17 Regulating the media: four perspectives

Amit M. Schejter and Sangyong Han

The media of mass communications are social institutions with the technological capacity to disseminate mass-produced messages (Turow 1992). In contemporary society they have become the chief distributors of symbolic content. Media regulation is the authoritative establishment of the quantity, quality and type of messages that they can or are required to distribute in a given social order. As a result, and within the context of defining the term "regulation" as set in Chapter 1 of this volume (Levi-Faur 2011) it is unworkable to discuss media regulation within a narrow definition of "regulation" that is limited to secondary legislation, as media regulation is a central and all-encompassing activity determining the extent of free expression in a given society, and all legal, economic and social means of governance can be employed in order to reach the same ends.[1] The means for media regulation differ among political systems as contemporary media regulation emerges from patterns embedded in deep-seated ideological traditions.

In order to analyze the different models of media regulation, both historically and contemporarily, this chapter identifies four perspectives employed to justify it: economic, technological, cultural and democratic. These four perspectives correspond to some extent to the chronological development of media regulation, as media regulation is as old as the media themselves. The chapter analyzes each of these perspectives, sets them within their historical context and ideological underpinnings, and provides examples for the development and changes in media regulation as they pertain to each of them.

17.1 THE ROOTS OF MEDIA REGULATION

Despite its early Asian beginnings, printing technology in its modern form was introduced in Europe (Green 2003a), where it was met by strictly governed authoritarian hierarchical societies controlled by the monarchy and the church (Siebert et al. 1956). The founding of the United States and the eventual ratification of the Bill of Rights (and within it the First Amendment to the Constitution, which promised unlimited press freedom) set press regulation on a different and free-of-government-intervention course in the Americas, inspired by the French Revolution. In Europe, however, including in post-revolutionary France itself, the adoption of a free press paradigm had a rocky beginning and suffered almost immediate setbacks (Walton 2009). The same can be said of the United Kingdom, in which the liberal ideas of the 17th and 18th centuries, advocating freedom of expression as an individual natural right and as an exercise without which the truth cannot be tested, contributed to the erosion of press controls; however, in lack of constitutional safeguards the actual defense of free speech amounted for decades to little more than "the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written" (Dicey 1959 as cited in Barendt 2005: 40). Unlike the Western individualistic and emancipatory ideals,

Asian conceptions of free speech emanated from consensual and group-oriented roots (Hsiung 1985). As a result, "the 'Asian-values' school has used this line of reasoning to equate press freedom with press-government harmony" (Gunaratne 1999: 206). Critical observers of the endorsement of "Asian values" find them inherently rooted in the pre-modern social-political system of the oriental monarchy, thus not only obsolete, but also susceptible to be employed by authoritarian elites in the same confounding manner as "Western values" had been used in the West (Sen 1997; Li 1999).

17.1.1 Media Regulation as Economic Regulation

Information products embody unique characteristics, which differentiate them from an economic perspective from tangible products. Information is a public good; thus its sharing does not eradicate its value (Owen 2002). Still, an economy to which information goods are central, what is commonly referred to as an "information society," is based on the understanding that information is a commodity (Schement and Liverouw 1988). The distinction between "information products" and "information economics" and the economics of tangible goods, however, was not recognized initially when an economic perspective was employed to regulate newspaper markets in the US.

Newspapers, the first "mass" medium, emerged initially as political pamphlets. The industrialization of the newspaper with the invention of the "penny press" led to its transition into a commercial medium[2] that enjoyed extensive freedoms, and news became a mass commodity (Hamilton 2004). In 1934 the United States Supreme Court agreed to review antitrust complaints against the press and determined that the business of newspapers was not exempt from such scrutiny. Thus an economic rationale and procedure opened the door to government oversight of an industry perceived until then best exempt from government regulation.

