ofcom's remit.

## 14 Other Internet Services

The question of how far it is desirable, or even possible, to regulate Internet services is often seen as 'the elephant in the room.' In practice, the more varied the forms of content delivered by the Internet, the less simple this question becomes. The answers will vary depending on the nature, the source and the impact of the content. For 'television-like' on-demand services, ATVOD/Ofcom regulation to prevent the distribution of 'hate speech' and pornography remains sensible while it works in practice, albeit with issues over its exact scope. The work the Internet Watch Foundation has done with Internet Service Providers (ISPs) in establishing a 'notice and take-down' system is very important. Here essentially the focus is on dealing with criminal online content. In respect of legal content, child protection requires filtering and locking tools to be made available to parents.

In the realm of electronic journalism, content regulation of new services without a history under either Ofcom or the Press Complaints Commission is likely to prove patchy and, if the content is not patently illegal, often elusive. A particular danger, both from the consumer's and the professional journalist's standpoint, lies in sponsorship and 'advertorials'. The economics of the Internet encourage this, in that pay walls deter users while, for services without a mass following, banner advertising produces relatively little revenue. The EU AVMS Directive lays down the principle that sponsorship should be clearly labelled, should not influence content, should exclude tobacco companies, should not promote medical products available only on prescription and should not extend to news and current affairs

programmes. ATVOD has a responsibility for ensuring that ‘television-like’ on-demand services comply with these restrictions, but this does not cover electronic versions of newspapers and magazines.

The consumer’s and journalist’s best protection in this field lies in the adoption of some form of kitemark by independently self-regulated services which enforce a proper separation of editorial content from advertisements and respect strict rules on sponsorship. Well-administered and publicised, the kitemark(s) should become a badge of trustworthiness.

## 15 In Conclusion

This paper suggests that, for the UK, a convergence of the Codes of Practice regulating electronic journalism should be a policy goal. More specifically:

- The scope of the UK’s ‘due impartiality’ regulation for broadcasting should be reviewed, with a view to reducing it, e.g. to public services only.
- The ‘public service’ concept should be freed from any restriction either to former analogue broadcasters or to broadcast transmission.
- Administration and enforcement of the journalistic Code of Practice for non-public-service broadcasting should be transferred to an independent self-regulatory body created for the purpose, analogous to the independent self-regulatory model being developed in the UK for the Press.

In the medium term the different regulatory bodies, converging from their different distribution-related backgrounds and histories, should be able to operate consistently, at the level of principle, in regulating different content providers performing the same, or a very similar function. Appropriate consistency does not require a single regulatory organisation, though some simple coordinating committee would be needed across a plurality of independent self-regulators.

These would be modest changes, far removed from the shake-up recommended by the Australian Convergence Review, though drawing on some of its ideas. Fears of government meddling with the Press, of television channels playing politics, of an increased risk of harm to children from deregulation, and of an all-powerful single regulator appointed by the state – all of which tend to inhibit consideration of regulatory reform – can be laid to rest. By making sharply focused changes, the reassuring elements of the existing regulatory pattern can be left in place.

Beyond arguing that any revised AVMS Directive should strengthen the role of self-regulation, I have not proposed specific changes for other European countries since they have different starting-points. The potential regulatory implications of convergence have certainly been debated at European level, for example by the **European People’s Party of the European Parliament**<sup>21</sup>. Then in his **Networked Society blog** Rene Summer, director of Government and Industry Relations at Ericsson, articulates in a European Union policy context the key principle:

In a converging and multi-platform environment, the same rules/standards should apply to all technologies and distribution platforms. This should not be interpreted as a one-way street option – for example, increasing regulation of new platforms, but also considering deregulating incumbent platform.<sup>22</sup>

21 EPP Group in the European Parliament, *Media convergence requires EU regulation*, Press Release, 12 March 2014 <http://www.eppgroup.eu/press-release/Media-convergence-requires-EU-regulation>

22 Rene Summer, *Resetting EU Policy frameworks for a converged world*, blog, 29 August 2013, <http://www.ericsson.com/thinkingahead/the-networked-society-blog/2013/08/29/resetting-eu-policy-frameworks-for-a-converged-world/>

However, in relation to this and other points of consistency he swiftly adds:

**This is easy to say but very hard to implement.<sup>23</sup>**

The diversity of existing national arrangements militates against a detailed EU prescription.

It therefore seems to me likely that, within a broad framework of European policy, the practical implications of convergence for media regulation will be worked out by different nations in their own way at their own time. However, the underlying principle is relevant both at EU level and more widely: as freedom of entry into the non-public service sector of broadcast and online journalism becomes closer to the historically much greater freedom of entry into the Press, so the regulation of freedom of expression in these converging fields should become more consistent and – I would argue – less state-based.

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## Biography

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Michael Starks managed the UK Digital TV Project from 2002 to 2004, working for the UK Government to plan the UK's full switch to digital television. Prior to that, he led the BBC's Free-to-View Digital TV Project, which culminated in the formation of *Freeview*. His main career was with the BBC, initially as a television Current Affairs producer and later a senior manager. He was also a regulator of commercial radio at the Independent Broadcasting Authority.

23 Ibid.