blurring the lines

market-driven and democracy-driven FREEDOM OF EXPRESSION

Maria Edström, Andrew T. Kenyon & Eva-Maria Svensson (eds.)

NORDICOM

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Contents

Preface

This anthology is a result of a conference held in Sweden at the University of Gothenburg, 6-7 October 2015, *Communicative democracy: Protecting, promoting and developing free speech in the digital era.* The aim of the conference was to gather scholars from several fields to gain new insights regarding the tensions between the state, the market, the media and the citizens regarding free speech. This is an emerging field of research that studies the complex processes and challenges when the line between advertising and journalism is blurred. Who is to be trusted and what consequences will this have?

Both the conference and the anthology is a part of the research project *Market-driven and democracy-driven freedom of expression*, a collaboration between Department of Law (Eva-Maria Svensson), and Department of Journalism, Media and Communication (Maria Edström) at the University of Gothenburg, financed by Ragnar Söderberg Foundation (2013-2016). In editing the book Andrew Kenyon from Centre for Media and Communications Law in the Melbourne Law School, University of Melbourne has been an invaluable resource and we thank the Melbourne Law School for financial support that assisted with his ongoing involvement. We would also like to thank Nordicom and especially the director Ingela Wadbring for professional publishing support and for contributing financially to this publication.

The conference was sponsored by The Swedish Foundation for Humanities and Social Science, the Partnership Programme 2015 and the Department of Law at the School of Business, Economics and Law, as well as Department of Journalism, Media and Communication, University of Gothenburg. We would like to thank our colleagues Johanna Arnesson, Jeffrey Johns, Christine Forssell and Lena Björk for valuable work before and during the conference; the journalism students Jan Soja and Julia Sandstén Vikberg for filming and editing the public event that opened the conference; and participants at the conference who were not able to contribute chapters, but added much to the discussion at the conference: Melanie Radue (PhD Candidate, Department of Mass Communication, Friedrich-Alexander-Universität, Erlangen-Nürnberg, Germany); David Davies (PhD Candidate, Department of Law, University

of Sussex, UK); Mathias Färdigh (Senior Lecturer, Department of Journalism, Media and Communication, University of Gothenburg), and Marie Grusell (Senior Lecturer, Department of Journalism, Media and Communication, University of Gothenburg).

Finally, we would like to thank all the contributors for their careful and thoughtful perspectives on challenges that freedom of expression is facing.

Gothenburg and Melbourne, August 2016

Maria Edström, Andrew T. Kenyon & *Eva-Maria Svensson*

Introduction

Rethinking Freedom of Expression and Media Freedom

Eva-Maria Svensson, Andrew T. Kenyon & Maria Edström

Freedom of expression is an essential part of democracy, and free speech goes hand in hand with a free media. Thomas Jefferson, the principal author of the American Declaration of Independence, wrote in 1816: "Where the press is free and every man able to read, all is safe" (Jefferson 1816/1900). And as emphasized in the UK's Leveson report earlier this decade, "With these rights, however, come responsibilities to the public interest: to respect the truth, to obey the law and to uphold the rights and liberties of individuals. In short, to honour the very principles proclaimed and articulated by the industry itself" (Leveson 2012:4).

Although the principle of free speech could be said to remain largely the same over time, the conditions for free speech and free media do not; they are certainly not the same as when Jefferson made his statement. Today the conditions are more democratic overall and the level of state censorship is lower (at least in parts of the world), concerns about state surveillance notwithstanding. However, the market pressure on media financing models and market-driven ideas that suggest the state should not 'interfere' in the media ecology makes journalism more vulnerable and less independent from commercial interests. It is these changing conditions of state and market that this book explores. We seek to make it at least a little more difficult to discuss free speech without addressing such contemporary conditions.

Professor Ulla Carlsson, UNESCO Chair on Freedom of Expression, gives a broad overview in the book's next chapter, which is a printed version of her opening speech at the conference *Communicative Democracy: Protecting, promoting and developing free speech in the digital era held* at the University of Gothenburg, Sweden, in October 2015. Technological developments have changed the conditions of free speech dramatically in various ways. The relations between the state, the market, media and citizens have altered and the challenges to freedom of expression are many as evidenced in numerous reports (UNESCO 2015; Leveson 2012). Beside state actors restricting and enabling free speech, others such as media themselves and wider market actors affect the conditions of speech. The balance in relation to other rights such as privacy, gender equality and rights to conduct a business, just to mention a few, causes tensions and

pushes the norms expressed in free speech regulation and self-regulation in sometimes contradictory directions. From a Nordic perspective, the theme is highly topical because it coincides with the 250th anniversary of the world's oldest constitutional protection for a free press and free speech, the Swedish Press Act of 1766, passed 50 years before Jefferson made his statement, quoted above.

The overall aim of this book is to focus on challenges from the market to free speech and how free speech can be protected, promoted and developed in a time when the lines between journalism and advertising are blurred. Its scope covers both structural and individual levels. It analyses tensions between what can be called democracy-driven and market-driven freedom of expression (terms that are considered below). Specifically, the book embraces three contemporary tensions and debates. In part I, the focus is on the governance of freedom of expression and the varied possible roles of the state in protecting and securing free speech; part II examines the contemporary conditions of the media market and their connections with journalism and other forms of public speech; and part III considers various restrictions and control of media content, both regulatory and self-regulatory. The book seeks to develop new perspectives on the relations between actors such as the state, market, media and civil society.

The collection is multi-disciplinary, with contributions from scholars in law, media studies and philosophy. It is also a result of a research project combining law and journalism studies.[1] Almost all the chapters were developed through intense discussions of papers during the two day conference, *Communicative Democracy*, mentioned above. The transnational discussions between scholars based in Austria, Finland, Germany, Norway, Spain, Sweden, the UK, USA and Australia highlighted both similarities and striking differences between various legal cultures concerning freedom of expression and media systems. The debate in these (western) parts of the world seems to have had a bias in favour of American and English perspectives, particularly within law and media studies scholarship. But other western legal cultures and media systems have other ways of handling free speech, which can offer interesting ideas for scholars in many countries. Our ambition in this book is to give voice to some of these other ways to deal with free speech, to offer an encounter between them and more traditional Anglo-American approaches, and to reframe the terrain of free speech analysis, if just a little.

General themes … or, in Swedish parlance, "red threads"

To capture one set of tensions between different perceptions of free speech and its relation to various values, we have developed the conceptual distinction between democracy-driven and market-driven freedom of expression (Svensson & Edström 2014; Edström & Svensson 2016). As Edström and Svensson have explained (2016:69), this distinction signifies two ideal types or rationalities used to understand and explain processes that can be seen primarily on an aggregated level as well as to capture a tension between the two rationalities themselves. The concepts market-driven and

democracy-driven freedom of expression are understood as two ends of a continuum, driven by different rationalities and assumptions. Even though both promote the idea of extensive freedom of expression, they differ in several respects. Some important differences involve: how freedom of expression, particularly in terms of public speech, is framed and anchored in a broader context of democracy and economy, how the core elements of freedom of expression are perceived, the role of journalism and how that is safeguarded. There are also other issues. Which expressions should be protected from (potential) state limitation, is one. Another is how different types of expression are conceptualised and valued, in terms of 'political' speech, 'commercial' speech, and so forth. And there are questions about which legal subjects' interests should be protected and who (or what) should determine the boundaries of free speech (ibid.).

Considering who is the actor when it comes to settling the boundaries of free speech can be approached through the conceptual distinction between positive and negative free speech (Kenyon 2014). In short, the issue concerns the relationship between the state (in the form of political and judicial power) and individuals. The main difference in that distinction is whether the state is expected to be 'active' or 'passive' when it comes to safeguarding free speech. Is the absence of overt state intervention sufficient to safeguard free speech or, to the contrary, does free speech and the goals that are said to underlie it *require* some kinds of state action? And, depending on the role and expectations of the state, who else has power or obligations to act? One theme evident in many chapters in this book is the view that the state is never absent in relation to free speech, rather it is relevant to talk of particular sets of government sanctioned systems encompassing free speech and free media. The systems take a variety of forms and can be understood to involve different conceptions of what freedom requires.

The media – understood in terms of different models of media system (Hallin & Mancini 2004), as a specific state-centred model (Syvertsen et al. 2014), or in terms of emerging media ecologies (McLuhan & McLuhan 1988; Logan 2015) – is heterogeneous, now perhaps more than ever (or at least more than in the age of 'broadcast news'). Media can be publicly or commercially financed, or a mixture of both. The concept of a 'dual media system' is quite often used, but it may signify various things, such as differences between public media and commercial media in general, or differences between the press and the broadcast media. The former distinction is perhaps self-evident, but the latter is implicit in the Swedish context and can be explained by the legal treatment of free speech in two constitutional Acts, each one based on the kind of media that is regulated: press on the one hand (or in fact printed materials well beyond 'the press' as commonly understood), and television and radio on the other. (There is also a third constitutional Act most relevant to individual speakers.) In Sweden, the concept of a dual media system may be linked to either understanding.

Challenges facing traditional public service media and the relatively week constitutional protections that such content often have is highly topical in many western countries. Drawing on a market rationality of competition, public service media and different forms of public subsidy, such as press subsidies, are questioned by commercial

media actors and some politicians. Several debates are currently on-going, perhaps especially in Europe, highlighting the supposed competitive advantage of public service media in relation to commercial media. Claims are raised for public service to be restricted to what could be said to be distinctive (different from what commercial actors do). This sort of argument is often based on a perspective of economic and market regulation, concealing the public role, value and importance of media. These qualities can be understood in terms of serving "the public interest, and /.../ encourag[ing] increased equality, integration and participation in society by means of creating and facilitating an informed public debate" and involve universality and diversity as central elements of the media's public value (Enli 2016).

Part I: Free Speech, The State and Tensions

The focus in Part I is on the governance of freedom of expression and the varied possible roles of the state in protecting and securing free speech, with contributions that engage with ideas about freedom, the state, public service and governance.

Andrew Kenyon begins by outlining an approach that includes ideas of positive freedom as well as negative or liberty aspects to free speech and suggests this means that both diversity and non-censorship are central to the freedom. He explores structural implications of this approach to free speech, in particular addressing "Who acts and how?" and "What do they do and why?" in terms of democratic state institutions. The analysis suggests a paradox of free speech in that institutional actors face challenges in acting effectively, yet there is a need for structures that support diverse public speech, which appears to require state institutional support. Recognising the challenges may help free speech become more a freedom of substance and not merely one of form.

Kari Karppinen also begins from the ideas of positive and negative freedom of speech, but seeks to extend beyond them by exploring two avenues – a capabilities approach to free speech and 'agonistic' democratic theories. In exploring what freedom means under these approaches, Karppinen suggests that communicative freedom cannot be guaranteed by any single institutional ideal or organising principle (such as public service institutions or free market competition). This, in turn, implies that media systems should involve a variety of overlapping and mutually checking systems or logics, including space for critical voices and social perspectives that are limited under current structures of public speech. To a degree, the media system suggested here echoes, within a contemporary context, suggestions from Curran (1996) and others (Baker 2007).

Rethinking ideas in a contemporary context is also a focus of attention for Hans-Gunnar Axberger. He analyses 'public service' as a concept and, using the example of Sweden and considering both press and broadcasting traditions, he suggests it should be redefined in the new media landscape. Public service would be understood to be a constitutional *function* rather than any particular set of public institutions. This could avoid dangers that exist now, for Axberger, of media becoming too closely integrated

with political institutions. It could help to preserve the independence in the new media environment.

Public service, in terms of media content, is also a concern of Victor Pickard. He uses the expression 'corporate libertarianism' to describe US developments that have led to a small number of corporations dominating the country's media system alongside weak regulation of public interest content and weak public media alternatives to large corporate platforms. He examines the historical and ideological roots of US corporate libertarianism and proposes a reform agenda where the state is more active in creating spaces for public service journalism. The First Amendment could, in Pickard's analysis, encourage opportunities for free speech and press freedom. Its purpose would lie in having diverse voices and viewpoints within media in a way that is presently lacking in US media.

