

## Guaranteeing the Programming Mandate of Public Broadcasters and Restraints on Private Broadcasters' Programmes in Multimedia Conditions

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### A. Introduction

The present German media structures are subject to a fundamental process of self-transformation due to technological as well as societal dynamics. This is especially the case for public service broadcasting. In the post-war era, the public service networks were one of the central intermediary institutions of organized pluralism, serving both the state and society at large. It is not only the growing competition between public and private broadcasters that has led to dramatic changes to the role of public sector broadcasters. The public sector is also being challenged by the rise of the entertainment economy and a shift in focus from public to private affairs. This paper describes the hitherto established role of public service broadcasting and its present crisis. The paper then proposes a proactive legal and political regulatory strategy, which might help find a new role for public broadcasters in a much more fragmented society. The proposed strategy follows the paradigm of proceduralization, which is also prevailing in many other parts of the institutional structures of postmodern society.

### B. The Function of Broadcasting in the "Society of Organizations"

#### I. Freedom of the Media and the "Information Economy" - Constitutional Reactions

The development of "information markets" is determined by an orientation to the interests of recipients, who are assumed to best know their own needs. Media consumers are supposed to be able to choose, in a free and unconstrained decision-making process, from among its various offers. There is an assumed trust that self-organization will bring about a market structure that also guides the political sys-

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tem. Despite its basic market orientation in its conception of the press, the Bundesverfassungsgericht's (BVerfG - German Federal Constitutional Court) decisions about media law tend to be based on a highly political process of opinion formation.<sup>1</sup> This also justifies the introduction of an objective-rights dimension of press freedom (protecting the whole network for society, prestructuring and processing of information before the actual process of dissemination) through, for example, special protective provisions in criminal procedural law (such as restricting searches in newspaper offices), in antitrust law (low intervention thresholds for press mergers) or through privileges in determining the requisite level of care in the event of disallowed actions. The Court thus assumes an institutionalised system of "concentric circles": the State decision-making system stands at the centre, surrounded by the system of parties and public-oriented associations. The next ring is formed by the media, which has the primary function of prestructuring social options about politics. So characterized, the media presents political information in a way that can be processed by the constituency as alternatives from which it can choose. The outer ring is formed by the institutions of civil society, such as non-political societies, associations, firms, family, markets, neighbourhoods, and so on. The media system and the general public form a hinge between the private sphere and the State's narrower conception of the public as mere decision-maker. Whether this view is accurate, in particular whether it fits the present system, will not be discussed in the framework of the present paper. However, it is important to note that the requirements placed on the media system are at least partially determined by the requirements of setting up and reproducing a collective order that is informed by this framework.

If a series of peculiarities of the "information economy" are emphasized,<sup>2</sup> these expectations are not entirely incompatible with a basically market-oriented view of the media. A press system can only function if individuals accept the reduction in the complexity of the information presented, such as through the bundling of information into a newspaper "package." Individuals might be willing to accept such a trade-off due to their limited personal capacity to search for and process information themselves. This also fits the Federal Constitutional Court's view of the press' prestructuring performance. The formation of definite decisional and association patterns makes available meaningful information through the selection of alternatives. This is reflected, for example, in "loyalties" to newspapers insofar as a paper's performance is not repeatedly called into question day after day. This is the

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<sup>1</sup> See German Federal Constitutional Court (Bundesverfassungsgericht) BVerfGE 12, 205 (261); BVerfGE 57, 295 (321); BVerfGE 20, 56 (101) (concerning the role of political parties).

<sup>2</sup> See George A. Akerlof, *The Market for "Lemons" Quality Uncertainty and the Market Mechanism*, 86 QUARTERLY J. OF ECON. 488 (1970).

only way in which the press can also provide a political orientation that could, in economic terms, be called a “meritorious good.”<sup>3</sup> That is, it goes beyond the satisfaction of individual information and entertainment needs to enable the formation of interests that can be generalised and to which the political system can respond. This is necessary because – due to the extremely limited private utility of voting<sup>4</sup> – individual economic interest alone could not justify participation in political elections. Therefore, economic interests alone cannot legitimise politics. The same could be said of State control of broadcasting and political influence over it.

In the German case, the public effectiveness of broadcasting is emphasised throughout the Federal Constitutional Court’s case law, especially because of the (at least until very recently) strong concentration of attention on a few channels of information. It is extremely questionable whether this helps us cope with the problem of insufficient production of the “meritorious good” of self-information and education by individuals, or whether it merely shifts the problem to another level.

## II. The German Federal Constitutional Court and “Basic Provision” Through Public Broadcasting

It is only by looking back at the Federal Constitutional Court’s early case law on the function of broadcasting freedom, which emphasized that the media “serves freedom,” that a better judgment about the viability of the concept of Grundversorgung (basic provision) can be gained. This better understanding of Grundversorgung is necessary, however, for any examination of the further development of constitutional law on broadcasting. Particularly in its second broadcasting judgment,<sup>5</sup> the Constitutional Court tied the principle of Grundversorgung to the “integration” function that is tightly connected to the political system. The Court explained: “Broadcasting also works to help shape public opinion through transmissions outside the sphere of actual information and political education.” By this the Court acknowledged that opinions are also formed by media exposure to entertainment, including “dramas and musical presentations.”<sup>6</sup> Viewed from this perspective, the Court concluded that “the broadcast programme consequently cannot be broken down into individual parts, but must be seen as a single unitary production.”<sup>7</sup> This

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<sup>3</sup> See GUIDO SCHRÖDER, *DIE ÖKONOMIE DES FERNSEHENS – EINE MIKROÖKONOMISCHE ANALYSE* 8 (Münster 1997).

<sup>4</sup> *Id.* at 9; GEOFFREY BRENNAN & ALAN HAMLIN, *DEMOCRATIC DEVICES AND DESIRES* (New York 2000).

<sup>5</sup> See BVerfGE 31, 309 (312); but also BVerfGE 12, 205 (259).

<sup>6</sup> See BVerfGE 12, 260.

<sup>7</sup> *Id.*

is always presupposed in later judgments on the concept of Grundversorgung, even if later the Federal Constitutional Court often expressed itself only vaguely in this direction. The Court continually stresses that “the relevant social forces should have a voice within the overall programme.”<sup>8</sup> The Court has thus held that broadcasting “gives the individual and social groups a chance to act so as to form opinion.”<sup>9</sup>

Broadcasting is thus added to the first of the system’s concentric rings. The second ring is comprised of the parties, which constitute the “connecting links between the citizen and the organs of State.”<sup>10</sup> The political parties collect and shape opinions, interests and efforts related to political power. They “balance them within themselves and shape them into alternatives from among which the citizens can choose.”<sup>11</sup> The inner circle of this integrating structure consists of the “leading political organs of State.”<sup>12</sup>

We need not examine whether the past function of public broadcasting is, on the whole, appropriately described by this model. The function of integration broadcasting cannot be defined solely from a perspective centred on the media’s components. Broadcasting’s integrative achievements can be explained only with reference to the requirements for integration in a pluralist society, and the fairly broad basis of consensus – despite all the potential for conflict – in such societies. In the 60s and 70s there was a harmony between the groups and the environment that surpassed all the controversies, at least to the extent that a solution and a balance could be found only within the political system, and particularly in governmental decisions. The objects of conflict and voting processes are the “great policy decisions” that allegedly can only be made by a centralised government. They are preceded by a consensus about social values, and a process of pre-structuring the proponents of different alternatives into parties and representative associations. Thus media autonomy (for our purposes, broadcasting) ultimately becomes politically functionalised, even if only with regard to one particular political tendency. However, this political centralization is undermined in post-modern society: traditional social ties to relatively stable cultural milieus are more or less sundered by frag-

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<sup>8</sup> See BVerfGE 31, 314 (325); BVerfGE 35, 202 (222); BVerfGE 73, 118.