Unlike the printed press in the US, which emerged through unregulated private enterprise that limited government intervention to the "economic" frame, broadcasting was launched as a private enterprise and has been subject to licensing since 1912 and subjected to regulations aimed at ensuring that it serves the "public interest" since 1927. This determination allowed the Federal Communications Commission (FCC), an economic regulator (Yandle 2011) created by the Communications Act in 1934,[3] to manage electronic media regulation, in addition to other considerations, as an "economic" issue and use the "economic rationale" to regulate speech. Broadcasting licenses were at first granted on a local basis, creating "broadcasting markets," and early policy determined by the FCC that it would not be in the public's interest for a private organization to be granted more than one broadcast license for each such market. The FCC rationalized the rule at first as necessary in order to protect the public from the dangers emanating from the concentration of economic power.

From a narrow focus on concentration, economic media regulation expanded to include enhancement of competition. The 1934 Communications Act "expressly forbids ownership or control of stations where the purpose or the effect thereof might be to substantially lessen competition or to restrain commerce" (*Superior Oil Company v. Federal Power Commission*), and the context of the Communications Act and its language focus on the economic rationale for ownership regulation, as was constantly repeated in its interpretation by the courts during the Act's early years. The economic perspective with

regard to the electronic media, however, was mostly an American paradigm for most of the 20th century, as the electronic media in the rest of the world were in the hands of governments. The late-20th-century emergence of private media across the globe introduced regulations embedded in the economic perspective in other countries as well. Those were mostly focused on the governance of the different markets commercial media created – the market for content, the market for distribution and the market for advertising. The former two led to regulatory control of horizontal and vertical mergers, while the latter, though an economic activity, led to the development of a distinct arena of regulation, which is invoked by cultural concerns as well (Ginosar 2011).

17.1.2 Media Regulation as a Technological Challenge

One perspective that has historically been shared by governments and lawmakers in the US with those in other countries is the technological, an angle that developed into a justification for content control both directly and indirectly. Content can be affected both directly and indirectly, as intended and as unintended, as a result of technological and technical determinations (Turow 1992: 28). The technological perspective was first rooted in the unique physical attributes of the broadcasting medium. The reliance on a new technology, the radio, and on a new distribution medium, the electromagnetic spectrum, challenged governing bodies worldwide. The appearance of subsequent technological developments such as cable distribution of video, satellite distribution, and content service over mobile telephone devices and ultimately the emergence of digital distribution and the Internet, each in its time, served as the justification for the creation of new rules, which were aimed at and eventually had an immediate effect on the distribution of information and ideas.

The first technologically induced radio law in the United States was enacted in 1910. However, it did not target content, as it pertained to the need of ocean vessels to carry emergency communications (Douglas 1987: 220). Its immediate successor, the Radio Act of 1912, while again targeting emergency communications, empowered the Secretary of Commerce with the authority to license the airwaves (Douglas 1987: 234). The road to introducing content-related considerations to the licensing process was not long. In 1927 the US Congress passed a new Radio Act, which was described by its initiator, Secretary of Commerce Herbert Hoover, as making it possible to "clear up the chaos of interference" (as cited by McChesney 1993: 18) but addressed radio as a medium carrying content that needed to serve the "public interest, convenience and necessity." Similarly, the first British media law driven by technological considerations, the Cinematograph Act of 1909, was also not content directed, as it aimed at protecting the well-being of movie theater audiences, by addressing safety concerns arising from the flammable nature of early film (Goldberg et al. 2009: 9). By 1912, however, concerns for public morality became the impetus for the establishment of the British Board of Film Classification, whose regulatory powers were content directed (Goldberg et al. 2009: 342).