An interest in obligations of the state also underlies the contribution from Katharine Sarikakis. She argues forcefully that one cannot discuss media and speech freedom in Europe without considering the complex impacts of the financial crisis, especially on European public sectors and public spheres. Media are players within the severe market pressures of the crisis, but also continue to have a public role in supporting citizens' efforts towards self-governance. Tensions between these two aspects are evident, with the press, media and (often interlinked) political interests limiting journalism's ability to provide citizens information, especially related to particular contentious issues (often linked to the crisis) as well as to political dissent more generally.

John Morison shifts the focus to voice and its place within governance. He examines the growing use of consultation and e-consultation procedures by governments and relates such consultation processes to ideas of free speech and speaking freely. How can new information technology give citizens a meaningful voice? By describing the current nature of consultation, Morison highlights the importance of listening and the potential for consultation to silence or, alternatively, empower subaltern counterpublics who may be able to formulate different interpretations and urge alternative conclusions than would otherwise emerge. Just as the idea of democracy implies certain things about free speech, the democratic idea suggests how the adequacy of consultation can better be evaluated.

Part II: In Between Advertising and Journalism

In Part II, authors examine the contemporary conditions of media markets and resulting situations for journalism and public speech. Contributions address commercial constraints on speech, various aspects and implications of the rise of native advertising and efforts to regulate it, the commodification of social relations and the demands of authenticity in online communications.

Justin Lewis begins this Part by emphasising how the market itself privileges certain kinds of speech and effectively suppresses others. He argues that as advertising becomes

more dominant within media and media financing, we should pay more attention to its ideological impact. Advertising is limiting freedom of speech in several ways. It favours some audiences over other audiences – it discriminates between them on an economic basis – it limits political diversity and it encourages consumer identities over citizenship. And in doing all this advertising "drowns out other possibilities". A fuller freedom of speech needs new ways of funding content. But Lewis laments that the possibilities for that change are currently "shrinking before our very eyes".

The following chapters continue the focus on advertising, addressing various aspects of changed advertising techniques and their effects on content, regulatory efforts to separate editorial and advertising content, and audience fatigue of advertising.

Tamara Piety focuses on one of the new styles of advertising that has emerged as a content funding mechanism. Native advertising involves disguising ads as editorial content in order to overcome consumer scepticism. She argues that native advertising is deceptive and threatens to spread advertising's low credibility with audiences to all content, thereby destroying the reason advertisers wanted to mimic editorial content in the first place. The blending of advertising and editorial content threatens to lead to heightened distrust of all media, as audiences realise that editorial content is suffused with paid promotion. This creates difficult choices for law, especially in the context of the US First Amendment, but legal inaction also runs the risk that media credibility may be undermined.

Eva-Maria Svensson examines whether (and if so, how) the distinction between editorial and commercial content is upheld in Swedish regulation and self-regulation. Her study confirms that both law and self-regulation express the importance of keeping a strict division between editorial and commercial content. Even so, there appears to be increased blurring of the lines in practice. This may have consequences for how commercial content is comprehended in relation to free speech; that is, it may affect whether commercial content gains more protection in line with editorial content or other non-commercial content. In the US, commercial content labelled as commercial speech already has constitutional protection largely in line with political speech. In Europe, the same sort of approach has gained ground even though the situation varies in different countries. Svensson argues that stronger protection for advertising as freedom of speech might have consequences for freedom of speech insofar as it is prerequisite for democracy. She suggests grounds for a continuing reluctance in a Swedish context to support claims for increased protection of commercial messages. Instead the division recognised by all actors mentioned above should continue to be emphasised.

As Fredrik Stiernstedt observes, critics and supporters of native advertising tend to be sure that it has a major role in future advertising. At best, it will boost advertising effectiveness and also fund media content including journalism. Again using the Swedish example, he examines how the transition to native advertising will not necessarily be "smooth and unproblematic". There are economic, ideological and regulatory barriers and his analysis suggests these calls for, among other things, renewed

regulatory efforts. In a way extending the suggestion of Svensson to emphasise the division between advertising and content, Stiernstedt suggests targeted protection of particular types of content (such as news) and even media system divided structurally to protect non-commercial spheres. As he notes, "if commercial media can no longer manage to uphold a 'wall' within their companies, then the 'wall' might instead run through the media system at large".

Maria Edström examines how audience fatigue of commercials is related to changes in EU regulation of commercial messages, and she considers how the European level requirements of the Audiovisual Media Services Directive 2010 with regard to improper promotion and product placement in broadcasting operate within the context of the Swedish regulation for both commercial and public service television. The history shows increasing difficulties in distinguishing editorial and commercial content, and problems with the European regulations' focus on *broadcasters* when other entities involved in content production may be using the prohibited advertising techniques and fall outside the Directive.

The commodification of digital life is the theme for Bengt Johansson and Stina Bengtsson. Advertising is embedded within social media and links to almost unimaginable data tracking and modelling; bloggers are sometimes paid to promote different brands; and so forth. They observe that "everyday space is becoming more commercial ... citizens are being transformed into consumers" and free speech online "is not free as it will be tracked, saved and used for commercial purposes". How are such changes perceived? Based on a national representative survey Johansson and Bengtsson show that people in general are rather sceptical towards different forms of commodification related to Internet use, especially being exposed to commercials based on the websites they have visited. However, age structures the ways respondents think about market influences on digital social relationships. As well as responses targeting media producers to increase transparency (in terms of both tracking and advertising), the authors call for broadening the concept of MIL, Media Information Literacy, in order for citizens to be able to raise demands about the commodification of their social lives.

Crystal Abidin and Mart Ots move the focus to a case study of 'Influencers' – who hold high profiles with relevant audiences, and therefore interest advertisers – intermediate agencies and the commercial companies who seek to use the bloggers as a form of native advertising that should be indiscernible to blog followers. A case study of influential bloggers who were exposed in relation to a campaign aimed to discredit other Singaporean telecommunications companies shows the lack of enforced norms (in both law and industry) regarding such practices, but also suggests how Influencers, followers and even clients can become "sensitive to what they experience as deceptive and unethical behaviours" which could lead to greater pressures for ethical behaviour by Influencers.

Part III: Restrictions and Control of Media Content

Various restrictions and control of media content, both regulatory and self-regulatory, are examined in Part III. In particular, aspects of the balance between regulation and self-regulation for the press, legal limits on sexist advertising, the preferable legal approach to hate speech, and political advertising limits in law are addressed. Clearly, each of these topics is huge and multifaceted; the chapters here seek to add perspectives that are less often seen in the English language scholarship, always maintaining an eye on the *democratic* aspects of free speech.

Torbjörn von Krogh begins Part III with an examination of the long term tensions between self-regulation for the press and state threats to regulate, often debated in terms of credibility, legitimacy, professionalization and press freedom. Canvassing historical developments since the mid-twentieth century, in the US, UK and Scandinavian instances, suggests how "the media lets out pressure" by changing self-regulation "when legislative steam is building". But media regulation is becoming less direct, and media monopolies are transforming with Internet communications, both of which make state-media relations more complex. This underpins von Krogh's examination of various threats of regulation within political, market, professional and public frames, and the possibilities for the continued relevance of the 'communicating vessels' between legal threats and reforms to self-regulation.

Marta Martín-Llaguno examines the first decade of a Spanish law that has been little addressed in the English language literature. Since 2004, the Spanish Organic Act on Integrated Protection Measures Against Gender Violence has sought to limit gender stereotypes, outlawing the advertising use of reified women's bodies and stereotyped behaviours, and also requiring a national awareness plan against intimate partner violence. Gender equality has been treated seriously, here limiting commercial speech in formal law at least. Martín-Llaguno examines problems in the law's implementation, and the substantial difference between public understanding and that of regulatory bodies of what advertising would breach the law.

Broadening the focus to hate speech, David Brax presents an argument in favour of its legal regulation. He begins with the more familiar idea that hate speech is harmful in that it undermines the speech of others, of the groups targeted by the hate speech. Brax then considers what is the likely distribution of the "costs and benefits" of hate speech, suggesting the harms mainly affect "people that are already among the worst off in our society". He argues that a 'prioritarian' view (that is, the effects on those who are worst off matter more, in moral terms, than effects on others) provides "the most plausible argument in favour of hate speech regulations".

The fourth limitation on speech considered in Part III concerns political advertising. Magnus Hoem Iversen examines the ban on such advertising in Norway, and the ways in which that ban has been flouted, at times, in the most recent twenty years. He argues there have been three noteworthy functions from breaking the ban. First, it can draw attention to political issues for parties and organisations. Second, it provides

an avenue through which broadcasters can protest against the ban and, third, allows broadcasters to portray themselves "as champions of free speech". Hoem Iversen finds the breaches have influenced debates, led to legal reform and litigation, and have been a way of attracting public attention for television channels – something which they may find more difficult to do as a reformed media environment bypasses such bans through a myriad of Internet-enabled possibilities for political advertising.

To conclude

The challenges facing free speech urge greater scrutinizing of the conditions for journalism and consideration of how it could be made less crudely vulnerable to market pressures. In this book, we consider how free speech can be protected, promoted and developed in a time where the lines between journalism and advertising are blurred. With the help of the conceptual distinction between market-driven and democracy-driven freedom of expression, we have gathered together analyses that consider free speech and the state, the contemporary conditions of media (in terms especially of markets and public speech such as journalism) and a range of regulatory and self-regulatory restrictions on content that have implications for a democracy-driven freedom of speech.

One hope from this collection is that when free speech is discussed, market pressures and constraints are also addressed, as well as pressures and threats from state (and other) interventions. Free speech is too complex and too valuable in its potential to be reduced beyond that.

Note

1. http://law.handels.gu.se/english/research/ongoing-projects/Market+driven+freedom+of+speech

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Opening speech

Freedom of Expression in Transition

A Media Perspective

Ulla Carlsson

> Finally, it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, it must be possible for society's state of affairs to become known to everyone, and it must be possible for everyone to speak his mind freely about it. Where this is lacking, liberty is not worth its name. (Forsskål 1759/2009)

These words were written by Peter Forsskål, born in 1732 in Helsinki, Finland, which at that time was part of the Kingdom of Sweden. He was a philosopher, theologian, botanist and orientalist, as well as one of Carl Linnaeus' disciples. Forsskål wrote these words in 1759 in the last paragraph of 21 in his publication *Thoughts on Civil Liberty*. Unexpectedly, Forsskål was given permission to print – a censored edition – but soon all copies of this book were banned and confiscated. Harassed and threatened, he was forced to flee the country.

Forsskål died at 31 years of age of malaria on the Arabian Peninsula. He was not to experience Sweden's enactment of constitutional law on freedom of the press in 1766, the first country in the world to do so – in large part thanks to his efforts.

Forsskål's belief in the power of the free word must have seemed wholly unrealistic at that time. But, in a long-term perspective Forsskål was right. Development of societies and freedom of expression are connected and affect each other. Historical perspectives are fruitful in many respects – which is why his words still make sense. And perhaps what we need today is more of the spirit, 'bildung', and courage that drove Peter Forsskål 250 years ago.

Because it is probably more urgent than ever before for us to better understand the problems and crises affecting contemporary societies. The challenge is not only to explain the problems, but also to contribute to solutions. Media researchers are no exception. We need to improve our understanding of what current developments in our increasingly 'wired' societies imply, perhaps most urgently their implications for democracy and human rights.

Freedom of expression in a new context

Society changes, but certain democratic principles remain true. Among them are freedom to think, to speak, to listen and to write – to express oneself and to communicate with others – as proclaimed in Article 19 of the UN Universal Declaration of Human Rights. But, there are multiple obstacles to overcome. Not all citizens are in the position or condition to exercise their rights, due to extreme poverty, social injustice, poor education, gender discrimination, ethnic and religious discrimination, unemployment, or lack of access to health care – as well as lack of access to information and knowledge. People in war zones and regions of unrest are especially vulnerable. Millions of people today have been driven from their homes and have no civil rights whatsoever.