<sup>9</sup> *Supra* note 6

<sup>10</sup> See BVerfGE 44, 125 (145).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

mentation processes that follow a new “networking logic.”<sup>13</sup> This development is intensified, but not ultimately caused, by the multiplication of possibilities for media transmission.<sup>14</sup> It is mainly due to the fact that the traditional big “representative organizations” like trade unions, churches, clubs, etc. and stable professional and social statuses are in decline. It is mainly due to the fact that the traditional big “representative organizations” like trade unions, churches, clubs etc. and stable professional and social statuses are in decline.

### C. Tensions Within the “Dual System” of Public Private Coexistence in the Media

#### I. The Significance of the Programming Autonomy of Public Broadcasters in Conditions of Competition with Private Broadcasters – How about the “Public Mandate” of Public Broadcasting?

As a starting point one could use the functional technological and market constraints on broadcasting to explain attempts to limit the declining de facto integration capacity of broadcasting to the audience that is faithful to the classical “broadcasting plurality,”<sup>15</sup> or to explain the production of “meritorious goods” that are not generated by the market. This would justify a sort of “narrow-gauge integration,”<sup>16</sup> while greater intervention would aim to compensate for market failure.<sup>17</sup> However, this conception would not do justice to the autonomy of the media – particularly broadcasting – as a subsystem of society. For Martin Bullinger, broadcasting retains its old mandate, namely to contribute to “social cohesion.”<sup>18</sup> But this conception loses shape if the concept of integration is separated from its political references. All social communications can contribute to “social cohesion” (even private broadcasters’ afternoon shows). What is typical, is the centralization of integration broadcasting on politics, on the one hand, and its effect of compensating for market failure– the limits of private broadcasting in this respect – on the other.

<sup>13</sup> See Karl-Heinz Ladeur, *Toward a Legal Concept of the Network in European Standard Setting*, in, EU COMMITTEES 161 (Cristian Joerges & Ellen Vos eds., Oxford 1999).

<sup>14</sup> For the necessity to allow for different standards of freedom of expression according to the rules of the relevant type of public forum, see Thomas Vesting, *Soziale Geltungsansprüche in fragmentierten Öffentlichkeiten*, 122 ARCHIV DES ÖFFENTLICHEN RECHTS 337 (1997).

<sup>15</sup> See MARTIN BULLINGER, *DIE AUFGABEN DES ÖFFENTLICH-RECHTLICHEN RUNDFUNKS – WEGE ZU EINEM FUNKTIONAUFTRAG* (Gütersloh 1999).

<sup>16</sup> *Id.*

<sup>17</sup> See Christoph Engel, *Rundfunk in Freiheit*, 44 ARCHIV FÜR PRESSERECHT 185 (1994); Martin Bullinger, *Elektronische Medien als Marktplatz der Meinungen*, 108 ARCHIV DES ÖFFENTLICHEN RECHTS 161 (1980).

<sup>18</sup> BULLINGER, *supra* note 15.

But the autonomy of the media systems which operates more and more following its own logic (focusing on entertainment) is not taken seriously.

## II. The Discussion on the Legal Consequences of the Challenge to Public Broadcasting

There is now a discussion about the role of public broadcasting in the so-called "dual broadcasting system."<sup>19</sup> Can public broadcasting stick to its established role of "integration" and "public forum," and defend itself against the dominant market logic?<sup>20</sup> Or can the public service requirements imposed on both private and public stations be reformulated to meet multi-media conditions and the abundance of technical transmission facilities? This discussion has led to a battle between legal experts, some who want to change the mandate of public broadcasters,<sup>21</sup> and some who defend old constitutional arguments. This is inevitable because the Federal Constitutional Court through its detailed jurisprudence in this domain has transformed this issue into a constitutional problem. In the amicus curiae briefs submitted on behalf of the public broadcasters by Professors Holznagel and Vesting, German legal scholars and media specialists, the "functional mandate" of public broadcasting is described as "proceduralized."<sup>22</sup> What the authors mean is that public broadcasting has to be given more autonomy but this concept is used in a rather formal way. Yet this also brings it, through the freedom for self-definition, dangerously close to tautology: the broadcasters themselves define what the performance of "public-service broadcasting" requires. This danger can be avoided only if the function of the mass media is first defined separately, and self-definition is only later used to create an identity for the individual broadcasters.

Niklas Luhmann's system-theory might be relevant here: if we sharpen the conceptualisation of the autonomy of the mass media and liberate it from the unproductive link to the political integration function, it will clear the way to better locate the

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<sup>19</sup> See the leading case BVerfGE 73, 118; WOLFGANG HOFFMANN-RIEM, *DIE REGULIERUNG DER DUALEN RUNDfunkORDNUNG* (Baden-Baden 2000).

<sup>20</sup> See Bernd Holznagel, *Der spezifische Funktionaauftrag des Zweiten Deutschen Fernsehens*, ZDF-SCHRIFTENREIHE NR.55, MAINZ 1999; THOMAS VESTING, *SPARTEN- UND ZIELPROGRAMME IM ÖFFENTLICHRECHTLICHEN RUNDfunk* (Frankfurt/M. 1999).

<sup>21</sup> See BULLINGER, *supra* note 15; Reinhart Ricker, *Die Grundversorgung als Aufgabe des öffentlich-rechtlichen Rundfunks*, 32 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT, 331, 335 (1989); Christoph Degenhart, *Öffentlich-rechtlicher und privater Rundfunk im dualen Rundfunksystem*, 31 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT, 47, 49 (1988); Edgar Kull, *Auf dem Weg zum dualen Rundfunksystem*, 31 ARCHIV FÜR PRESSERECHT 1983, 365, 368.

<sup>22</sup> See for a new theoretical construction of the freedom of broadcasting THOMAS VESTING, *PROZEDURALES RUNDfunkRECHT* (Baden-Baden 1997).

“function of the mass media in the constant production and processing of irritation.”<sup>23</sup> According to Luhmann, it is only then that it becomes possible to “arrange communication processes within modern society to make them endogenously restless like a brain’s, thus preventing them from becoming too strongly linked to established structures.”<sup>24</sup> The result is not “integration,” but the production of “the descriptions of the world and society by which modern society can orient itself inside and outside its mass-media system.”<sup>25</sup>

Through this intermediate theoretical step we might be able to describe the public organization of broadcasting as an institutional attempt to limit the special risks associated with broadcasting’s time-dependency (high investment costs, uncertainty in estimating audience interest) and the resulting special pressure towards conformity. To distinguish between majority and minority interests can easily bring a false paternalist note into the debate over Grundversorgung.<sup>26</sup> These media-economy risks are increased by the media-economy’s upward trend in prices for programming rights. The public form of organization is supposed to help maintain the “variety pool” of programme components and formats. Accordingly, broadcasting can and must also further develop thoroughly proven programmes with mass effectiveness, especially as the uncertainty of expectations means that public broadcasters must have a right to develop a “brand” with which audiences can relate. Although audiences frequently surf between channels, broadcasts are not being sent out into an unstructured option-space, and it is against this background that the emphasis on the self-defining capacity of public-service broadcasters takes its shape.

The old “integration broadcasting” was linked – not unproblematically – to the political system, while private broadcasting is considerably exposed to economic constraints that limit its autonomy. This idea of limiting uncertainty through public organization, and the capacity for self-definition that it offers, throws a different light on the need for self-observation and assessment of the performance of public broadcasting, as more heavily emphasized by authors such as Bullinger.<sup>27</sup> This can be seen as a thoroughly useful idea, especially as the notion of guaranteeing multi-

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<sup>23</sup> See NIKLAS LUHMANN, *DIE REALITÄT DER MASSENMEDIEN* 174 (2<sup>nd</sup> ed., Opladen 1996).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 175.