One effect of the technological perspective was the evolution of policies aimed at diversifying content over the airwaves. In the US, the FCC adopted the "fairness doctrine" that required licensees to broadcast programming of a political-controversial nature and to do so while allowing opposing viewpoints the opportunity to be heard. The Supreme Court's decision in 1969 in which the (now defunct) doctrine was upheld as

constitutional cited scarcity of broadcast frequencies as the reason for the ruling. Since broadcasters utilized a resource which was scarce to others, it was deemed pertinent that the government could proactively deny them the right to censor. Scarcity was also the reasoning behind the introduction of the broadcasting regime in the UK (Goldberg et al. 2009: 304), although the eventual regulatory system that emerged as a result was very different than that in the US. Another technology-related phenomenon was recognized and cited by UK regulators in the 1920s: the perceived power of the media over a mass audience (Goldberg et al. 2009: 304). Concerns regarding the impact of media appeared in the US as well. However, they were first expressed only in 1978 when the Supreme Court justified the need for regulation of indecent content in broadcast media, citing the intrusive nature of radio and the presence of children, to whom broadcasting is uniquely accessible even when they are too young to read. The identical assumption that the media are powerful and the spectrum is scarce had also been the driving force behind media regulation in other countries, such as New Zealand (Brown and Price 2006).

Technologically driven regulation has often led to the creation of multiple regulatory regimes (and even regulatory agencies) within legal systems. In the 1980s and 1990s, countries such as South Korea and Israel established separate regulators for cable and broadcast television (Kwak 1999; Schejter 2009). In the United Kingdom, on the other hand, all commercial television services were regulated in the 1990s under the same regulatory authority, regardless of their form of distribution. Commercial radio in the UK was regulated under a separate umbrella, while in Israel it was regulated within the same framework as commercial television. In the US, there has always been only one regulatory agency overseeing both media and telecommunications, but the technological distinctions between the printed press, the broadcasting industry and the cable industry led to three distinct regulatory philosophies, each enjoying different degrees of freedom (Pool 1983). As a result, US courts have determined that rules pertaining to political fairness, for example, can be imposed only on broadcasters but not on newspapers, and their application to cable was limited to local cable channels. Technological differences, however, did not have such an effect universally, which demonstrates how technology is but a perspective, not a determinant of a single regulatory response. Article 5(1) of the German Basic Law, for example, guarantees "freedom of the press and freedom of reporting by means of broadcast and films."[4] One reason for these differences in structural regulatory determinations may be that US law had made the technological differences between the media a cornerstone of media regulation, as all media were inherently market based and privately owned, while European governments asserted early on that broadcasting was too important to be left in the hands of the market (Levy 1999) and managed the broadcasters by themselves. Consequently, since the introduction of new media technologies such as cable and eventually the Internet was virtually simultaneous with the transition to a regulated media market in Europe, it allowed for the emergence of technologically neutral regulatory regimes, even though at first the transnational nature of the latter suggested it might be ungovernable (Murray 2011).

Technology has also been the driving force behind the establishment of transnational regulatory regimes such as the European Union's (EU) Directive on Television without Frontiers (TWF), which was a response to the transnational nature of satellite broadcasting (Harrison and Woods 2007: 52). However, the adoption of a technologically neutral framework by the EU led to the rewriting of the directive in an attempt to over-

come traditional distinctions between broadcasting technologies. The new Audiovisual without Frontiers (AWF) Directive[5] distinguishes "linear audiovisual media services" (analog and digital television, live streaming, webcasting, and near video-on-demand) from "nonlinear audiovisual media services" (on-demand services). Because "nonlinear services" are distinct from "linear services" in the user's choice and control and in their impact on society, the directive imposes lighter restrictions on them. Yet newspapers and magazines do not fall into the jurisdiction of the directive (Schejter 2008).