Globalization – and digitization – connect people and economies across great distances. Horizons have broadened, but at the same time parts of the world seem to be retreating further. Some people feel the need to defend their identities, and when common cultural platforms can no longer be maintained, stockades are raised around local cultures, religious beliefs and communities. Transcendence of boundaries and defense of boundaries are twin aspects of the globalization process (Anderson 1991; Jonsson 2001).

This is the context we have to understand, recognizing that globalization, geopolitics and new information technologies exert strong formative influences on freedom of expression in modern-day society.

Freedom of expression is democracy's praxis. It is a right, but it implies responsibility and respect for the rights of others. Limits of freedom of expression are not constant – they are marked by its cultural and social context. But, there must be no doubt about where responsibility resides (Kierulf & Rønning 2009; Rønning 2013). Freedom of expression has legal, ethical and moral dimensions; ultimately, it is a question of the fundamental idea that all human beings are inherently equal.

Media are vital to freedom of expression. The presence of pluralism and independence of the media are essential to democratic rule – whether publishing takes place offline or online. Media have long been considered as central, shared sources of information, as 'watchdogs', and as fora of public debate – a public sphere – based on the nexus between media, democracy and civic engagement (Askanius & Østergaard 2014).

Digitization and globalization – with growing commercialization and far-reaching media convergence in their wake – they have changed our communication systems in terms of time, space and social behaviour – it is about changes in functions as well as management practices and markets. These changes have transformed the public sphere, and the context of freedom of expression has shifted.

The communication society of today has a tremendous potential. We have access to knowledge and an awareness of events that only 'yesterday' were far beyond our horizons. And we can communicate and interact as never before. The opportunities to express oneself freely have never been greater – largely as a consequence of social media. Human experiences tells us, however, that although new technologies

almost always bring about significant benefits – they also entail risks (Ellul 1964; Winston 1998).

Every day we see threats to freedom of expression, and freedom of the press: new forms of state censorship and repression, self-censorship, surveillance, monitoring and control, hate speech, gatekeeping, propaganda – disinformation, acts of terror, anti-terror laws and organized crime. Even outright murder, targeting journalists or their sources.

There are a good number of influential media and communications bodies that are attuned not to maintaining democratic values or serving the public, but solely to the market – or to the political power. It is not always clear who the sender, the originator, is – whether it is commercial interests or government, which is one of the main topics for speakers at this conference.

New types of transnational media companies, for example Google and Facebook, are enormously powerful actors from an individual perspective as well as industrial and political perspectives. Many parts of the society today have become heavily dependent on these companies (Freedman 2014a; McChesney 2015).

They make it possible to partake of and exchange vast amounts of information and knowledge and to use a variety of services, which is of great benefit and enjoyment. But, at the same time, they are collecting vast amounts of information about their users, which can be used for everything from advertising and consumer control to state surveillance or criminal activities. Power over users is exercised by changing algorithms, terms and guidelines without transparency. It is about having a monopoly on information (Fuchs 2013, 2014; Freedman 2014a,b; McChesney 2015).

The openness that makes the Internet so immensely valuable also creates vulnerability. Offering such a means of communication also creates new opportunities to express hatred, to harass and to threaten. Privacy and security are critical aspects of using the Web. But providing security without impinging on either privacy or freedom of expression involves striking a delicate balance. The fact that the digital public sphere is beyond national control – when services are operated by foreign-based companies with global reach – has profound consequences in many countries. And the domestic media find themselves exposed to an entirely new situation of competition.

Obviously, there is a need for global solutions to public problems – agreements that are formulated globally and implemented nationally. Unfortunately, such declarations are often ignored – but it is now active mobilization of such agreements is extremely important. But, in order to make real progress there is an urgent need for a new approach to global governance that is built on a strong multi-stakeholder foundation. There are many challenges facing policy, business, civil society, academia, philanthropy, etc., at the local, national, regional and international levels. This is primarily a question of determination – a democratic will.

Increasing knowledge and participation gaps

But there are also other implications. When each of us is able to create our own frame of reference – based on our own interests and preferences – and our own, personally tailored flow of information, then we can turn our backs on others' perspectives and others' flows.

For people who are interested in politics and public affairs, it has never been easier to find qualified information. But the opposite is true as well. For those who are not interested in politics and public affairs, it has never been easier to stay away from such information. And, never has it been easier to be misinformed or manipulated (Strömbäck 2013).

Increasing diversity in media output means greater differences in how different groups use the media – especially news media. These differences imply a risk that knowledge gaps – and participation gaps – will widen, which in turn may weaken social cohesion and increase inequality between social classes – as well as gender inequality (Norris 2012; Lee et al 2013; Strömbäck 2013).

When media use becomes more fragmented, diversified and customized, a number of axioms about the role of media and journalism in society and the conditions under which they operate need to be revisited.

Democracy does not work without well-informed citizens who have a critical eye, and well-informed citizens cannot exist without reliable media and journalism that trains a critical eye on those who wield power. The media need to be accountable. Without such awareness and insight, neither constructive political solutions nor a vital civil society is possible. This reasoning has long been considered axiomatic. But does it still hold?

What are the consequences of the current pressures on news media, especially newspapers? Of recurring cutbacks in reporting staff, with fewer journalists producing more copy? When foreign correspondents are let go, local offices are shut down and budgets for investigative reporting are reduced? When Facebook takes an increasing hold on the news industry in a new economic model. Traditional newspaper companies, which have owned the production and distribution of news, are now becoming content providers for a huge viral distribution platform that is lacking in journalistic competence and ethics.

The diversity of news sources is growing. The public sphere involves complex interactions between holders of power, lobbyists, public relations consultants, information officers, journalists and private citizens via social media and other online platforms – which can result in deliberately misleading marketing practices or market-driven journalism, all of which tend to undermine ethical rules and self-regulation. Today, for example, the consequences of 'branding' and 'native advertising' are widely discussed (Allern 2011; Garsten et al 2015).

Both non-professionally produced content and selectively addressed information from sources other than those we traditionally regard as media are increasing. And,

it is becoming more difficult to distinguish between advertising, propaganda, news, information and knowledge – as well as to identify the source. Meanwhile, the corps of professionals who have been trained to examine public affairs and to judge their credibility before reporting on them is shrinking.

Freedom of expression is usually understood as a relationship between the individual and the state. All too often, the relationship to the market is neglected. Today that is a problem. Recent studies, here in Sweden conducted by Eva-Maria Svensson and Maria Edström, demonstrate the importance of making a distinction between democracy-driven and market-driven freedom of expression – such an approach is of crucial value to future research (Svensson & Edström 2014).

In a larger frame, this raises questions about the kind of society we want to live in. How we answer these questions will decide what degree of support will be extended to the media – and, with that, the value we attribute both to journalism and to the participation of ordinary citizens, 'the public at large', in public affairs.

The principles of freedom of expression rest on institutional foundations. The role of the State is crucial. Several experts argue that if journalism is to survive, there is a need for public support to media in order to exist at a level required in a democracy. It is well known that countries with the most extensive public support for different media as print media, radio and television have shown the highest values for a review of a number of indices that measure the vitality of democracy, prosperity, freedom, the absence of corruption and similar indicators (Syvertsen et al 2014). The countries of the Nordic region are prime examples. Media subsidies – as well as regulation – can defend freedom of expression – and democracy (Curran et al 2009; Syvertsen et al 2014; McChesney 2015). And it is high time for the regulators to be just as innovative as the digital industry (Mansell 2015). Media policy has to be in focus in a democratic society – both as an empirical fact and as an ideological tool (Freedman 2014).

Media and information literacy: A core competence in a democratic society

Many consequences need to be taken into account when we discuss the future of democracy, human rights – and freedom of expression – not least against the background of changes in the relationship between political power and the market. Tendencies shifting away from institutions to individuals affect the fundaments on which the freedom and independence of the media stand.

A sense of cohesion is crucial to the health of any democracy, and if that sense no longer rests with its public institutions, at least not to the extent it once did, it will have to rest to a greater extent with citizens – if new institutions are to be created (Habermas 1989, 2006; Castells 2009; Rothstein 2011; Alvater et al 2013; Svallfors 2015).

Given these circumstances it is clear that today's complex society requires competent and critical citizens if democracy and freedom of expression are to be maintained.

Offering good schools for everyone, girls and boys, is one vital prerequisite of democracy and freedom (Wilson et al 2011; UNESCO 2015; Putnam 2015).[1]

In this context it is important to realize that media- and information literate citizens are essential in a democratic society – having knowledge about the media and network society – how they work and how to use them – and understanding the meaning of human rights and freedom of expression – have become crucially important. Such a knowledge and understanding is a contribution to democratic learning (Wilson 2011; Print & Lange 2013; Doganay 2014; Mihalidis 2014; Carlsson 2015).

Investments in media and information literacy to inform and improve citizens' capacities will help in creating a healthy and constructive media environment. Or as one researcher recently concluded: "The promotion of media literacy is one way of creating public value, as it goes beyond the interests of individual consumers and benefits society as a whole" (Radoslavov 2014). Media and information literacy is about protecting, promoting and developing freedom of expression in the digital era.

Rethinking research on freedom of expression and media

There is also an obvious need for more knowledge and new approaches if we are to understand the processes at work. Given the challenges contemporary society poses to freedom of expression, media and digital culture, it is imperative that the research community engage, at the national, regional and international level, to encourage researchers at all these levels to work together to test our capacity to propose and imagine models that contribute to more holistic paradigms of civilizations. We need to learn more from one another, to share knowledge and contexts.

Globalization processes force us not only to focus more on transnational phenomena in general, but also to note and explore differences. It is for example crucial to have knowledge about how principles of freedom of expression – and human rights – are adopted in very different cultures – with very different organizations of the state, and very different ideas of the individual in the society (Price 2015).

We have to argue for a stronger focus on regional inequalities and social transformation, and to develop understandings of human rights and freedom of expression from the perspective of a multipolar world, but also from a cosmopolitan perspective.

This is particularly important in developing new approaches that can help to implement and further develop the international rules that provide for basic human and civil rights, such as freedom of expression in a number of new contexts.

Well-established international, regional and national research platforms – with a sense of the history of the field – are more important than ever. As researchers we need platforms where we can consider the relevance of the questions we formulate, where we are more judicious in our choice of theoretical perspectives, contexts and methods, and where we evaluate the validity of our findings and the conclusions we draw from them (Carlsson 2014).

I am convinced that this conference is in line with such an approach.

In short: We need to dare to ask the difficult questions about the status and vigour of democracy, human rights – and freedom of expression. Dare to work with concepts like power, hegemony, equality and justice – concepts that still are of relevance.

The keys to success in this endeavour are our accumulated knowledge, our ability to reflect and use our critical faculties, our creativity, integrity and ethics– not least, it depends on our will – and courage.

Note

1. See also the Unesco Movement 'Education for All': http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all, retrieved 20 April 2016.

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I. Free Speech, The State and Tensions

1.

Who, What, Why and How

Questions for Positive Free Speech and Media Systems

Andrew T. Kenyon

Abstract

This chapter outlines an approach to free speech that includes positive as well as negative aspects – matters of diversity as well as non-censorship. It explores the structural implications of this approach, asking in terms of democratic state institutions 'Who acts and how?' and 'What do they do and why?' in relation to free speech. The analysis suggests a paradox of free speech. The main state institutional actors are all compromised in their ability and effectiveness when acting in support of free speech. Yet there remains a need to protect structures that support diverse public speech. There is a need to protect the architecture of free speech, which appears to require particular forms of state action. That is a challenge that needs to be recognised if free speech is to have substance and be more than a merely formal freedom.

Keywords: positive freedom, negative freedom, diversity, public media, architecture of public communication

What state of affairs is required for speech to be free? One way to respond starts from the goals that are said to be served by free speech, which are routinely described in terms of: knowledge or truth; self-government, participation or democracy; and self-development or autonomy. In US writing especially, free speech analyses commonly also involve a distrust of government action, where that action limits speech or subjects it to legal liability (see eg Barendt 2005).[1] Beyond these rationales, free speech is commonly understood in negative terms within law as a restriction on what government should do. However, fostering knowledge, self-government and so forth appears to require more than the mere absence of specific limitations, more than a bare liberty of speech. The goals require diversity or pluralism in public speech.