<sup>26</sup> See BVerfGE 74, 297 (326); Michael Libertus, *Der Grundversorgungsauftrag als Grundfunktion des öffentlich-rechtlichen Rundfunks und seine dogmatische Grundlegung*, 7 *MEDIA PERSPEKTIVEN*, 452 (1991); ALBRECHT HESSE, *RUNDFUNKRECHT* 118 (3<sup>rd</sup> ed., München 2003); HOFFMANN-RIEM, *supra* note 19, at 205.

<sup>27</sup> See BULLINGER, *supra* note 15.

plicity through the Broadcasting Council seems heavily fixed on relatively simple political alternatives.<sup>28</sup> Self-design and self-observation by public broadcasters ought to be more strongly differentiated by quality objectives, and thus made both transparent and open to external (nongovernmental) assessment. On this basis, a new distribution of roles could also be sought, lying somewhere between external statutory control and autonomous self-regulation by broadcasters. Linking the core task of Grundversorgung with a multiplicity of various sector programmes and multimedia services seems entirely legitimate, as long as these programmes and services can be linked into a network oriented towards maintaining the openness of the broadcasting production process. It must not be aimed primarily, and destructively, at driving viewers or listeners away from private broadcasters, as might occur if public broadcasters simply duplicate the programming identities of their private counterparts. One solution to the risk of duplication could be a numerical restriction that prevents the public broadcasters from producing just “more of the same,” such as the broadcast of a music-based youth programme that is aimed at the same age-group as a similar programme distributed by a private broadcaster.

It should now be clear that the emphasis on the autonomy of the mass media can contribute to a new form of procedural legitimising of public broadcasting. But, for this to occur, the link with a problematic conception of “integration broadcasting” that has lost its basis in an age of fragmentation of the public must be broken. Only then will we be able to see the unfolding of the concept of procedural broadcasting freedom. Procedural broadcasting freedom serves to maintain society’s “variety pool” and forms a “corporate identity” for it in the form of the public-service broadcasters. By contrast, private broadcasting is much more strongly exposed to the risks of programme design and funding, and its autonomous choice of themes and forms is limited by economic constraints. It operates under the economic pressure (in broadcasting) to generate a large audience within a very short “time slot”; this is one of the reasons why private broadcasters tend to follow their competitors who have found successful formats such as reality TV instead of experimenting with new ideas. When media operators experiment (e.g. in the internet) they are confronted with the other horn of the dilemma: an increasing fragmentation of the public, which makes it difficult to refinance programmes. At the end of the day this version of public service broadcasting would end up in a kind of elitist approach which would give up the ambition to establish public broadcasting as a mass media.

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<sup>28</sup> The “Broadcasting Council” (Rundfunkrat) is the body which represents the pluralistic group based structure of public service broadcasting.

#### D. The Dilemma of the "Integration Mandate"

##### I. The "Integration Mandate" and its Link to the Model of Organized Pluralism

The Federal Constitutional Court has always stressed the objective legal importance of broadcasting freedom, which is described as a guarantee of pluralism. To reinforce this characterization of broadcasting freedom the Court has rejected a subjective "right to be heard" for the organizations represented on the Broadcasting Council.<sup>29</sup> The Court has found that the representation of groups ought not to oblige broadcasting to political "integration" (whatever that may mean). Instead, group pluralism serves only to buffer the economic constraints that are faced by advertising-financed broadcasting, and to enable autonomy to function within the media. Recourse to the "integration mandate" of public broadcasting leads to an argumentation trap: investment in "mass-attraction areas" becomes a sort of self-advertisement with the object of "preventing audience migration."<sup>30</sup> Surreptitiously, the reception of public programmes by itself is made to constitute "successful integration." The position of the Association of Public Broadcasters (ARD) openly contradicts itself in this respect: thus, "above-average efforts" are demanded in areas "dominated by private broadcasters," including "premium sports."<sup>31</sup> However, interest in broadcasting sports events is legitimised on the ground that otherwise "many spectators can no longer be reached," and this sort of development is interpreted as non-fulfilment of the "integration mandate." This argument is hard to follow as it ultimately amounts to regarding the most expensive programmes – sports, Hollywood films and big shows – as "extras" that might entice the spectator to tolerate the real "integration mandate." This would have to be regarded as thoroughly disproportionate on the ground of cost alone. The likelihood that a spectator would acquire an interest in political background information by watching top sporting events is not particularly high, especially in the "age of channel surfing." If public broadcasters centralise the "integration mandate" so much, they are unwittingly supporting the private broadcasters' argument that consistently calls for increased commitments in the core area of "integration broadcasting." The autonomy of public broadcasting is hard to demonstrate, especially in the area of sports broadcasts. It is even harder to accept the contention that hundreds of millions of Euros should be spent on sporting rights just to prevent "mi-

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<sup>29</sup> See BVerfGE, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 766 (1992).

<sup>30</sup> On this see also the ARD (Association of public broadcasters of the 1<sup>st</sup> and 3<sup>rd</sup> programmes) *Principle Paper on Prospects for Public Broadcasting*, *Epä Medien*, No.9, 6 February 1999, 1.

<sup>31</sup> *Id.* 21.

gration” of spectators from a program format that is not even the core area of integration broadcasting.<sup>32</sup>

Even an array of popular programmes and broadcasting formats that de facto still attract high audience ratings can no longer “bring an integration effect” (in the classical sense) against the background of conditions, sketched above, that have led to the fragmenting of the hierarchical forms used to maintain order in the “self-organized” society. Despite a multiplicity of common themes and cultural correspondences, there is no longer a unitary public; the fragmentation processes of post-modern society operate against that. The common interests tend to remain “free-floating,” and it is noteworthy that the public broadcasters want to derive an “integration effect,” specifically from sport and entertainment, that can only be understood in this foreground sense. The notion of the big “Saturday-night show” as a forum for social integration no longer has anything to do with classical integration broadcasting.

## II. From Scarcity of Transmission Possibilities to Scarcity of Programmes

The critique from the private side, where it points to trends towards adapting to conditions of commercialisation in the dual broadcasting system, definitely touches upon a weak point in the organization of public broadcasting. Indeed, it must be asked how the process of self-definition of public broadcasting in the form of proceduralisation through group pluralism can be seen as oriented around the changes in the system of multi-channel television: the group structure is a consequence of linking the broadcasting system to the political system. It presupposes centralization of society around a political forum and seeks to weaken the media link to politics through pluralisation, thus keeping it open to change. If the weightings shift inside the full programming line-up, and also in the network of sector programmes and additional information (on-line), the functionality of group pluralism is in danger. It then becomes necessary to contemplate supplemental forms of self-regulation of public broadcasting. In this respect, the idea of a more exact statutory definition of a simultaneously expandable “functional mandate” on public broadcasters and its linkage with a system of self-assessment and external assessment – an idea which has been formulated by Bullinger, one of the opponents of the system of public broadcasting as it stands now – is definitely worthy of further consideration.

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<sup>32</sup> The German public broadcasters had bought the programme rights of a major part of the matches of the next World Football Championship in 2002 at a price of more than 200 million DM whereas the right for the championship of 1998 cost less than 20 million DM. This is a reaction to the decline in audience figures all European public broadcasters have suffered from, *see* THE ECONOMIST of 5 August 1999

The public broadcasters have so far responded defensively, even if de facto experiments are already being made with “quality management” through programme monitoring.<sup>33</sup> However, a narrowly defined functional mandate – as Bullinger contemplates – is not appropriate.<sup>34</sup> That it is incompatible with the Federal Constitutional Court’s case law may no longer count for much as qualitative change in the broadcasting system will itself undermine that same case law.