17.1.3 Media Regulation as Cultural Paternalism

The paternalistic perspective of media regulation is most commonly associated with the emergence of the media in the UK. It is a perspective deemed to "guide and protect" the majority to adopt the ways of the minority by emphasizing what "ought" to be communicated (Williams 1976). Raymond Williams, who first identified this perspective, rejected technology as the shaping force behind media regulatory structures and claimed they are subordinated to the social and economic structure, which is primarily capitalist, but in the UK is modified by the "paternalistic" view of the public interest (St. Leger 1980). Similar conceptions of the role of the media were eventually adopted in former British colonies such as Australia where the right to broadcast was assigned to national organizations operating in the "public interest" or to private individuals who were licensed to operate their stations as "public trustees." Since those private enterprises were suspect as for their capability to provide what the public "needs" over what the public "wants", extensive control and scrutiny by a public body were deemed to be necessary to ensure that private broadcasters lived up to their public trustee status (Albion and Papandrea 1998: 3). Similarly, the British public broadcasting ethos has made its way into the former colonies of Hong Kong, Singapore, Malaysia and India (Green 2003b).

The notion that broadcasters need to adhere to close state supervision and to assume "public service" responsibilities that are cultural was widespread all across Western Europe from the inception of broadcasting and well into the 1990s and beyond. The "public service" role may have changed over the years and may have been tweaked to meet changing social, political and economic conditions, but by the 1990s it had embodied a number of accepted principles: public accountability; public finance; regulated content; universal service; regulated entrance (Siune and Hulten 1998); a comprehensive coverage remit; a generalized "broadly worded" mandate; pluralism; a cultural mission; a central place in politics both as highly politicized organizations and as reporters of the political process; and non-commercialism (Blumler 1992). Within this "interventionist" culture and clear sense of social purpose, Blumler assembled a list of "vulnerable values" protected by media policies across Europe, which were created as a reaction to the loss of the monopoly status of public service broadcasting. Generally, those "values" were identified as: program quality; maintenance of cultural diversity; cultural identity; independence from commercial influence; safeguarding the integrity of the civic community; protecting the young; and maintaining standards. Ang (1991) perceives broadcasting in Europe as a "servant of culture" (p. 101) and argues that these high-minded national cultural ideals may have been the destructive force behind its decline. Ang's predicament notwithstanding, European public broadcasters have long struggled to maintain their unique position and were successful in pushing through the institutions of the European

Union a protocol appended to the 1999 Amsterdam treaty, which defined the mission of public broadcasting as "directly related to the democratic, social, and cultural needs of each society and to the need to preserve media pluralism" (Schejter 2008). Still, some observers note that the transition to a single European market has in fact "gone hand in hand with an erosion of the cultural dimension upon which the European public service tradition has been based" (Burgelman and Pauwels 1992), and the adoption of the new AWF Directive has led to further devaluation of cultural objectives (Burri-Nenova 2007). At the same time the public service model was the dominant broadcasting model adopted by post-communist European countries (Harcourt 2003).

The cultural paradigm, although traditionally associated with Europe, has both been exported to and independently emerged elsewhere. Reviewing African media policies, Eko (2003) notes that the colonial heritage of African nations has also led to the adoption of the colonialists' view of the media, in particular the establishment of broadcasters in the "public service" mode. Interestingly, Eko refers to these entities as "governmental public broadcasters," a characterization that distances them from the "cultural paternalism" paradigm to one more associated with state control or "authoritarianism." In the meantime, a similar regulatory philosophy on the border between cultural paternalism and authoritarian state control developed in the early days of Japanese radio. Advertising was banned to ensure the burgeoning medium's reliance on the government, and the government maintained strict controls on all aspects of broadcasting. However, the justification for this control was cited as defense of the "Japanese character" of a working people who are "unlike Westerners" (Green 2003a). Kwak (1997) claims that at the end of the day the dominant common Confucian cultural values have been reflected in the practice of broadcast regulation in Japan, as well as in Korea and Hong Kong.