This chapter outlines an approach to free speech that includes positive as well as negative aspects – diversity as well as non-censorship. It explores the structural implications of this approach to free speech and asks, in terms of democratic state institutions, 'Who acts and how?' and 'What do they do and why?' The analysis suggests a paradox of free speech. The major state institutional actors are all compromised in their ability and effectiveness to act in support of free speech. Yet there remains a need

to protect structures that support diverse public speech. Because structures that affect public communication also influence political processes, there is a sense in which the 'architecture' of public speech must precede public debate and political settlements. Debate could reshape this architecture to some degree, but could not make changes that went beyond the requirements of free speech for non-censorship and diversity.

Free speech and diversity

Multiplicity of voices and the presence of contradictory ideas in public debate are invoked by classic writers on free speech. For example, Milton and Mill stated: "Without contraries, there is no knowledge" and public speech needs to be "a struggle between combatants fighting under hostile banners" (Peters 2005:78; Mill 1956:58). Mill's approach could see disagreement needing to be sustained, even where it otherwise would not exist, in order to counter orthodoxies of the state and of a population's "tyrannical majority" (Wragg 2013:365).

The state of affairs of which I am thinking – free speech should incorporate diversity – suggests that free speech has positive aspects. As well as the *absence of prior censorship*, and the *close scrutiny of legal limitations* on published speech, free speech involves the *presence of multiple, diverse voices* (eg Lichtenberg 1990). The interests served by this approach are not just those of speakers, who are often the focus of attention in free speech analysis and litigation. The approach also respects the significant interests of audiences in the availability of diverse public speech.

In part, these interests in diverse speech recognise the way in which speech can be understood to create 'discursive publics' – publics that exist in relation to the circulation of texts, including media texts. This is less a rationale underlying free speech than "a condition-universal of public speech" (Kenyon 2010:711). Thus, speech concerns the creation of publics that *appear* to be self-organised and open to all, but actually select participants "by criteria such as shared social space … habitus, topical concerns, intergeneric references" (Warner 2002:106). The result is that: "When any public is taken to be *the* public, those limitations invisibly order the political world" (ibid:107). All public speech brings about "particular political orderings" (Kenyon 2010:710).

Structural implications of free speech

The above approach changes what it means for speech to be free. Here I explore the 'who, what, why and how' of positive free speech. Clearly, the questions are huge and somewhat unwieldy. So I focus on just one aspect of them: *the role of various public institutions in formally democratic contexts in relation to mediated speech*. That is not to suggest that these institutional roles are the only important aspect of the questions, but they do have importance and they suggest some matters relevant to free speech

more generally. (Adding questions about 'where and when' could also suggest developments for research on comparative media systems, which I leave aside here.[2]) Many areas of law and policy affecting public communication raise issues of free speech, in ways that are not always recognised. Government decisions about media ownership, public service media or Internet access and architecture, for example, are not decisions of 'unrestricted' policy; they raise matters of free speech that should shape and inform what is done. The analysis presented here offers a normative counter to public attitudes about commodified digital lives (documented by Bengt Johansson and Stina Bengtsson in this volume) and runs broadly parallel to the examination of advertising's limitations on speech (addressed by Justin Lewis in this volume). Here, I consider some legal and structural implications for free speech that follow from that sort of approach.

While I address 'positive aspects' of free speech or 'positive free speech' – and other labels could be used, such as empowering or active[3] – a key part of my concern is with *structural* implications of free speech as a concept. That focus might avoid some unwanted connotations of the word 'positive' – for example, that the positive is necessarily beneficial unlike the negative; or that, when the state acts to foster free speech, dangers are not present as they are when the state acts directly to restrict speech. The positive-negative terminology is also not meant to suggest the state is ever *absent* in terms of free speech or state-media relations. A market-based approach to speech "is not an absence of constraints, but a particular set of government sanctioned constraints" (Hutchinson 1989:21). As Victor Pickard states in this volume, "the real question is *how* the government should be involved." So my interest is with what can be called structural aspects of free speech and recognises that complete non-interference by the state is impossible (eg O'Neill 1990). To that end, the term 'positive' is short, simple and captures something of free speech that is probably under-considered in the literature. It seeks to take matters beyond a purely formal freedom.

Negative aspects of free speech

Turning to the questions framing this chapter: Who acts in relation to free speech and how, what do they do and why? Before considering those matters in relation to positive aspects of free speech, let me consider them for free speech's negative or liberty aspects. (While focusing here on public institutional actors, that is not to suggest there is not a wider range of actors and factors affecting speech.)

Who acts and how?

Under most formally democratic constitutions, free speech has the status of a constitutionally protected right. In terms of state institutions, under such a constitution, 'who' acts to protect negative free speech is largely understood as 'the courts' although

there are also extensive debates about how parliamentary processes may protect such rights. Parliament might be seen as a supplement to judicial action or even as the preferred method of protection rather than courts. But for negative aspects of free speech, a simple summary would suggest that, in legal actions, arguments are made that free speech has been breached, whether by a statute, by regulatory provision or decision, by older judge made law (in common law systems) or by executive action, and so forth.

The language of free speech is used much more widely than that – for example, against forms of private content control or censorship – and sometimes such wider arguments have legal traction. In commonplace analyses, however, courts protect free speech as a negative liberty against government action not against private action, with free speech being a value or principle or right enshrined in a constitutional document. Courts do this within individual legal cases. Courts may follow a 'categorical' approach to classifying the speech in question and the test to be applied to its restriction – as US First Amendment law is often described with its language of 'strict scrutiny', 'clear and present danger' and so forth. Or courts may engage in a more open 'balancing' exercise which takes into account, as well as free speech, other constitutional values or principles or rights (privacy, dignity, etc.). In both instances, free speech is a value that constrains what parliamentary majorities can enact and what executives can do. The result is that something that is believed to be socially beneficial by a majority may be ruled unconstitutional because it fails to meet the legal standards that are required for restricting speech.

What do they do and why?

Thus, who acts? Courts. What do they do? Courts strike down laws or governmental action or they reinterpret older legal positions to comply with free speech. Why? They act to uphold a more basic constitutional commitment – something which is seen as being too important to leave to parliamentary majorities, or unsuited to leave to parliament. And how do they act? Courts act within individual legal disputes. Simplifying matters in that way suggests some strengths and weaknesses of the approach, as well as some assumptions that underlie it.

Implications

I will take as widely recognised strengths that this approach offers for free speech, where a formally independent judiciary in an established and relatively powerful legal system is able to act on the basis of recognised principle to constrain majority or executive restrictions on speech. Battles have long been fought for that approach, and those battles will no doubt continue. But I also want to note weaknesses in the approach. Some are suggested by Joel Bakan's (1997) analysis of the Canadian Charter of Rights and Freedoms. He emphasised that free speech litigation has limited impact on

ordinary people's capacity to communicate in ways that affect public life. The analysis suggests that the promise of the Canadian Charter holds out little hope of fostering what can be called 'voice' (Couldry 2010; see also contributions to this volume by Justin Lewis and John Morison). Bakan argued that seeing free speech in negative terms – as he suggested Canadian courts almost always do – means being suspicious of state power, invoking free speech against government (but not private) action, and hardly ever requiring the state to act in support of speech. The approach involves an 'atomistic' conception of rights that "constructs social conflict in dyadic terms, as an accumulation of discrete clashes between rights-bearers and duty-holders" (Bakan 1997:47). While negative aspects of free speech might constrain discrete government restrictions on speech, they do little for structural aspects of speech. They do little to support diversity in speech.

As I have explored elsewhere, in many analyses it appears to be assumed that the goals of free speech exist when the state does not directly restrict speech (Kenyon 2014). Or at least, it is implied that the absence of state action will bring the goals of free speech closer. This is rarely argued explicitly, but analyses often examine free speech goals and then critique one or more restrictions on speech, with the implication being that the absence of restriction on speech is sufficient to foster the goals. But the assumption appears unconvincing. The most plausible version of it suggests merely that government action directed at speech will be more harmful to free speech goals than inaction (and that judicial action striking down restrictions on speech will be more beneficial than judicial inaction) (ibid; Schauer 1994). In some situations that may well be true. But there is little reason to think it would always be so, especially when some types of government action in support of diverse environments for public speech appear beneficial.

An obvious example of government action in support of diverse public speech is the creation and support of public service media. That has been shown to correlate with greater public knowledge of varied aspects of public life, from domestic, regional and international politics to entertainment and celebrity information (e.g. Aalberg & Curran 2012; Cushion 2012). This is not to suggest that public service media, as it has existed, fulfils the idea of positive free speech. Rather, public service media can illustrate *some* aspects of positive free speech in terms of diversity of content and separation from both government and market control.

Positive aspects of free speech

For questions about 'who, what, why and how', do the answers change if the focus is shifted to positive aspects of free speech? In comparison with negative free speech, responses would be different for at least the first two questions. That is, who acts and what they do.

Who acts and how?

As with negative free speech, courts may well act in support of positive aspects of free speech. But they are unlikely to act alone: multiple actors would be responsible for promoting positive aspects of free speech. The broadcasting decisions of the German Federal Constitutional Court are perhaps the most striking example (see brief discussion in Kenyon 2014:392-393). This is worth emphasis because so often positive aspects of free speech are seen *only* in terms of what parliament should enact and then what courts should then not strike down. There are many US examples of that approach, which may reflect the practical challenge of imagining or arguing for positive free speech in the US context (illustrative examples include Barron 1967; Baker 2002; Williams 2004; Piety 2012). Under current judicial practice, the US First Amendment is overwhelmingly negative (eg Schauer 2008). But the First Amendment is only a part of free speech, not the whole. And in my analysis it should not be equated with free speech as a concept. The German example shows how a constitutional free speech provision can be very different. It can create judicially enforced requirements for other arms of government to act to support diverse public speech. In particular, a substantial broadcasting sector that is not commercially driven has long been seen as a constitutional requirement for free individual and collective opinion formation under the free speech provisions of Article 5 of the German Basic Law.

What do they do?

In terms of what they do, courts might require parliament to enact legislation in compliance with certain constitutional provisions, including the provision of adequate funding to public service media along with protecting media independence, as in German law. Or it might entail private property owners treating speech as if they were government authorities, as in US First Amendment law on public forums. As for courts taking on such roles, questions about institutional competence may well be raised. I return to that issue below when considering why particular actors take action.

Of course, even when thinking in terms of public institutions the issue is broader than courts. Where courts in particular legal, historical and cultural settings *refrain* from acting to support free speech, it would appear that other arms of government should act to support diverse public speech (or perhaps at least explain why they are failing to act). As Thomas Gibbons has suggested, affirmatively protecting free speech is a responsibility "the state should not avoid" (2012:42). This means free speech has substantial implications for public policy. Many matters that are often seen as 'merely' questions of policy involve free speech once its positive aspects are recognised. That is true for many parts of media law and regulation, with the UK offering a good example with recurrent debates about the BBC and its legal basis, mission and funding. It could be illuminating to review the political and commercial pressures facing the BBC in the current Charter renewal process in light of free speech – do some

attacks undermine the values commonly seen to be fostered by free speech, whether in terms of knowledge, self-development or, perhaps most clearly, self-government? The language of free speech could be used against those plans for public media. Free speech underlies similar arguments about Internet regulation, such as those about net neutrality (eg Ammori 2012). And it offers another angle for thinking about media, commercial speech and regulation (eg Lewis 2013 and his chapter in this volume).

Schauer (2008:925) has noted in passing that implications from this sort of approach to free speech include the existence of high quality, broad-appeal public television, although he does not set out an argument for its adoption (the German experience, for example, is not considered in his US-focused analysis). But he does examine how the First Amendment is, either, "underinclusive vis-à-vis the background justifications that the First Amendment was designed to serve", or that the First Amendment creates "a larger array of rights than the courts alone can or should be expected to manage" (2008:929). And he notes that these two versions may be "different conceptions of the same thing" (ibid). In an approximate parallel, I would suggest that *negative* free speech (in Schauer's terms the First Amendment) is not consistent with free speech's stated goals, *and* that free speech encompasses a wide range of negative and positive aspects. The question of institutional enforcement of those aspects is separate and need not be resolved by reference solely to the US experience.