What ultimately lies behind the report is the idea of the normality of a private-economy media structure, as opposed to a structure in which broadcasting has to be legitimated by a bigger effort to compensate for market shortcomings. Bullinger starts from the position that the broadcasting system is increasingly adopting the structure of the press, so that public broadcasting – as a vestige of the earlier system – requires a new justification.<sup>35</sup> However, this argument ignores the fact that the transformation of the media in the course of digitalisation is an innovation that calls for new legal forms. It does not require an extension of the normality of the market to the broadcasting system, and it must be remembered that solving the problem of scarcity of distribution of transmission possibilities (to alleviate which public broadcasting was partly founded) has created, or at least made visible, the new problem of programme production.

Scarcity of transmission possibilities will be increasingly replaced by a scarcity of programmes. The prices for attractive programmes (films, sport and “big events”) have been rising for years. This is not only because television must increasingly meet demands of a mass market, but also because of the specific risks of the television economy as an “economy of the new.”<sup>36</sup> The programmes must be new or unknown while also being able to meet existing audience expectations; otherwise, films would not be seen, even though they would have successfully gained ratings. This leads to a disproportionate rise in the price of particular genres. “The new” that has already gained attention (because of its “star” performers, particular transmission formats, series, and so on) engenders an exclusivity that tends towards monopoly. This becomes particularly clear in sport. Federal Football League

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<sup>33</sup> See Karl-Heinz Ladeur, *Rechtliche Möglichkeiten der Qualitätssicherung im Journalismus*, 45 PUBLIZISTIK 442 (2000).

<sup>34</sup> See generally BERND HOLZNAGEL & THOMAS VESTING, *SPARTEN- UND ZIELPROGRAMME IM ÖFFENTLICH-RECHTLICHEN RUNDFUNK* (Frankfurt/M. 1999).

<sup>35</sup> See BULLINGER, *supra* note 15.

<sup>36</sup> See GEORG FRANCK, *DIE ÖKONOMIE DER AUFMERKSAMKEIT* (München 1997); CARL SHAPIO & HAL R. VARIAN, *INFORMATION RULES* (Boston 1999); MICHAEL J. WOLF, *THE ENTERTAINMENT ECONOMY* (New York 1999); Nicolas Economides, *The Economics of Networks*, 14 INT’L J. OF INDUSTRIAL ORG. No.2, 14 (1996); Michael H. Goldhaber, *Die Ökonomie der Aufmerksamkeit*, TELEPOLICE No.4/5, 117 (1998).

matches are not competing with each other or with other types of entertainment. That makes the programmes increasingly more expensive, which endangers refinancing through advertising. This results in free television with a vast array of both expensive and inexpensive programmes that balance the increasing salaries which “stars” have to be paid.

The problems of advertising efficiency – loss of reach resulting from fragmentation of interests – are increasingly compelling free TV to question the traditional boundaries between advertising and new “hybrid” programme formats. The big private broadcasters have made unambiguous strategic declarations about this, and the trend will be difficult to halt without endangering the financing of free television by private broadcasters, and while the development of pay-TV is encouraged still further. This change also shows that the broadcasting system as a whole is in a process of transformation. Directing attention – as suggested by Bullinger – primarily at the pressure on public broadcasting to change will only lead to misunderstanding.<sup>37</sup> The trend towards developing new forms of advertising is particularly encouraged by the problems of financing ever-more-expensive programmes.

### III. Building “Brands” as an Alternative to the Functional Mandate?

In a multipolar media system that stretches beyond the old dual broadcasting system, and a media system that is escaping the constraints of the media economy, the increased pressure on private broadcasters to find additional funding sources is also a new reason for public funding. The foreground market criticism of public broadcasting underestimates the limitations on self-promotion that are faced by broadcasters that must provide innovation and are increasingly facing unclear and ever more diversified audience preferences. More than ever before, this forces television producers to create a “brand” identity that can hold audience attention and arouse interest even beyond the particular programme elements (such as a football report). Thus private broadcasters can no longer finance the costs of reporting football matches only by selling advertising slots. They must instead hope to make a profit from their whole programming line-up, through the possibility of placing specific self-advertisements or generally through (sympathy) promotion. This is in turn associated with the fact that the difficulty of determining audience preferences is demonstrated by a certain “volatility” of attention to the new.<sup>38</sup> Thus a younger public is more interesting to private broadcasters than an older one. A younger public is more open to new ideas and is easier to for the private broadcasters to mobilize. This also offers the possibility of developing a “brand” with which expect-

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<sup>37</sup> See Libertus, *supra* note 26.

<sup>38</sup> See FRANCK, *supra* note 36.

tations can be formed and tied down. Even future multi-channel television (in particular digital pay-TV) will not – contrary to Bullinger’s apparent expectations – be able to offer viewers individual programme segments, because the particular conditions of the media economy would make this much too risky for broadcasters.<sup>39</sup> They will instead develop exactly the sort of “brand” that can – indeed, under conditions of partial knowledge – attract audience attention.

This is another reason why public-service broadcasters cannot just offer the sorts of programme elements that are insufficiently produced by the private ones. The “brand” that the public broadcasters create must be capable of being autonomously determined and dynamic – that is, oriented to change – as this is the precondition for effective access to a larger public. Forcing the public broadcasters to offer particular programme segments from the outset would run counter to the dynamics of the new media system.<sup>40</sup> That is why public broadcasters must be open to all sorts of formats, including entertainment. The way in which a plurality concept can be formulated under changed conditions must be determined by the broadcasters in a process of self-definition, self-assessment and external assessment.

The importance of brand-building can be demonstrated by the example of advertising by pay-TV broadcasters. One such broadcaster, “Premiere World”, advertises with a bundle of programme offerings for which a common brand is established and to which specific advertising for particular programmes can be tied. Even under multi-channel television conditions, it makes sense to mandate that public broadcasters develop full programmes in accordance with an open plural concept. The particular focal points of “public service” television can be created by building sector channels and further additional offerings around various programme elements in accordance with changing audience habits. The development of pay-TV and Internet-TV may well lead to such a thorough change in the use of the media that even this concept of television can no longer be sustained. But for now, that is only speculation. If the production of varied programmes and programme segments is stressed, there is no current danger of thematically restricting the range of programmes offered by public broadcasters, or of limiting public broadcasting to traditional forms of programming.

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<sup>39</sup> See Economides, *supra* note 36.

<sup>40</sup> See HOLZNAGEL & VESTING, *supra* note 34.

E. Towards a New Role for Public Broadcasting Beyond a Narrow “Integration Mandate”

I. Proceduralisation of the Public-Service Obligations on Broadcasting

In accordance with the considerations set out above, it is possible for public broadcasters to develop a procedural form for thinking about what they do, through which they can define their own “brand” and make it transparent to the public. The existence of de facto definite adaptations to the private “brands” demonstrate the possibilities available and raise the question of legitimising individual programme sections. It is correct, as Vesting and Holznagel have stressed, that the autonomy of broadcasters must relate to the definition of their programming ranges,<sup>41</sup> but it is also necessary to build a procedural structural element into the regulation of public broadcasting. Public broadcasting must not be based only on group pluralism that ties the multipolar broadcasting system to the definition of a concept (albeit a variable one) against which it measures its programming practice. The need to have public broadcasters define themselves, imposed by law, is not just confirmed by unreflective trends by which they adapt themselves to conditions of commercialisation, but also by utterances from within public-broadcasting circles. For example, P. Voß, former ARD Chairman and Director of the Südwestrundfunk, has justified the transmission of football by public broadcasters’ by reference to the political need to legitimise licence fees.<sup>42</sup> This seems highly suspicious because it ultimately amounts to nothing but a reformulation of the “quota” as a criterion for programme choice. This theme is also contradictory because, as a result of the costs of transmission rights, there would need to be either a distribution through reallocation at the expense of other programme components, or the fee would have to be raised solely to finance sports transmissions. This is a dilemma that a public broadcaster should not have to face (by contrast, it is not a philosophically problematic issue for private broadcasters). The shift in emphasis towards production also justifies a heavier commitment by public broadcasters to developing online and other media services, particularly the Internet and other new technologies (such as UMTS).