17.1.4 Media Regulation as Promoter of Democracy

Freedom of expression, as noted, is at the root of media regulation. While economic and technological justifications have traditionally played a role in regulatory design, more often than not the regulatory effort focused on the control of content as governments assumed the role of determining if and which type of content would be allowed. Napoli (1999) identifies three fundamental differences between communications regulation and the regulation of other industries: the unique potential for social and political impact; the ambiguity of classification of decisions along economic or social regulatory lines; and the potential overlap and interaction between economic and social concerns within individual decisions. All three point to the inherent tension between applying regulatory constraints on the media for whatever reason and the consequences such action has on the social role the media play in society and, as a result, on the health of democracy.

Thus, as Curran and Seaton (2003) note, the prevailing myth regarding freedom of expression in the United Kingdom, for example, is that the British press gained its "freedom" from government sometime in the mid-19th century. However, while the printed press enjoyed growing freedoms from government starting in the mid-19th century, it transited into a new market-controlled system, which established limitations of its own on press freedoms that have even been considered as "more effective than anything that had gone before" (Curran and Seaton 2003: 5). A similar fallacy equating the mere relaxation of government controls on the media and their subjugation to

market rules as setting them free was also at the basis of the classic analysis of press systems offered in the mid-20th century by Siebert et al. (1956) in *Four Theories of the Press*, regarded as the single most influential volume in contemporary media studies (Nordenstreng 1998). In addition to failing to see the role of the market in regulating media (rather than "freeing" it), analyses based on *Four Theories* fail to identify regulatory mechanisms that are designed to enhance democracy, not only to leave it be.

An example of such an effort is the development of "diversity" as a component of the "public interest" standard in US media governance. First appearing in the Radio Act of 1927, the "public interest" was merely a term plugged into the legislation for lack of a more coherent and finely defined standard over which members of Congress could agree (Krasnow and Goodman 1998). But, over the years, it was explicated by the FCC, which determined that it meant maintaining and fostering "competition," "diversity" and "localism" – three concepts it believed to extend directly from the public interest (Napoli 2001). Diversity, as a policy goal, is often described as "competition in the marketplace of ideas" (Kwerel et al. 2002: 350) and is operationalized by policies aimed at ensuring public access to a wide range of viewpoints and opinions as well as to a large number of sources for information. The diversity principle in the US is associated with the Supreme Court's position that the First Amendment is based on an assumption that diverse and antagonistic sources of information are essential to the public welfare.

A combination of the conventional notion that electronic media have a powerful effect, of the fact that they play a role in the sustenance of a democratic public sphere and of the idea that "elections are won by the press" (Barendt 1998) has led to the development of rules regarding media usage during elections. In the US, these rules are mostly limited to post factum rectifications of perceived advantages given to one candidate for office over another.[6] In the United Kingdom each of the commercial and public broadcasting regulators is required to adopt a code of practice with respect to the participation of candidates in programming during the election period. Paid advertising, however, is prohibited, and, while in the US candidates can virtually purchase as much airtime as they wish, in the UK they are limited to a very limited number of "party election broadcasts." In Australia political advertisements need to be truthful (Orr et al. 2003), and the role of banning the untruthful is in the hands of the self-regulatory body of commercial broadcasters, the Federation of Australian Commercial Television Stations (Bamford 2002). In Canada, fairness during election times is governed through a mandate on all broadcasters to make a minimum of paid prime time broadcasting available to the eligible political parties.

Governing media in a democracy supporting perspective is not limited to the political sphere. In addition to diversity of opinion, other forms of diversity can be supported by concerned regulatory regimes. One area, which is addressed in many systems, is the provision of minority voice and representation, which at times conflicts directly with the acculturating role assigned to the media in the name of national unity. The need to provide for minority voices has been recognized internationally. The normative aim of minority media rights is for "autonomous ethnic minority media which can speak for, and to, their own community; . . . minority media which can generate a dialogue between . . . minority communities; and between these and dominant . . . communities" (Husband 1994: 11). Still, minorities' "self-presentations remain minuscule in comparison with the electronic media output of majority culture" (Browne 2005: 3). The US legal system never created a