So, who should act? Legislatures, regulators and other arms of the executive should act to promote free speech. Where they do act and legal challenges to their positive policy decisions are mounted, courts' responses need to be informed by positive as well as negative aspects of free speech. Courts need to resist the effects that repeat-players can have over time by seeking to reshape laws affecting speech to their own ends. As Tamara Piety has noted in the US context, litigation against commercial speech restrictions, over decades, has "made an argument seem natural and inevitable that only fifty years or so ago would have seem absurd – that commercial speech is entitled to full First Amendment protection" (Piety 2012:2). In addition, where parliament and executive do not act, it may be that courts should act to protect a value that is too significant to leave solely to other actors. In formally democratic settings, it is commonplace that courts act to protect the negative or liberty aspects of free speech; there are arguments that they should also have a role in terms of positive free speech.

That said, it is notable that some relatively diverse media architectures have been arrived at through parliamentary processes (and through wider social and cultural factors). For example, Nordic 'media welfare states' may offer useful lessons for positive free speech, but also ones that are tempered by the contemporary pressures those countries face in terms of sustaining their media models (eg Syvertsen et al 2014; Kenyon, Svensson & Edström 2016).[4] While there are examples that, to a limited degree, display positive aspects of free speech without action having been taken by courts, contemporary political and economic pressures suggest real doubt about the continuation of those models.

Why do they act?

For the third question – *why* an actor acts in relation to free speech – I suggested above in relation to negative free speech that courts may strike down laws restricting speech in order to uphold a basic constitutional value, a value which should not be left to the executive or parliament. The answer may be the same when considering positive aspects of free speech; it is just that the *value* at stake is understood in a broader fashion. In particular, if public communication is meant to serve democratic ends, there are real questions about leaving some aspects of public communication to a mix of executive and parliamentary choice. Politicians appear to be susceptible to media coverage, and perhaps particularly so among different branches of government. Indeed, politicians *should* be susceptible to public speech. But that does not mean they are the best-placed arbiters of structural matters that affect public speech. Politicians may be well served (or believe themselves to be well served) by a particular form of media; for example, media that is not especially diverse, mirrors elite interests and debates, and allows politicians to cultivate relationships with media actors to serve their own interests. Free speech may not be served at all well by the very same form of media.

In conclusion: The paradox of free speech

Considering questions about 'who, what, why and how' of positive free speech suggests a paradox. In terms of state institutional actors, all are compromised in their ability and effectiveness to act in support of free speech. Yet there remains a need to protect communicative structures that support diverse public speech. Because structures that affect public communication also influence political processes, there is a sense in which the 'architecture' of public speech must *precede* public and political debate. Thus free speech should entail media of different institutional forms, internal organisation, personnel and economic bases containing speech of diverse content and style, aimed at different ends, creating different and only partially overlapping publics, and seeking to influence (among many things) political decisions. Debate could reshape this architecture to some degree, but it could not make changes that went beyond the requirements of free speech for non-censorship and diversity.

Just as the German Constitutional Court has noted, in what I would call a 'precautionary' approach to free speech, the role of free speech in opinion formation gives it a position prior to many other constitutional rights. This quasi-foundational role for speech is recognised within many democratic systems. It is "the matrix, the indispensable condition of nearly every other form of freedom" (German *Lüth* 1958 decision quoting the US *Palko* 1937). As the German court has stated, when changes to the architecture of public communication "prove to be faulty, they can only be rescinded – if at all – to a certain degree and only with considerable difficulty" (*Third broadcasting*

case 1981). The risks, for example, if commercial broadcasting dominates the formation of public opinion means the court must take "precautions for the protection of journalistic diversity" by protecting public broadcasting (*ZDF Treaty* case 2014:[36]).

There is nothing about the ideas in this analysis that appears to be limited to the German context. Rather, it suggests a need for courts to be prepared to act.[5] There is also nothing in the ideas that suggest they must be limited to public service media: rather, they suggest requirements for the *architecture of public communication* more generally. This includes, for example, the position and role of corporate intermediaries (and their connections to government) in Internet architecture. The idea is not that courts dictate the approach as a whole. Rather, the legislature would retain a large degree of choice about what it legislates, within a *framework* protected by the court (see eg Alexy 2002:314ff). There are matters on which parliament must legislate and various minimum standards that legislation must meet.

In terms of institutional state actors, positive free speech raises issues for courts, legislatures and executives. The conflicted position of political actors in relation to the architecture of public speech and the dangers for political processes if courts do not act to protect the architecture of speech, suggest that leaving courts to deal only with *explicit restrictions* on speech is likely to fail free speech. That is not to ignore the conservatism of the legal system and many actors within it – a matter which writers such as Bakan have noted as critical in understanding limitations about judicial action on free speech. Decisions by judges, whatever approach they take to such matters, are likely to reshape the terrain available for political life. Concerns raised by Bakan would underscore the importance of aiming for protection of a structure that would enable substantial public debate to occur in a manner that could affect public life. Any attempts to realise free speech will have limited and partial natures, but they should recognise the necessity of framing free speech in terms that include both restrictions and opportunities for 'voice'.

Notes

1. There are other divisions and classifications; examples in the mainstream legal literature include the idea of free speech allowing both social change and stability (Emerson 1970) and free speech having a 'checking function' on government (Blasi 1977).
2. Limitations of space means that analysis is left aside here, but the example of Hallin and Mancini (2004) offers interesting potential to consider two related aspects of the approach to free speech that I outline here. First, positive aspects of free speech might merely be an example of their Northern European or democratic corporatist model with, for example, Germany and Sweden using different institutional actors (court and parliament) to foster diverse public speech. Second, Hallin and Mancini mention free speech only briefly, which is unsurprising in their broad study, but when they do address free speech, it is in terms of the US First Amendment. There is no express recognition that what is meant by 'free speech' might differ elsewhere, which suggests ways in which the comparative analysis might be developed.
3. Other possible terminology, instead of negative and positive aspects of free speech, includes Stein's conceptualisation of 'defensive' and 'empowering' approaches to the First Amendment: Stein (2006). 'Defensive' is also used by, eg, Germany's Federal Constitutional Court: see Kommers and Miller

(2012:408-410). Gibbons (2012:25) uses the term 'active' (while noting 'positive' is often used). Keller (2011:413) contrasts ideas of 'liberty to publish' and 'empowered autonomy'.

4. Examination could also be made of the free speech provision in the relatively new Article 100 of Norway's constitution; Art. 100(6) reads, 'It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse'; see eg Rønning (2016).
5. As well as questions of institutional competence that might arise here, the approach would entail examination of who would have standing to bring legal actions.

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2.

Beyond Positive and Negative Conceptions of Free Speech

Kari Karppinen

Abstract

Freedom of speech, and associated notions like media freedom, are values that few oppose in principle. Yet their definitions, interpretations and limits are subject to endless contestation politically and philosophically. This chapter seeks to introduce fresh perspectives into conceptual debates on free speech from contemporary political philosophy and democratic theory. Different conceptions of freedom have traditionally been discussed in terms of the dichotomy of positive and negative freedom. Beyond these frameworks, this chapter reviews an emerging third perspective, in which communicative freedom is no longer understood as a state that can be unambiguously achieved or attached to universal, definite conditions of realisation. Instead, freedom is seen as always provisional and partial, something that calls for ongoing resistance against a wide range of constraints and limits.

Keywords: negative freedom, positive freedom, capability approach, radical pluralism, non-ideal theory

Different conceptions of freedom are often discussed in terms of the established dichotomy of positive and negative paradigms of freedom (e.g. Berlin 1969). Although it remains useful, the dichotomy has been much criticised and debated in political philosophy generally, as well as in more applied contexts like media and communication policy research.

Beyond these conventional frameworks, this chapter discusses two additional theoretical directions from which to look at the opportunities and constraints to free speech in the contemporary media environment. As one possible theoretical perspective, I discuss the 'capabilities approach' developed by Amartya Sen and its usefulness for debates on communicative freedom. Secondly, as a distinct theoretical framework, I discuss the implications of contemporary radical-pluralist, or 'agonistic' theories of democracy and their conceptions of freedom.

The theories discussed in the chapter represent mutually different theoretical traditions and thus do not constitute a 'third paradigm of freedom' in any meaningful sense. One idea common to them, however, is that freedom is seen as a contested ideal, and always a partial achievement, not a state that can be attained in any absolute sense.

In other words, the theoretical perspectives discussed in this chapter imply a 'non-ideal' or 'anti-essentialist' approach to free speech. This means that freedom is not seen as an either/or issue, and the aim is not to define any universal or definite conditions for its realisation. The recognition that free speech does not have any 'natural' content, however, does not mean that it cannot serve as a relevant aspirational ideal in academic and policy debates. Instead, it can be argued that the contested nature of the concept only makes it more relevant to discuss the usefulness of different theoretical approaches for identifying existing constraints and opportunities to communicative freedom.

Beyond positive and negative freedom

Freedom of speech, and associated notions like media freedom and Internet freedom, are values that few oppose in principle. Yet their definitions, interpretations and limits are subject to endless contestation both politically and philosophically. Consequently, it is often between different conceptions of freedom, rather than between advocates and opponents of free speech, that normative and political debates in media policy and academic research take place.

In political philosophy, as well as more applied political discourse, the distinction between 'positive' and 'negative' conceptions of freedom is one of the most established ways of framing the debate on different meanings of freedom. Negative freedom typically refers to the absence of external constraints, or 'freedom from' something, while positive freedom signifies 'freedom to', or the actual possibilities or capacities that people have to make use of their freedoms.

Similarly in media and communication policy the distinction is often used to characterise ideological differences, for example between different national media policy traditions. Negative freedom is traditionally associated with the absence of state censorship or other forms of state intervention (see e.g. Curran 2002, Jones 2001, Kenyon 2014; Lichtenberg 1990). In contrast, positive freedom is typically invoked in debates on citizens' communicative rights, or when emphasising the structural preconditions required for citizens to get their voices heard in public discourse. As Andrew Kenyon argues in this book, positive concept of free speech involves not only absence of prior censorship, but also presence of multiple, diverse voices as a precondition for the effective use of free speech. Following from this, positive conceptions of freedom usually also imply governments' responsibility to actively support citizens' opportunities to exercise their free speech, through institutional arrangements, such as public service media (Jones 2001; see also Kenyon's chapter).

The negative and positive conceptions of freedom can also be related to the distinction between 'market-driven' and 'democracy-driven' freedom of speech. Although philosophical ideas and real-world institutions do not correspond one-to-one, the negative conceptions is often seen to correspond with the American free speech tradition and the US market-oriented media system, the positive conception is respectively

seen to correspond with the (Northern) European, public interest oriented media policy traditions, or the 'Media Welfare State' as the Nordic media model has recently been named (Syvertsen et al. 2014).

The distinction between negative and positive conceptions of freedom has been widely debated, problematised and redefined for decades now. In philosophical debates, the negative/positive freedom distinction is often seen as too simplistic or too vague. Yet the distinction is still very much alive. Both positive and negative conceptions can be easily found, for example, in debates on Internet freedom and citizens' digital rights. Despite its shortcomings, the dichotomy seems to offer a useful way of illustrating aspects of free speech, identifying the underlying assumptions of different position in media policy, and also categorising media systems and their underlying ideological traditions (see, for example, Pickard's discussion of the corporate libertarian tradition of American media policy or Axberger's chapter in this book on the different treatment of newspapers and broadcasting in Sweden's dual media system).

Both negative and positive conceptions also have their limits and blind spots. In the context of media and communication studies, a negative conception of freedom is typically criticised for ignoring constraints other than state intervention, such as market failure or self-censorship. As Kenyon (2014) argues, negative conceptions of free speech often implausibly assume that the goals of free speech exist when the state does not directly restrict speech. As a consequence, the 'free information flow' or 'marketplace of ideas' conceptions ignore how journalism is tied in broader relations of power in society, and how media markets and journalistic routines themselves inevitably privilege certain voices and exclude others.