There are similar discussions about the “functional mandate” of public-service broadcasting in other countries. In Britain, for instance, this debate concerns the position of the BBC. The commission established to review the role of the BBC has suggested shedding the BBC’s commercial activities (such as BBC World) through privatisation and otherwise financing BBC resources by a tax on the purchase price of digital televisions. Thus BBC use of the Internet and other new forms of trans-

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<sup>41</sup> *Id.*

<sup>42</sup> *Epd medien*, 10 Jan. 2001, No. 2.

mission would be publicly financed but the BBC would not return to its traditional function.<sup>43</sup> In the meantime, the BBC has so greatly extended its Internet offerings that it is referred to as the best English-language Internet website, and its content is frequently downloaded. In the future, this will certainly make it harder to demarcate some of the free offerings from those to which access is offered through the portal function (with their corresponding advertising possibilities). This confirms the idea that the future of public broadcasting has to be determined with a view to the possibilities for developing Internet television and other multimedia offerings, and not just by the statutory reference to the status quo.

The “functional mandate” of public broadcasting cannot consist only of a finite list of substantively fixed functions (integration, example, forum, and so on.). It must instead guarantee more flexibility for self-definition by taking into account the growing importance of content-production. However, this ought not be equated with unstructured autonomy. The autonomy of programme development should be expanded to meet the multiplicity of new possibilities, and the requirement to explore experimental areas should be governed through procedural rules concerning development strategies, and forms of self-assessment and outside assessment for the variable task of public broadcasting. ZDF, with its extensive online offerings, meets this need for experimentation with a new variable network structure of diverse components grouped around a “full programme.” This sort of structure, which allows a flexible network of full programmes, sector programmes, Internet offerings, and so on, should be the object of an open “functional mandate” for public broadcasters.

A new regulatory perspective, focusing on the objective of maintaining programme diversity in a new form, is possible when we take into account the changed conditions for the media economy that have been brought about by the disappearance of frequency scarcity. Digital pay-TV will probably develop as the third pillar of a new television system in which the individual components will be sector programmes. It is conceptually impossible to attach pluralism requirements to such programmes. But brand building for programme packages could be a starting point for a strategy that guarantees plurality in the new media system. The linking of programme offerings into a network (full programmes and supplementary programmes or online services, etc.) or into a package of sector programmes offered through a “brand” could and should be tested against the diversity of the package. That is, does the package also contain news offerings, cultural transmissions, and so on, which can benefit from the advertising attracted by the total programming line-up. The “brand” would then have to guarantee diversity and professional quality.

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<sup>43</sup> See THE ECONOMIST, 26 June 1999; THE ECONOMIST, 5 August 1999.

## II. Regulation Under Conditions of Uncertainty

This idea that the new media world is still evolving into new forms is important for defining the practical development of media law. It can be assumed neither that the old the media system will continue to develop nor, in spite of the variety of possibilities, that a new paradigm is emerging that will find its unity at a higher level of abstraction. We can observe a multiplicity of positions and hybridisations between various services, endpoint devices and transmission forms, but the thoroughly appropriate formulation about the emergence of a “network of networks”<sup>44</sup> should not blind us to the fact that this is concerned with a diversity of networks whose importance and linkages are anything but clear. In the past, the media tended to develop slowly along a particular path. The new range of possibilities rules out expectations of the sort of unity based on initial conditions, and it also excludes the possibility of simultaneously developing an array of development paths or of bringing all the possibilities together within the Internet. The wealth of possibilities<sup>45</sup> creates its own limits: the diversity of programmes has fragmented the relative homogeneity of the television-viewing public, but it has also exposed new limits, such as those associated with attracting the attention of viewers.<sup>46</sup> The new media world is already demonstrating that the technologically expanded area of options is setting new economic limits, particularly with regard to funding.

The extent to which pay-TV can succeed alongside the “old” free TV or new Internet entertainment alternatives is not certain,<sup>47</sup> though it does initially appear to have market viability. The new programme strategies are not just competing with other providers in their own markets, but with a plethora of quite different markets. This makes it harder to assess the public’s willingness to pay, for example, for pay-TV offerings. It is clear that many viewers are interested in football transmissions, but it is less certain that they are also willing to pay as much as it costs the broadcasters to purchase the rights. This problem can be explained through the peculiarities of the network economy in which the attractiveness of a television programme is much more closely connected with the number of viewers than are

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<sup>44</sup> See Eli M.Noam, *From the Network of Networks to the System of Systems*, 18 TELECOMMUNICATIONS POLICY 286 (1994).

<sup>45</sup> For convergence of the media see Christian Koenig & Ernst Roeder, *Converging Communications, Diverging Regulators?*, 1 INT’L J. OF COMM. L. & POL. No.1 (1998); CONVERGENCE IN COMMUNICATION AND BEYOND (E.Bohlin ed., Amsterdam 2000).

<sup>46</sup> See SHAPIRO & VARIAN, *supra* note 36, at 6.

<sup>47</sup> See *What the Internet Cannot Do*, THE ECONOMIST, August 19<sup>th</sup> 2000; for the complexity of the next steps of integration of all electronic devices through “blue tooth” see *Is Blue Tooth Worth the Wait?*, THE ECONOMIST TECHNOLOGY QUARTERLY, 9 December 2000.

material goods.<sup>48</sup> Pay-TV requires attractive – that is, expensive – films in order to gain viewers, but a broadcaster can only afford to buy those if it has already acquired many viewers. In this context it is easy to get into a vicious circle.

This also applies to commercial entertainment on the Internet. Many companies in the entertainment industry have invested huge amounts of money in the purchase of Internet firms. However, the break-point of commercial success in this area remains out of reach, even though the technical barriers to displaying films and expensive media products on the Internet are being overcome faster than could be assumed a few years ago. The Economist recently had a cover story about “what the Internet cannot do.” The article presumed that the future of the Internet might not lie in the area of traditional mass entertainment after all. Its future might instead be found in other individualized forms of utilization that could emerge there for small segments of the public that cannot reach the high yields needed in order to finance products such as expensive films. The fragmentation of the public makes it harder to finance both expensive offerings through advertising, and pay-TV programmes.<sup>49</sup> Even a short film costing ten thousand dollars requires a hundred thousand viewers in the United States in order to secure advertising funding; only a few offerings reach this threshold. It is even harder to induce users to pay for programmes when there are so many gratis offerings on free-to-air television. Below blockbuster level, which can only be reached via a longish chain of exploitation, every film is competing with a frightening array of films and other offerings.<sup>50</sup> Thus films generally need marketing to catch the public’s attention and flag their novelty. According to a leading AOL manager, T. Leonsis, the company’s purchase of Time-Warner was not a signal of a new commitment to entertainment on the Internet, but had more to do with a strategy for obtaining economies of scale through combining the marketing of various information offerings.<sup>51</sup> The alternative wealth of the new information technologies is paradoxically leading to a partial self-blockage of development because it is increasingly harder to mobilize users to activate the investments needed for entertainment offerings on the Internet. This includes the primary payment for the product, and also users’ purchases of more powerful computers or other new receivers, or the network equipment (ADSL, ISDN, Video Streaming, etc.) needed for broadband Internet usage. Only one per-

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<sup>48</sup> See CARL SHAPIRO & HAL VARIAN, *INFORMATION RULES. A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 109 (Boston 1999); EUROPEAN COMMUNICATION COUNCIL REPORT, *DIE INTERNETÖKONOMIE* (Berlin 1999); DON TAPSCOTT, ET AL., *DIGITAL CAPITAL. HARNESSING THE POWER OF THE BUSINESS WEBS* (Boston 2000).