mechanism of positive content regulation to ensure diversity in programming (Freedman 2005), and minority representation was supposed to be achieved through diversity in ownership (Mason et al. 2001), applying an "economic" rather than a "democratic" perspective. In 1990, the Supreme Court found that the government had a "compelling interest" in promoting diversity of viewpoints through broadcasting, and that this objective could be achieved by encouraging minority ownership of media outlets. This determination was later somewhat mitigated and never fully prompted action by the FCC. In Australia, the Special Broadcasting Service (SBS), incorporated in 1991, is to provide "multilingual and multicultural radio services that inform, educate, and entertain all Australians and in doing so, reflect Australia's multicultural society" (SBS 2005). The Australian Broadcasting Corporation (ABC), the public service broadcaster, is required to "reflect the cultural diversity of the Australian community." However, this requirement was not geared toward Aborigines or their culture, but rather to immigrant groups (Jupp 2001). In more uniformly cultural settings, such as in the post-Soviet European republics, minority programming is little promoted in mainstream media (OSI 2005), while in long-established systems such as those in the UK and France the reference to minority broadcasting is all but marginal and on a regional basis (Schejter et al. 2007).

17.2 CURRENT TRENDS AND FUTURE CHALLENGES

The media landscape is undergoing changes challenging all of the four historical perspectives. The changes affecting this process include:

- democratization in previously totalitarian regimes;
- the rise of neo-liberalism and its global diffusion; and
- the emergence of global markets for media fare.

The control mechanisms set on media are challenged, as are the economic justifications for media regulation, and the ability to enforce cultural goals and regulatory structures on content that negates national boundaries.

These have taken place parallel to technological changes:

- an abundance of media content that audiences can access;
- a diminishing need to rely on content delivery over the airwaves for stationary devices;
- the transition to digital and Internet protocol-based delivery systems;
- a growing mobile entertainment industry; and
- a blurring of the traditional boundaries between information services and entertainment.

The new technological reality raises challenges from all perspectives. *Economically* there are calls to leave the future of the media sphere in the hands of the market (Blackman 1998), even suggesting that no government regulation will be further needed in light of the decentralized nature of new media (Negroponte 1995). Others assert that the economic framework is not sufficient to encounter the needs of a functioning market

(Shelanski 2006) and that government still has a role in regulating the media (Abramson 2001). New *technologies* have allowed countries to adopt rules that significantly reduce freedom of expression, most notably in Asia (Gomez 2004), although not uniformly (Skoric 2007). *Cultural* effects of the new media environment call for prescriptions to enhance the role of non-commercial media within this new environment (Goodman 2009) and to further protect children from the new dangers it imposes (Montgomery 2009). Late-20th-century deregulation has led to warnings that this regulatory oversight could lead to unhealthy consequences for *democracy* in the long run and that communication theory can contribute to bridge normative gaps that economic analysis alone cannot offer (Brennan 1992).

At this developed stage in the history of media regulation, it is clear that normative choices truly determine which perspective is adopted in each locale. An informed and educated citizenry should be able to seize this opportunity and ensure that the change works to favor civil empowerment over economic and technological determinism and open and egalitarian cultural exchange over top-down paternalistic imposition.

NOTES

1. There are other methods to control free expression or to enhance it, ranging from the incarceration of anti-government political activists to the teaching of the importance of free speech within the educational system; however, the media are the central arena to which all actions eventually merge.
2. Although, as Altschull (1984) notes, no causal connection between the expansion of the advertising industry and the penny press has been proven (p. 27), and, as Nerone (1987) contends, the emergence of the penny press was influenced by the political and economic environment and was not a result of a determined decision on the part of the newspapers to become more commercial.
3. As an heir to the Federal Radio Commission formed under the previous Radio Act in 1927.
4. https://www.btg-bestellservice.de/pdf/80201000.pdf.
5. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF.
6. With the exception of the right to purchase airtime on radio or television that is secured for candidates to federal positions.

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