Conceptions of positive freedom, on the other hand, have traditionally been criticised for paternalism or essentialism, trying to define the communicative needs and rights of citizens from above. As Isaiah Berlin (1969) argued, the danger lies with manipulating positive freedom into a political tool of tyranny, or coercing non-rational individuals to be free. Although discussions of the positive approach to free speech today are strongly associated with a pursuit for a more democratic media systems, it still raises the question of who is to decide on what counts as genuine freedom (see Axberger's chapter for discussion of such fears in the context of public service broadcasting). Or if it is argued that positive freedom requires institutional preconditions, such as diverse media architecture or equal access, how is it to be decided what this means in practice?

Besides theoretical critique, the media environment itself has changed in ways that challenge the applicability of conventional normative frameworks. The digital media environment, and the range of different types of opportunities and constraints to free speech, has arguably made the established interpretation of the negative/positive dichotomy increasingly problematic as a basis for conceptualising different aspects of communicative freedom.

The opportunities of citizens to express their voices have in many ways multiplied with digital convergence and information abundance. At the same time, constraints and power relations that structure these opportunities have become more complicated,

with many other powerful actors than states who practice censorship and surveillance. Media also increasingly cross borders of nation states, questioning conceptions of national media systems or free speech regimes. This also makes it increasingly difficult for governments to implement media and communications policies based on shared national values and aimed at guaranteeing a particular institutionalised interpretation of citizens' positive communicative rights (e.g. Lunt & Livingstone 2012).

All these changes challenge the inherited normative models that media policies are based on. As Alistair Duff (2012:6) argues, because of media convergence, distinct normative traditions associated with separate media (or national media systems) have clashed and consequently, the information society has inherited "a baggage of discordant normative traditions". Similarly, van Cuilenburg and McQuail (2003:198) have called for "a new communication policy paradigm", which is to reflect entirely "new political ideas and social values".

It can therefore be argued that the traditional negative/positive freedom distinction in free speech thinking has been increasingly challenged both by intellectual currents in political philosophy and by changes in the communicative environment itself. Without claiming to introduce 'a new paradigm' as such, I will next briefly raise some theoretical horizons that might be worth pursuing more systematically in order to develop such new normative theories and paradigms around communicative freedom.

As a terminological note, I use the notion of 'communicative freedom' here as a broader theoretical notion to avoid some of the more formal legal and political associations of the term 'free speech'. Without associating it with any specific theoretical tradition, the term is intended to serve as an open-ended starting point for discussing the implications of different theoretical approaches to citizens' communicative opportunities and constraints.

Toward a "non-ideal" approach to communicative freedom

A common starting point for the perspectives discussed here is that it is not productive in the contemporary media environment to talk about freedom as an either/or issue. In much of traditional political and academic discourse on free speech and the relationship between media and democracy, within both negative and positive traditions, it is often assumed that abolishing the political and economic restrictions can guarantee free communication in some authentic way.

As Kenyon (2014) notes, this applies particularly to negative conceptions of free speech, which assume that free speech exist when the state does not directly restrict it. Similarly, however, positive conceptions of communication rights can be criticised for trying to develop a pre-determined list of universal preconditions that genuine freedom of expression would involve (Kioupkiolis 2009).

Yet, public communication is always subject to a range of constraints and limitations, ranging from individual skills, access, and market logics to cultural conventions

and other forms of social control. It can even be argued that restrictions are constitutive of public expression. As Stanley Fish (1994) has argued, "there is no such thing as free speech"; meaning that assertions of free speech have never been general, but are always articulated against the background of some type of restrictions and exclusions that give the concept its meaning.

Instead of a transcendental, absolute value, freedom – and notions like free speech, freedom of press, media freedom – can be understood as a terms rooted in certain historical practices, institutional arrangements and privileges that they protect. According to Wendy Brown (1995:6), "freedom is neither a philosophical absolute nor a tangible entity but a relational and contextual practice that takes shape in opposition to whatever is locally and ideologically conceived as unfreedom".

This can be criticised as a relativist position that allows freedom to be used for any purpose by anyone. However, in contrast to the absolute and universalising rhetoric, a position that recognises the contextual nature of freedom can also be seen as a more realistic basis for expanding and reimagining communicative freedom as a normative value (see e.g. Fish 1994; Kioupkiolis 2009).

In much of contemporary work in political philosophy and democratic theory, freedom is no longer understood as a state of affairs that can be unambiguously achieved, or that is attached to any universal, definite conditions of realisation. Instead, freedom is increasingly seen always provisional and partial, subject to a range of constraints and limits. These constraints can be either internal or external to the subject, and based on state, market or cultural relations of power. Communicative freedom can therefore be seen as a continuum, with negotiable endpoints, but which nevertheless provides an ideal worth defending and expanding. In the following, I briefly discuss two approaches, which both acknowledge, although in different ways, the non-ideal nature of freedom.

Capabilities approach

The capability approach of economist-philosopher Amartya Sen, which has been further developed, among others, by Martha Nussbaum, provides one arguably underutilised theoretical resource for thinking about communicative freedom. The capability approach to freedom is often associated with positive, or substantial conception of freedom, because it is not concerned with absence of restrictions only, but with people's real opportunities and their structural preconditions. As Sen (2009) argues, debates on human freedom should move focus from transcendental, procedural, and abstract ideal of authentic freedom to expanding "real freedoms that people enjoy".

However, instead of advocating any predefined conception of "genuine freedom", the capability approach recognises the multiple dimensions of freedom and the impossibility of its perfect realisation. Instead, Sen emphasises the incremental and practical achievements that expand people's opportunities to make use of their freedom.

According to Sen (2009:228-229), freedom is valuable for at least two reasons: it gives individuals more opportunity to pursue our objectives, what we value; and for the process of choice itself. For these reasons, Sen argues that there are good grounds for giving personal liberty some kind of a real priority over contestable conceptions of public interest, or paternalistically deciding what is good for others. Capabilities are thus best understood as real, actual opportunities people have to do the things that they have good reason to value (Sen 2009:253). Instead of the means to achieve various abstractly defined goals, Sen is concerned with the way freedoms are used and the actual capability of individuals to achieve the end result. Emphasising the importance of capabilities, rather than particular institutional arrangements, outcomes or procedures, thus escapes the charge of paternalism and elitism. People value different things that are not commensurable.

What implications would the capabilities approach then have for media and communications? Sen himself has strongly argued against "one pre-determined canonical list capabilities, chosen by theorists without any general social discussion or public reasoning" (Sen 2005:158). Accordingly, the substance of basic capabilities in the context of media and communications would be an open question that is left for scholars to consider in each context separately, based on public reasoning.

In contrast to the more open-ended approach of Sen, Martha Nussbaum has developed a list of central, basic capabilities that all democracies have the responsibility to guarantee to citizens. Among these, Nussbaum (2000:78) recognises, for instance, the ability "to use the senses, to imagine, think, and reason – and to do these things in a 'truly human' way […] informed and cultivated by an adequate education"; "being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice and "being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech". Nussbaum also emphasises the role of public policy in promoting the educational, institutional and material conditions for the realisation of basic capabilities. In this sense, access to information and communicative resources can also be seen as having an important, facilitative role in the realisation of other basic capabilities (see Gelber 2012).

In any case, since theorists of the capability approach have so far had relatively little to say about communication or media more concretely, more work would be needed to develop the framework for the purposes of theorising or operationalising communicative freedom.

So far, the capabilities approach has been discussed to some extent, for example in the context of research on communication and development and the digital divide (see Garnham 1997; Gelber 2012; Kleine 2013; Schejter et al. 2015), but it has not been extensively applied in media and communication research or policy more generally. While the question of what basic human 'communicative capabilities' would entail in different contexts remains open, as a heuristic perspective to communicative freedom, the capabilities approach could arguably provide one useful framework for compara-

tive work on how different media systems promote people's real communicative opportunities, or for studying the communicative inequalities with regard to access or voice between individuals or groups within societies, only to name some possibilities.

Radical democracy and agonistic freedom

Another, distinct theoretical horizon, which emphasises the contested and partial nature of freedom can be found in contemporary radical or 'agonistic' theories of democracy, promoted by theorists such as Chantal Mouffe.

The central idea of the agonistic democracy, according to Mouffe (2005:3) is that "instead of trying to design the institutions which, through supposedly 'impartial' procedures, would reconcile all conflicting interests and values, the task for democratic theorists and politicians should be to envisage the creation of a vibrant 'agonistic' public sphere of contestation where different hegemonic political projects can be confronted".

The underlying emphasis here is that the liberal model of the marketplace of ideas, but also ideal conceptions of a rational and deliberative public sphere, fail to address power and existing forms of exclusion. Instead, radical-pluralists emphasise the permanence and ineradicability of hegemonic power relations. As a consequence, the aim of communicative freedom from this perspective cannot be the elimination but the continuing contestation of existing relations of power. As Mouffe (2005:51) argues, "without grasping the structure of the current hegemonic order and the type of power relations through which it is constituted, no real democratisation can ever get off the ground".

Drawing on similar ideas, Alexandros Kioupkiolis (2009) criticises the conventional, modern conceptions of freedom for essentialism – trying to tie freedom to unchanging universal laws and definite conditions of realisation – and for failing to address the constrained nature of human agency.

In contrast, an 'agonistic' conception of freedom emphasises that freedom is always a partial achievement, which calls for constant resistance against various constraints and power relations. This does not mean a purely defensive strategy. Instead, Kioupkiolis particularly criticises conventional negative conceptions of freedom for opposing freedom to limits, such as censorship. Similarly to Kenyon (2014), he argues that the assumption that people are as free as they can be if only there is no outside intervention affords no insight into how we can actually go about expanding freedom.

Kioupkiolis (2009:484) argues that the recognition of the limited nature of freedom can expand the imagination by emphasising creative agency and innovation – projecting new objects and ways of living and extending the range of options beyond those prefigured by their social contexts. In short, breaking free from the essentialism of modern conceptions can extend freedom beyond predetermined bounds – freedom breaks loose from the compulsion to achieve its definite realisation within fixed social conditions and particular institutional arrangements (Kioupkiolis 2009:474). Simi-

larly, Mouffe (2005) emphasises that while concepts such as democracy and freedom are always indeterminate and open to a multitude of interpretations, it is the role of critical research itself is to offer these interpretations, and thus provide a basis for real political alternatives.

In terms of the radical-pluralist approach's concrete implications, the emphasis on the processes of contestation, resistance and criticism makes the approach susceptible to the criticism that it is obsessed with disruption only, and incapable of developing any substantive normative positions or concrete institutional suggestions. Is some ways, it is clear that the radical-pluralist approach is above all a call to recognise the aspects of power, exclusion and control inherent in all conceptions of the free speech, not an attempt to defend any particular definition of freedom or its institutional preconditions.

However, there is no reason in principle why the radical-pluralist perspective would be incompatible or disinterested with concrete questions of media policy or the political economy of the media. The implications of this kind of thinking for media policy, however, have so far been less developed in media studies (see, Karppinen 2013a). One clear implication of the suspicion of totalising claims of genuine freedom or unrestricted communication is that communicative freedom is not guaranteed by any single institutional ideal or an organising principle (such as public service institutions or free market competition). This, in turn, implies that media systems should involve a variety of overlapping and mutually checking logics. Besides traditional public and private media sectors, this can mean, for example, support to minority and alternative media linked to social movements and other civil society actors, which provide space for critical voices and social perspectives that are excluded by currently dominant structures and styles of public speech (Curran 2012:239-240). In this sense, the radical-pluralist approach comes close to Kenyon's argument for diverse architecture of public speech as a central precondition for free speech.

Conclusions

Lawyers, philosophers, politicians, journalists and activists who invoke the value of free speech thus frequently talk past each other – or use the concept instrumentally to argue for a specific purpose, rather than even trying to reach agreement on the nature and meaning of the concept. In this sense, few would deny that freedom of speech is an "essentially contested concept" (Gallie 1956) that does not have any single, stable meaning.