<sup>49</sup> THE ECONOMIST, 19 August 2000.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

cent of those who could have access to broadband telephone in the United States have actually taken advantage of it. This factor increases the difficulties inhibiting profit in the network economy.

The same problem will emerge with UMTS. It is clear that its technical capabilities (it integrates narrow and broadband uses of all kinds through a mobile telephone) are attractive to a wide public audience. But how much will these consumers want to pay for these new uses for their phones? UMTS will be competing with a variety of gratis offerings, and the advantages of the network economy – the enormous cost advantages once the profitability threshold is crossed – are increasingly harder to achieve in conditions of increasing competition. Thus, there will be barriers to the individualization of media utilization that is frequently predicted for the time after the age of frequency scarcity. New individualized forms of media utilization, in which the financial expenditure on content is not exorbitantly high, will undoubtedly emerge. One always needs a relatively big public in order to profit from the broadcast of expensive programme rights. The traditional media transmission forms will continue to play a big role in this forum, and this is another consequence of the growing restriction of programme rights. The cheapening and multiplication of transmission possibilities has increased demand and thus contributed to an enormous rise in prices for programming rights. But the quantity of attractive programme content is inevitably limited; this is particularly obvious with sporting rights. Here a new monopolization effect arises through the organization of “tournaments” (the term “tournament effect” comes from the economic literature), which simply mean that the “winner takes it all.”<sup>52</sup> Film markets are similarly affected. For example, the aforementioned blockbuster effect occurs where marketing fixes attention that is supported by the “star” phenomenon.<sup>53</sup> This is enhanced by its success and enables the advantages of the network economy to be reached. Above a minimum threshold, high profits can be secured without incurring any additional costs worth mentioning. Exploiting a film costs almost the same regardless of whether it reaches a hundred thousand or a hundred million spectators. This is itself a reason why there cannot be a range of attractive content corresponding with the modest demand. If there were a much greater range, the film rights would have to be cheaper and the network effects would thus be even harder to reach. The profit interest of film producers will thus tend to run counter to this development.

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<sup>52</sup> See SHAPIRO & VARIAN, *supra* note 48, at 177.

<sup>53</sup> See Abraham S. Ravid, *Information, Blockbusters, and Stars: A Study of the Film Industry*, 72 J. OF BUS. 463 (1999); Arthur De Vany & David W. Walls, *Does Star Power Reduce the Terror of the Box Office?*, 23 J. OF CULTURAL ECON. 285 (1999); Karl-Heinz Ladeur, *Die vertikale Integration von Film-, Fernseh- und Video-Wirtschaft als Herausforderung der Medienregulierung*, 46 RUNDFUNK UND FERNSEHEN 5 (1998).

F. Consequences for Media Regulation: What is Left of the Diversity Requirement for Private Broadcasters under Conditions of Multimedia?

I. A New Look at the New Media – Toward a New Regulatory Approach?

What consequences will these briefly sketched developments have on media law and media regulation? In the literature and in practice, two alternatives can be noted. There are those who stick to the paradigm of existing broadcasting regulation and perhaps desire cautious extension of regulation to new services, particularly the Internet.<sup>54</sup> It is argued that the benefits of using the openness of the “constitutional broadcasting” concept found in the Constitutional Court's case law (“topicality, attractiveness and breadth of a presentation”) to make regulatory operations more dynamic,<sup>55</sup> will encourage the classification of “Internet television” as a kind of broadcasting (especially if it can reach a minimum quality and a minimum user figure). For other media services, which are not clearly distinguishable from broadcasting, using the clause of Article 20(2) of the Interstate Broadcasting Agreement might also be useful.<sup>56</sup> For services resembling broadcasting, it provides a procedurally conceived (because of the requirement that all the media companies and all the Länder [Federal States] agree) transition from free access towards broadcasting regulation.<sup>57</sup> The demarcation of broadcasting and individual media services within the new media landscape has often been an object of dispute.<sup>58</sup> This distinction seemed to lose much of its importance when the public – like the transition possibilities – fragmented, and these conflicts are now little more than shadow-boxing. It is certainly not unimportant whether or not an operator needs a broadcasting permit to provide a service. However, the decisive feature of broadcasting regulation seems to me to lie in the substantive requirements concerning the diversity of a programme in relation to both individual programme components and the various political and cultural tendencies in a society.<sup>59</sup> However, if the multimedia

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<sup>54</sup> For the controversy on the regulation of “broadcasting services” over the Internet see HOFFMANN-RIEM, *supra* note 19, at 241.

<sup>55</sup> See Koenig & Roeder, *supra* note 45; Karl-Heinz Ladeur, *Rundfunkaufsicht im Medienzeitalter zwischen Ordnungsrecht und Selbstregulierung*, 3 KOMMUNIKATION & RECHT 171 (2000).

<sup>56</sup> [www.alm.de/gesetze](http://www.alm.de/gesetze)

<sup>57</sup> “Media Services” with a limited effect on public opinion (but what does this really mean?) are not regarded as “broadcasting services” and are treated like the press (e.g. for advertising there is only a basic requirement concerning separation of content and advertisement and not on the number of interruptions etc. as in TV).

<sup>58</sup> See HOFFMANN-RIEM, *supra* note 19, at 205, 241.

<sup>59</sup> See BVerfGE 73, 118 (160); HESSE, *supra* note 26, at 238.

age means that the Länder media companies can no longer give full programmes (in the traditional sense) priority over sector programmes because frequencies are no longer scarce, then diversity standards almost entirely lose their importance because departure from diversity can be presented as a special interest channel.<sup>60</sup> Under such conditions, regulation loses much of its importance. Of course there are still important differences between broadcasting and media regulation. This particularly concerns advertising (interrupting the programming of films and television plays), which is subject to a narrow restriction that does not apply to the presentation of a film as a media service.<sup>61</sup>

It seems doubtful whether this actually has major practical importance since films and other programmes with more advertising would quickly fail due to an acceptance threshold. However, a certain distinction does remain, but its importance will decline because we have to expect new forms of advertising that bring films and sports transmissions together with e-commerce.<sup>62</sup> In other respects, the differences between broadcasting and general restraints on media freedom are not great, particularly those that concern the protection of young people, criminal law and pornography.<sup>63</sup> These differences are not very large if one considers that media services that endanger young people have to be fitted with access control, or a possibility of blockage (see §12 of the State Treaty on Information Services, *Mediendienstestaatsvertrag*, and the new Treaty on the Protection of Minors from the Media, *Jugendmedienschutzstaatsvertrag*).<sup>64</sup> There are certainly different jurisdictional responsibilities for supervision over media services and broadcasting (we need not go into these here). And dissemination over cable networks retains certain privileges for programmes broadcasts vis-à-vis media services, but these will lose their importance in the medium term.

The core aspect of broadcasting supervision – the thing that has differentiated broadcasting freedom from other media freedoms – is the obligation to guarantee a

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<sup>60</sup> See for a new approach of defining broadcasting Wolfgang Schulz, *Jenseits der Meinungsrelevanz*, 40 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 487 (1996).

<sup>61</sup> All that applies is the general requirement to separate advertising from programme. Art. 13 *Mediendienstestaatsvertrag* (MDStV – Interstate Media Services Agreement), which is the interstate agreement on new media services that are not regarded as “broadcasting” in the traditional sense.

<sup>62</sup> For the legal dimension related with data-protection See Karl-Heinz Ladeur, *Datenverarbeitung und Datenschutz bei neuartigen Programmführern in “virtuellen Videotheken”*, 3 MULTIMEDIA UND RECHT 715 (2000).

<sup>63</sup> See §12 MDStV and the new rules on protection of minors from media contents in the *Jugendmedienschutz-Staatsvertrag* (JMStV – Interstate Agreement for Protecting Youth from the Media).