Often the notion is used loosely as a catchphrase that everyone can embrace, more or less as a synonym for all things good, much like 'democracy' in its more vague uses. On the other hand, the notion of freedom has also shown itself to be easily appropriated for many instrumental and more cynical political purposes, to protect the self-interest of the media industry or close down further debate about media accountability (e.g. Tambini 2012).

Does the idea of free speech or media freedom then have any relevance or critical potential in current media policy debates, or has its meaning dissolved with its many uses? The aim of this chapter is to discuss some new theoretical horizons in academic debates on communicative freedom. There is obviously no final agreement on the nature and meaning of freedom as a political value. The main point of this chapter is that media and communication studies have by no means exhausted the theoretical resources available for developing the meaning of communicative freedom (see also Karppinen 2013b). There are many theoretical perspectives available that have so far been relatively neglected in media and communication (policy) research.

Despite the distinct theoretical roots of the approaches discussed here, they share the idea that freedom is not a transcendental, foundational ideal, but an open-ended ideal that can always be extended to include more alternatives and opportunities, especially for those currently disadvantaged in the public sphere. While the capabilities approach focuses on the actual, practical improvements to people's lives, radical-democratic theorists emphasise the value of contesting power relations and openness to new opportunities that extend and contest the idea of freedom itself.

The concrete implications of these approaches for media policy remain to be discussed in more detail. Without necessarily arguing that the more conventional ideas of free speech have become useless, I argue that these non-essentialist understandings of freedom can provide at least a fresh starting point for analysing the various types of constraints and opportunities to freedom, without falling into a purely defensive strategy of protecting existing institutional arrangements or vested interests.

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3.

Freedom of Expression as a Public Service

Hans-Gunnar Axberger

Abstract
The development of the Internet has fragmented mass media and is on its way to undermining media institutions that have served public interests for a very long time. Constitutional consequences will follow when the press cannot anymore – at least not to the extent we have become used to – deliver high quality information, engage in investigative journalism and provide qualified platforms for exchange of ideas. And public service broadcasting faces its own challenges and problems. What – if anything – should be done in response? This chapter examines the history of press subsidies and public service broadcasting in Sweden in light of these changes to suggest a redefinition of public service. The chapter argues that we ought to start thinking about public service as a constitutional function rather than as public institutions.

Keywords: public service, press subsidies, free speech, constitutional protection, press freedom, broadcasting, Sweden

The Internet and the convergence of what used to be newspapers, radio, TV, cinema etc. are fundamentally changing the preconditions for media politics. The press is weakening in its position as the 'Fourth Estate'. Public service broadcasting companies, financed through government, might be thought capable of taking the press's place, but they face their own difficulties. In this brief essay, the developments are discussed from a Swedish constitutional point of view. The purpose is not to elaborate solutions as such. But there is one conclusion: the public service concept used in Sweden needs to be redefined in the new media landscape.[1]

Background

Sweden has a long tradition of constitutional protection of free speech. In 1766 a 'fundamental law' abolishing censorship and establishing press freedom was adopted by the Parliament. Even though the law did not survive for more than six years, its principles reappeared in the constitutional Freedom of the Press Act (FPA) of 1809.

On the whole, press freedom has been well taken care of since then; judicial institutions have developed the principles that originated in 1766 into a sophisticated press law system. The concept, in the beginning obviously designed for print, has served as a model for protecting freedom of expression in general, and since 1992 there is also a Freedom of Speech Act (FSA).[2]

The Fourth Estate and the no rule-rule

There is a straight line between the constitutional reforms that were realised over two centuries ago and the development of the newspaper industry. Inspired by Montesquieu's theory of the division of powers, the press has often been referred to as 'the Fourth Estate', and it can be argued that this metaphor ought to be taken literally. While 'the Fourth Estate' is the term used when referring to the traditional division of powers, in Sweden, with its dualistic constitutional tradition, the press is instead called 'the Third Estate'. A Swedish legal scholar once wrote that press freedom should be regarded as a statutory power of control, trusted with the tasks to observe political issues and watch over public authorities. The press should therefore be understood as an 'estate' not only in a factual but also in a legal sense (Eek 1942:260).

The 'estates' according to the theories of Montesquieu and others all correspond to constitutional institutions: parliament, government and courts. The media as an estate does not fit into this pattern. While the other functions are founded in the legal system and in detail regulated within it, press freedom is based on the idea that the field of communication between citizens shall be left alone by the legislator. So, the Fourth Estate is not the press itself, it's an idea, or a rule. With a simplification one can say that there is only one rule, the 'no rule-rule', stating that there shall be no rule (or at least as few as possible) and that the state shall not interfere. This is well illustrated by the laconic wording in the United States Constitution: "Congress shall make no law … abridging the freedom of speech, or of the press".

In general, the Swedish ideology of press freedom is that if citizens are left free to communicate information and ideas society as a whole will benefit. The same goes for the far reaching constitutional rights for citizens to access public documents, rights that were included already in the Freedom of the Press Act of 1766. The public interest is reflected in the constitutional acts, where it is stated that the aim is "to secure the free exchange of opinion and comprehensive information" (*säkerställa ett fritt meningsutbyte och en allsidig upplysning*). In other words, these rights fulfil *a public service function*, and that is why citizens are protected against governmental intervention when exercising them.

State subsidies

For a long time, the 'no rule-rule' served Swedish society well in the sense that a strong press tradition evolved, with a great richness in newspapers and other printed publications. In the midst of the twentieth century, however, market forces caused a concentration of ownership in the newspaper industry. As a result, smaller newspapers were put out of business.

It appeared that market forces were driving the industry towards local and national monopolies. In 1970, after lively debate, a *press subsidy system* was introduced. The subsidies were financed by a tax on advertising. Since advertising more or less exclusively occurred in newspapers at that time, and mostly in the largest of them, most of the money was collected from the wealthier newspapers. So, it was a kind of Robin Hood-tax, taking from the rich and giving to the poor.

The press subsidy system is an obvious breach against the idea that government should leave 'the marketplace of news and ideas' alone. General subsidies, such as reduced VAT for all print media and other content-neutral measures of that kind, are one thing. Selective subsidies for certain newspapers are different. With measures like that government can, as in the Swedish system, take an active role in 'balancing' what politicians regard as a distorted formation of public opinion. The political response to criticism against this kind of governmental interference has been that if the market cannot produce newspapers that reflect a broader perspective of news and views, giving voice to the whole spectrum of opinions and ideas in society, someone has to correct this misrepresentation (or 'market failure'). This line of argument is similar to the broader discussion where traditional press freedom is characterised as 'negative' as opposed to a corresponding 'positive' freedom.[3]

A public mission

After the introduction of the subsidy system, political interest in press politics increased. Several governmental commissions followed. In this context, newspapers were given a public mission. It was officially pronounced that the media had three assignments in society, namely to

- inform,
- examine public affairs (powerful and influential institutions and people), and
- serve as an arena for public debate.

The meaning of these assignments was elaborated in official reports and made part of press politics.[4] What was formally pronounced no doubt well described the functions that media in modern western societies de facto have fulfilled. But when these functions are transformed into political objectives and made part of a state ideology

they are also likely to affect how the constitutional protection of press freedom is interpreted. There is an obvious danger that as a result press freedom will be limited to speech which is considered politically relevant or, even worse, politically correct, and that other aspects of free speech, including literature, art, science and entertainment etc. will be regarded as less important.

In contrast, the parliamentary commission that prepared the Swedish Freedom of Expression Act of 1992 underlined that though freedom of expression is indispensable to democracy, we don't have it in order to serve the procedures of democracy. The commission therefore hesitated to state a concrete, comprehensive reason for protecting free speech. Instead, it pointed out the risk that elaborated motivations of that kind can be turned into reasons to limiting free speech.[5] The conclusion seems to be that free speech is close to being a goal in itself, or, in other words, that its value is more intrinsic than instrumental. Indeed, the commission also states that what calls for justification is not freedom of expression but interference with it.[6]

State monopoly becomes public service broadcasting

In the era of the Enlightenment, when the ideas of free speech as a fundamental freedom took form, the printing press was the only existing means of mass communication. It wasn't until the twentieth century that a comparable phenomenon appeared: broadcasting. But as we know, freedom of speech for radio and television was not fully recognised. Instead, the state intervened. The ultimate reason was scarcity in transmission frequencies. State governed broadcasting[7] was considered necessary if there were to be anything worth listening to on the wireless. With it followed statutes and contracts stating how the broadcasting company was to be organised. Once there, the company was commissioned to do things that were useful to society. In the early years – in the era when the corporatist, consensus-oriented 'Swedish Model' was founded – this resulted in programs containing uncontroversial music and entertainment, '*folkbildning*',[8] religious services from the State Church etc. The way it was all organised is typical for Sweden in those days: the newspaper industry was invited as partner alongside with government and organisations linked to political parties. It took decades before radio broadcasting developed into something like a news medium. Up until the sixties it was exclusively used as a channel for news transmissions produced by the dominating private Swedish press agency (*Tidningarnas telegrambyrå*, TT). This has obviously changed and over time the missions of the radio and TV companies have, with the consent and support of politicians, developed into the now well elaborated system of public service broadcasting.

One can observe that the development of a public service ideology coincides with the introduction of the press subsidy system and with an increased political interest in the media sector, resulting in the above described public mission. Although the press and the public service companies have always been treated separately in Swed-

ish politics, it is easy to conclude that the public service institutions have served the same purposes as the press subsidy system, i.e. to provide a desired diversity in media content that the market has not been considered able to produce.

There is, however, a fundamental difference between governmental intervention in the free market for technical reasons – frequencies are scarce, therefore regulation is needed to safeguard the common good – and intervention to promote certain types of media content. Still, the regulation of public service broadcasting remains unchanged *in principle*. The scarcity argument is nowadays obsolete but, as far as the law is concerned, it has not been replaced. One of the things Swedish politicians, in contrast to the debate in other countries, have thereby omitted to discuss is what 'public service' actually means.[9]

The Fourth Estate in a new shape?

The newspaper crisis of the sixties was mild compared to the changes that the Internet has caused more recently across the print industry. Digitalisation could have been a path to survival. However, very few newspapers have been successful when switching from print to web. The much talked-about search for 'a new business model' has been going on all over the world for decades, with poor results. We are moving into a media landscape where newspapers, printed or not, will no more have the societal standing they once had. In other words, it seems as though we are facing the decline – and fall? – of the Fourth Estate.

When considering if this is a problem from a constitutional point of view, public service broadcasters must be included. Together with the press they have come to form a dual media system. The two once proved to co-exist rather well, in a subtle kind of way. In short, one can say that the free press watched over public service, helping it to guard its independence from government, and that public service journalism formed a corrective against exaggerations and abuse in the free press.

Now, if one branch of the media system is weakening, as seems to be the case with the newspaper business, there is still the other branch, isn't there? The ideals of public service cover what has been assigned to the press – to inform, to investigate and to serve as arenas for public debate. To a certain extent – maybe sufficiently – the public service sector can provide us with those functions.

This is precisely what seems to be happening. During the last few years, the publicly financed Swedish broadcasters have gradually moved over to the web. Their sites – where 'radio' and 'television' share unlimited space with written articles of a traditional press character – are among the most well frequented on the web. The impression, at least optically, is that they expand as newspapers become thinner. The weakening of the media system caused by the effects of the Internet could in this way be compensated. But the public service concept faces its own problems in the new media landscape.

Public service broadcasting – three problem areas

Task and content

In the old context, it was self-evident that the task of broadcasting within the limited available frequencies had to be assigned to some kind of institutional entity. Public service in Sweden therefore became synonymous with the company – later on companies – running 'the show'. Today, this is not at all self-evident. If the aim is to promote content that is not to a sufficient extent provided by the free market, the public service functions can be fulfilled in many other ways than by state controlled broadcasting companies with a monopoly to collect license fees. If public service is defined as a function rather than as an institution, the question of what the State shall support and why, ought to have the same answer regardless of what kind of media activity we are talking about. When press, Internet and broadcasting have converged into a seamless merge of what used to be different media, government policies concerning press subsidies and public service can no longer be kept apart. To say that public service is what the publicly financed broadcasting companies do was at one time rather natural; today it is avoiding the question by going in circles.