<sup>64</sup> See Wolfgang Schulz, *Jugendschutz bei Tele- und Mediendiensten*, 1 MULTIMEDIA UND RECHT 127 (1998).

“positive order” for broadcasting oriented towards diversity through organization and procedures (to use the Federal Constitutional Court’s description).<sup>65</sup> It is important to note that this will become practically obsolete. It is now scarcely conceivable that a broadcasting programme would be rejected for lack of diversity.

This is the occasion to call for a new trend in the current debate. Should we seek the dismantling of constitutional regulation as a whole and a transition to restraint controls in the classical liberal sense, as well as merger controls through economic law?<sup>66</sup> This variant appears to have some advantages, and this impression is enhanced by the losses of function for broadcasting supervision.

On closer inspection, however, the picture is more differentiated. While one cannot entirely reject the suspicion that the traditional form of programme supervision will largely lose its importance, this does not necessarily mean that we have to do without regulation entirely. Programming diversity continues to be a highly valued, scarce good, but its function and the way in which it is promoted need to be rethought. While the fragmentation of the public and its spheres will not go as far as was often assumed at the time the break-up of the public monopoly and when the transition to a “dual broadcasting system” began, there is no longer the possibility of reaching the general public through an overall programme addressed to the public at large.<sup>67</sup> This concept was tailored to the conditions of frequency scarcity that offered the public few alternatives. Today, viewers can inform themselves “one-sidedly,” even in conditions in which there is so much programme diversity that the diversity of individual programmes is no longer an aim that makes sense.

Pluralism should now be reformulated as a goal and adapted to the new risks of blocking innovation and the new potentials in the “network of networks.” The media are no longer separated as in the past but there is a rising interchangeability and a practice of linking beyond traditional borders. In conditions of multimedia there is no longer a homogenous public nor a balanced programme comprising many different aspects in a shared framework. These new conditions are particularly typified by the paradox that occurs when scarcity of attention exists alongside a potential multiplicity of possibilities, and when the conditions of the network economy can lead to new one-sided developments that cannot simply be explained by options for the public. The price increases for programming rights themselves offer an important starting point for a new concept of pluralism that is no longer

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<sup>65</sup> See BVerfGE 73, 118 (160); HESSE, *supra* note 26, at 238.

<sup>66</sup> See ELI M. NOAM, CYBER-TV. THESEN ZUR DRITTEN FERNSEHREVOLUTION (Gütersloh 1993); CHRISTOPH ENGEL, MEDIENORDNUNGSRECHT (Baden-Baden 1996).

<sup>67</sup> See BVerfGE 74, 297 (334); HESSE, *supra* note 26, at 118.

related to a programme but to the wealth of available alternatives. Such disproportionately expensive programming rights – the prices of which are to be attributed to factors such as economically irrational “star” effects rather than market rationality – “consume” diversity because the budget (which is inevitably limited for both firms and users) is placed under unhealthy strain. The victims are other programme components and information offerings.<sup>68</sup>

## II. Regulation of Diversity in Multimedia Conditions

One method of compensating under multimedia conditions might be to create new levies. For example, there could be additional levies to promote new films over and above film-promotion levies that already exist.<sup>69</sup> We might also impose a progressive purposive tax that the sport clubs would have to raise in order to promote cultural alternatives. Or we might think of granting public broadcasters a gratis or low-cost extended second reporting right, to be taken up an hour or so after the start of broadcasting of a free-sale transmission right. This would have to be legitimated as a kind of “fair use” of openness to compensate for the high prices for sporting rights that cannot be explained through market rationality alone. The narrow time restriction on use leads to monopolization of attention and correspondingly heightened profits.<sup>70</sup> This sort of “fair use” right could lower the value of first-transmission rights, as the monopoly right would be correspondingly limited.<sup>71</sup>

These are two possible elements of a regulatory strategy that would be more oriented to the new peculiarities of the network economy emerging in multimedia conditions. Their flexibility also fits the openness of development within the “networks.”<sup>72</sup> There would be little sense in taking a particular procedural model of multimedia development as a starting point. It is instead important to “immunize”

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<sup>68</sup> See generally for such a conception of tackling the issue of pluralism and diversity at a meta-level ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION. HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 184 (New York 1999).

<sup>69</sup> See Ladeur, *supra* note 62.

<sup>70</sup> See Campbell Cowie & Mark Williams, *The Economics of Sports Rights*, 21 TELECOMMUNICATIONS POLICY 619 (1997).

<sup>71</sup> The German Constitutional Court has regarded the imposition of a (limited) right to report on e.g. football associations as being constitutional but not the exclusion of financial compensation BVerfGE 97, 228.

<sup>72</sup> For the discussion on copyrights on the Internet see Trotter Hardy, *Property (and Copyright) in Cyberspace*, in THE UNIVERSITY OF CHICAGO LEGAL FORUM 217 (1996); Henry H. Perritt jr., *Property and Innovation in the Global Information Infrastructure*, in THE UNIVERSITY OF CHICAGO LEGAL FORUM 261 (1996).

the whole development with more diversity, and to bet on incentives to enhance diversity that might be able to interrupt the self-blocking tendencies within the open option space.

This includes strengthening public broadcasting. The function of public broadcasting should no longer be based on the model of the “integration” of a unitary public (although it usually still is). It should be more strongly established as a counterweight to the rapidly strengthening potential one-sidedness of the network economy, although it should certainly not be intended to offer only what private providers neglect<sup>73</sup> (to do so would amount to creating a ghetto, as can be seen with “public-service broadcasting” in the US). The offer of qualitatively good content should be increased in all programme sectors (including entertainment) and should be freed from the risks and constraints of the network economy. It should not provide for minorities, who find more information in multimedia conditions, but should enable compensation for the one-sidedness of private providers facing the constraints of the network economy, and should make experimentation possible. It should also develop popular transmission formats and professional quality standards for all programme components. Even if it has not become irrelevant, the old integration model is no longer sufficient to legitimise public broadcasting. The breakdown of boundaries between services means the functional mandate on the broadcasters should also be extended to online services and to the establishment of portals and search engines.<sup>74</sup> The organizational structure of public broadcasting no longer seems enough to guarantee the new conception of diversity oriented to innovation and alternative wealth, so proceduralising the mandate should be guaranteed through a public constraint on self-definition and self-assessment of the programme. One might also consider the creation of an independent commission to supplement self-assessment with external assessment, with the specific performance of public broadcasting being considered from both perspectives.<sup>75</sup> A first step

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<sup>73</sup> According to the German Constitutional Court the constitutionality of private broadcasting is linked to the condition that public broadcasters fulfill their democratic obligation to guarantee diversity BVerfGE 73, 118 (157).

<sup>74</sup> The German law now explicitly legalizes offerings of online-services of public broadcasters; See Michael Libertus, *Kommunikationsrechtliche Einordnung neuer nichtlinearer digitaler Dienste*, 44 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 555 (2000); in the new formulation of the 7<sup>th</sup> Rundfunkstaatsvertrag (2004) this possibility has been reduced by a the requirement of a closer link to broadcasting programmes in the traditional sense whereas the discussion in the UK seems to be much more open towards a more comprehensive approach to public communication beyond the traditional limits of public service broadcasting, See the contributions in FROM PUBLIC SERVICE BROADCASTING TO PUBLIC SERVICE COMMUNICATIONS (Damian Tambini & Jamie Cowling eds., London 2004).

<sup>75</sup> See the overview of the discussion in Karl-Heinz Ladeur, *Der Funktionsauftrag des öffentlich-rechtlichen Rundfunks – auf Integration festgelegt oder selbstdefiniert?*, 48 MEDIEN UND KOMMUNIKATIONSWISSENSCHAFT

toward a more adequate approach to the evaluation of public service requirements imposed on public broadcasters under conditions of competition with private broadcasters has now been accomplished by the seventh Rundfunkstaatsvertrag (RStV – Interstate Broadcasting Agreement) enacted this year, which expects public broadcasters to develop a system of self-reporting and self-evaluation of their public functions.<sup>76</sup> In the same vein of a proceduralised evaluation of public broadcasting the British House of Commons has asked the new supervisory agency for telecommunications and broadcasting (OFCOM) to review the fulfillment of public service requirements by the BBC in particular.<sup>77</sup> OFCOM will also focus on a functional view of the goals of public service requirements and not try to start from a rigid conception of a specific type of programme the BBC has to deliver.<sup>78</sup> However, one has to bear in mind that the approach of the new UK Communications Act of 2003 is still rather traditional in its focus on, among other things: “fair and well-informed debate,” “comprehensive coverage of news and current affairs,” and “programmes that reflect the lives and concerns of different communities and cultural interests and traditions within the United Kingdom.”<sup>79</sup>

As the contradictory scarcity of attention and the wealth of possibilities dominate the development prospects of multimedia, it will become more important to include the potential discriminatory effects of the new mediation services – such as electronic programme guides (in digital television and in virtual videotheques), portals, search engines, and so on – in the list of areas subject to regulation. The multiplicity of objective alternatives and the openness of subjective preferences that are made possible only by marketing mean that one cannot trust such issues to the decisional sovereignty of users, especially as information (in the broadest sense) is an “experience good.”<sup>80</sup> This means that, in order to be able to decide among al-

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93 (2000); and the more detailed analysis in MARTIN EIFERT, KONKRETISIERUNG DES PROGRAMMAUFTRAGS DER ÖFFENTLICH-RECHTLICHEN RUNDFUNKANSTALTEN (Baden-Baden 2002).

<sup>76</sup> RStV § 11 par. 4.

<sup>77</sup> For an analysis of the reform of media supervision in the UK see Stuart Weinstein, *OFCOM, Information Convergence and the Never Ending Drizzle of Electric Rain*, INT’L J. OF COMM. L. AND POL. 8 (2004) available at [www.ijclp.com](http://www.ijclp.com)

<sup>78</sup> See OFCOM Review of Public Service Television Broadcasting, available at [www.ofcom.gov.uk](http://www.ofcom.gov.uk) which will start with a public consultation; See from the English legal discussion Georgina Born & Tony Prosser, *Culture and Consumerism*, 64 MODERN L. REV. 657 (2001).

<sup>79</sup> Clause 264 of the UK Communications Act (2003); See Robin Foster, et al., *Measuring Public Service Broadcasting*, in Tambini & Cowling, *supra* note 74, at 170.

<sup>80</sup> See Schröder, *supra* note 3, at 28; SHAPIRO & VARIAN, *supra* note 24, at 85, 91; generally B. JOSEPH PINE ET AL., *THE EXPERIENCE ECONOMY* (Boston 1999).

ternatives, one always needs prior knowledge (just as one gains interest in a book only if one has first learnt to read and expanded one's capacity for understanding). When the list of options is relatively open, marketing and presentation of films (and other offerings) plays a significant role. Rapidly self-strengthening trends can be sparked off, and these can become disproportionate in the network economy, and ultimately occur at the expense of other cultural provisions. It is therefore necessary to check that the design of mediation services does not create discrimination. It is also important to reformulate diversity requirements in such a way that providers are obliged to run promotions, according to a catalogue of set criteria, in the interest of creating diversity.<sup>81</sup> This would apply even to non-commercial services that are deemed (perhaps by Länder media broadcasters) to deserve promotion. Here we might contemplate new forms of regulated self-regulation that offer creative possibilities to providers. Electronic programme guides<sup>82</sup> in television formats or in new virtual videotheques will create new diversity problems. The aim should be to subject the selection and search criteria of programme guides to procedural openness obligations. In order to create diversity, alternative offerings should be provided, which will be specified as "particularly valuable" according to a public promotion system. This will not only help to prevent abuse of the law at a meta-level of openness to innovation and the production of alternative wealth according to a competition law model, but it will also use law to create a new variant of positive order that is adequate to the network.

We might also consider creating privileged access to the offerings of public broadcasters. This could be linked to general considerations about whether diversity regulation should be re-approached at a higher level of abstraction. Should we ask about pluralism in marketing strategies? We might perhaps also conceive of a review structure that does not look for apparently fixed limits on the admissible. Borrowing from distinctions in environmental law, we might think of going beyond the limits of "warding off dangers" in the classical sense, towards reducing "trash" (that is, the quantity of poor-quality programmes) as a form of "risk aversion." Concrete cause-and-effect relationships between the content and consequences of media programmes can hardly be confirmed, but the fact that the media affects the collective intelligence of a society – its social capital – is presumably beyond dispute. We might therefore consider imposing quality management on the firms themselves, and no longer tying individual programmes to diversity standards.

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<sup>81</sup> See generally SHAPIRO & VARIAN, *supra* note 48.

<sup>82</sup> See only HOFFMANN-RIEM, *supra* note 19, at 141.

In the area of advertising regulation,<sup>83</sup> we should similarly focus on the new conditions of flexibility and the transitions between services and formats. While it seems doubtful whether the relatively rigid rules separating advertising and programmes are still sensible for all formats, it is clear that a separation is now hardly applicable to sport transmissions.

New ways of linking programming, advertising and E-commerce will have repercussions on film content and sports transmissions. For instance, can the aforementioned possibility of clicking on a film actress's dress or a tennis player's tee-shirt, and the transit to E-commerce, still be covered by the traditional principle of separation? Do we not need new quantitative restrictions in the case of films? Might more flexible rules be more appropriate for sports transmissions?

This blueprint would require an appropriate organizational supervisory structure. It demands unitary supervision throughout the federation. This is not just because of the unitary working of multimedia, but because this sort of step would permit the necessary specialization of knowledge needed for observation of complex media developments. A new supervisory board, common to all the Länder, ought also be given relatively broad discretionary powers of assessment. This would be appropriate to the uncertainty of future development and would enable the board to cope flexibly with developments. This version of supervision also seems constitutionally acceptable, as it seeks to duplicate the old model's guarantee of diversity. In other respects, the point would be to keep enough openness available to observe and deal with uncertainty. Implementing such a conception would be facilitated and underpinned by Europeanisation.

Perhaps the present type of regulation can still be maintained for a while, but it will ultimately be swept away by the rapid internal change in the multimedia system. New forms and procedures of supervision must be developed to take up the challenge of the development towards a "network of networks."<sup>84</sup> An attempt must be made to do this!

### G. Summary

This paper has recommended that we go further. We should take more account of the changes from within private broadcasting in the light of the rise in price of pro-

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<sup>83</sup> See generally RICHARD ADLER, *THE FUTURE OF ADVERTISING* (1998); with reference to TV advertising Jamie Cowling, *From Princes to Paupers: The Future for Advertising funded Public Service Television Broadcasting*, in Tambini & Cowling *supra* note 74, at 61.

<sup>84</sup> See Ladeur, *supra* note 75.

gramming rights and the need to develop new advertising forms. And, against this, we should stress the importance of a programming conception that will be controlled by self-assessment and that is free from the constraints of the media economy.

Over and above this, we need to understand the importance of self-promotion for programming networks, and their need to make brand-building agreements. Over and above the merely superficial quota orientation, we should give public broadcasters a chance to develop a new concept of diversity in networks by establishing a "brand."

Public broadcasters ought to drop their defensive stance and be more open to change. The simple opposition of market and "public mandate" is no longer adequate in this context and it could and should be shown that specific media-economy conditions continue to justify the concept of a conception of public broadcasting determined by media autonomy. In the future, there will be a greater need to take the development of international public-service broadcasting into account in a comparative fashion.