In their services, the publicly financed broadcasters have traditionally included quite a lot of popular programs that could also have been produced on a commercial basis. In Sweden, the historical reason for this is that with a too 'narrow' and non-commercial content the support for public service broadcasting would erode. A good example of the mechanism occurred in the early sixties when a 'pirate radio' broadcaster operating from a ship on international water – Radio Nord, mostly playing pop music – was silenced. The station had before that become so popular that a new channel called 'the Melody Radio' was introduced within the monopoly, in practice to compensate for closing down Radio Nord. The same argument is still used to include otherwise popular content – like sporting events, 'Expedition Robinson' (which became known as 'Survivor' outside Sweden), etc. – in the broadcasting task of the public service companies. The paradox that this boils down to is that a precondition for publicly funded broadcasting with the task of compensating for market failure is that it also carries popular programs of the same kind that could otherwise easily be provided by the market. This is probably inevitable and a political reality; government financed media that solely produce content that does not appear on the commercial market is not a viable alternative. In that sense it resembles publicly financed or supported theatre, opera and cinema. As a consequence, publicly financed media will always cause 'market disturbances' and other problems that must be dealt with by politicians.

Financing

Everything was easier in the beginning. Scarcity in frequencies demanded governmental action; this was not controversial. The same goes for the license fees. Since there was nothing else on the air, buying a radio set meant signing up as a Swedish Radio

listener and license payer. Up until satellite and cable TV appeared, the same logic applied for TV sets. Having a TV set in your home and not paying the license fee was fraudulent. It wasn't an alternative for anyone to say: we don't pay because we don't watch, which a newly appointed Minister of Culture in 2006 learned the hard way when she had to resign after having said just that; no one believed her (Lindström 2006).

Today, she would have stood a much better chance of being taken seriously. You don't have to watch programs from the public service companies to be an informed citizen anymore. Moreover, the Supreme Administrative Court has ruled that other devices such as mobile phones, iPads, etc. do not require a license even though they can be used to watch 'TV'. It's true that Swedes in general still pay license fees, but for how long? The traditional way to watch remains a habit of the older generations, as does subscribing to a newspaper, but not among the young. A fair guess is that the years to come will follow the pattern of newspaper consumption. As the newspaper industry must prepare for a life with fewer or no paper products, the broadcasters have to deal with a future where few will listen to or watch traditional scheduled programming. In any way it will be harder and harder to convince citizens to pay what the governmentally organised companies are asking for.

In spite of this, spokesmen of those companies are optimistic; they feel that they have a large support among viewers and listeners and seem to be assured that the willingness to pay for what they provide will stay strong. I would like to believe that they are right, but I don't. I fear that the long run financing of public service, regardless of how it is to be organised, might already be a lost case. The way the public service-companies act and react reminds one of the newspaper business response when confronted with the World Wide Web; they said it was just a question of finding a new payment model, otherwise it was business as usual. They're still looking.

Regulation, governance and (lack of) independence

Regulation, governance and (lack of) independence are also products of history. 'Freedom of broadcasting' was never an option in Sweden, regardless of the country's deeply rooted press freedom. Broadcasting was different. Government support and control were welcome and at least in the early years were not looked upon in terms of censorship or regulation of free speech. Statutes prescribing objectivity and impartiality, unthinkable for newspapers, were regarded as natural.

In the same spirit, safeguarding freedom of expression for broadcasting was not on the agenda in 1992, when the constitutional protection was expanded. The problem was the opposite: how could a constitutional protection of free media speech be achieved without depriving the state financed public service companies of their protected and still monopoly-like position? The solution was, as often in Sweden, a pragmatic compromise. To put it in simple terms, most of the constitutional principles safeguarded in the FPA and the FSA apply for broadcasting – except the freedom to broadcast. Terrestrial broadcasting was and is forbidden without permission from the

Government. If you get a permit quite a few regulations and conditions come with it. These regulations and conditions are not part of the constitutional protection of free speech; from a legal systematic point of view they must be regarded as exceptions from the principles of free speech. In other words, the organisation of public service broadcasting is not dealt with by the Constitution. Even though the governmentally organised companies have of course adapted, the way in which the system as a whole is set up still reflects the original ideas of a state controlled service. It remains an antithesis of the no rule-rule.

The democratically important position of publicly financed public service companies in the media system of today requires some kind of constitutional regulation concerning their organization and institutional autonomy. It seems to be a common conception that the independence of the Swedish public service companies is well taken care of. From a constitutional point of view, this is a misconception. In a factual sense, and for the time being, the companies have strong positions, due to public and political support. However, if this changes there is no constitutional safety net. Any political administration could easily rearrange the fundamentals of today's public service broadcasting in Sweden. The legal constructions surrounding it are to a large extent window dressing, to make the institutions look independent. One can of course object that dramatic changes are unlikely to occur, but arguments of that kind are normally considered constitutionally irrelevant, since constitutional protection is always based on worst case scenarios. It ought to worry at least journalists within the publicly financed media companies that there are no constitutional obstacles to prevent a new Government from intervening with the Swedish public service institutions in the same ways as have been done in some other countries. Besides, one can wonder if a system that lacks constitutional stability might not be more sensitive to subtle political and governmental influence than seems to be officially assumed.

Redefining public service

The fundamental idea with press freedom – at least as I understand it – and the Fourth Estate-doctrine, the 'no rule-rule', is opposite to the fundamental idea of public service broadcasting: we must rely on Government to get it right. Side by side these two ideas can co-exist as they have done in Sweden's dual media system. However, if public service broadcasting is not balanced by strong, economically healthy and independently owned media, information, journalism and public debate will ultimately be governed by political institutions. Both in theory and in practice this may lead towards a politicised media system. Such a system could of course serve citizens and societal needs well, in the established public service tradition. But it would be extremely sensitive to changes in opinion and political climate. It is therefore more likely that the public service-companies would become more or less integrated with the Government, instead of being an Estate of its own. Preventing that would require

a new constitutional concept: a formally recognised public service media-agency, i.e. a governmental institution based in fundamental law. Instead of the no rule-rule based on freedom of expression explicit provisions on what the public service-agency shall do and not do, how it can be governed, safeguarding its independence etc., need to be introduced in the Constitution. Obviously, this would seriously blur the view we have up until now had on free speech.

As described above, there are more problems. An alternative to the road leading towards a politically governed media system is to rethink about what public service means. If one takes a look at the media landscape it is quite obvious that there has been and still are media actors that perform public service outside the publicly financed companies. If this were not the case we would never have coined the expression 'the Fourth Estate' in the first place, and politicians would never have introduced the press subsidy system. In the literal sense, public media services can be provided in many forms. If we want to keep something that resembles the dual media system in the converged media landscape, we ought therefore to start thinking about *public service as a constitutional function* rather than as public institutions.

Notes

1. A text with similar background and partly the same content, 'Constitutional Responsibility for the Free Flow of Information and Ideas in the Internet Age', has previously been published in Lind et al. (2015). The focus here is different, however, being aimed at the role of publicly financed broadcasting companies in the emerging media landscape.
2. The FSA is more or less a copy of the FPA. It protects media that can be subject to the same kind of regulation as print, among them websites run by media companies and devices containing digital information. Theatre and exhibitions are not covered. Broadcasting is partly protected but is in practice largely subject to non-constitutional regulation and governmental permits.
3. See for example some contributions in this book, such as Kenyon, Karppinen, Lewis and Pickard. For my part, I'm reluctant to characterise one as negative and the other as positive. Even if this is of course a technical terminology I still find it misleading. "Negative" press freedom can obviously not deliver everything democracy needs but "positive" press freedom cannot exist without it.
4. See for example *Vårt dagliga blad – stöd till svensk dagspress*, SOU 1995:37, p. 156.
5. SOU 1983:70 p. 78 ("*vi har inte yttrandefriheten för att kunna ha fungerande politiska friheter. Man måste vara uppmärksam på att detaljerade motiveringar för yttrandefriheten kan skrivas om till lika detaljerade förbehåll för den*").
6. "*Det som kräver motiveringar blir då inte yttrandefriheten utan ingrepp i den.*" (ibid.)
7. Terminology is a sensitive issue here. However, from a legal point of view, the publicly financed broadcasting companies in Sweden – later on simply described as "public service" – are parts of the public sector and constitutionally belong to the same category as public authorities and agencies. Financing is regulated in law and license fees are decided by Parliament. The companies are controlled by the State in the sense that there are statutes and governmental permits abridging their freedom of expression as well as governmental agencies reviewing program content etc. Within this framework the companies enjoy substantial independence but that doesn't change the constitutional fundamentals. In that context it should be observed that Swedish governmental agencies in general have a strong constitutional position (for example, a minister of the Swedish Government is forbidden to interfere with decision-making in a public agency). This independence doesn't make them 'independent of the State'.
8. The word *folkbildning* (literally 'education of people') has no proper English translation. It stands for general education, which does not require prior knowledge or a particular social background, open

for every lay person with ambition to rise to a higher level of learning. It played an important role in developing the dominating political movements in Sweden during the twentieth century.

9. See the report from the Public service-kommissionen (Public Service Commission), *Framtidens public service – från analog institution till digital funktion*, 2016, chapter 4.

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SOU 1983:70 *Värna yttrandefriheten* [Protect freedom of expression].

SOU 1995:37 *Vårt dagliga blad – stöd till svensk dagspress* [Our daily newspaper – subsidies for Swedish press].

4.

Toward a People's Internet

The Fight for Positive Freedoms in an Age of Corporate Libertarianism

Victor Pickard

Abstract

The US media system is primarily a commercial one dominated by a small number of lightly regulated corporations, and offset by weak public alternatives. This was not inevitable; it resulted from the outcomes of specific policy battles and from specific values triumphing. One way of understanding this logic is to focus on 'corporate libertarianism', which emphasises negative freedoms (freedom from) as opposed to positive ones (freedom for). Historically, much US media law and policy has been framed in negative terms, exemplified by the First Amendment. But there are also largely forgotten traditions that draw from a positive rights discourse. This social democratic orientation privileges media diversity and protects collective rights held by publics, audiences, and communities over the individual rights of corporations. Drawing from historical case studies, this chapter considers media policies for the digital age founded on positive freedoms.

Keywords: American media, Internet policy, media history, political economy, First Amendment, free speech, democratic theory, USA

Taken as a whole, the American media system is atypical. It is a primarily commercial system that is dominated by a small number of corporations, it is lightly regulated by public interest protections, and it is offset by weak public alternatives. Many other countries face one or two of these problems, but rarely all three. This 'American exceptionalism' was not inevitable or natural; rather, it was highly contested. The system that Americans have inherited resulted from specific policy battles, and from specific logics and values triumphing over others. In particular, this arrangement is founded on the logic that I refer to as 'corporate libertarianism,' where the negative rights of media corporations are privileged over the positive rights of everyone else (Pickard 2015a).

Although this paradigm remains dominant in the US today, it is not necessarily permanent. Hegemonic relationships require tremendous work to keep them intact (Gramsci 1971), but it is necessary to expose this ideological work in order to challenge it (Pickard 2015b). Within the discursive battles and manoeuvres that are deployed to maintain the status quo, we may see emerge potential weaknesses, alternatives, and political opportunities that can be exploited. With this goal in mind, this essay aims

to uncover the historical and ideological roots of the corporate libertarian project. It proposes a counter-narrative based on positive freedoms that helps set the stage for structural alternatives to the increasingly dominant oligopolistic model. Although my primary case study is the American media system, many of its problems exist to some extent in countries around the world.

The logic of corporate libertarianism

To understand how corporate libertarianism took root in the US we must first historicise it. Much of its ideological formation traces back to policy battles in the 1940s when a social democratic vision of the press was defeated, largely resulting from anti-communist hysteria and redbaiting (Pickard 2015a). In its place emerged a social contract defined by three features: media self-regulation, industry-defined social responsibility, and negative liberties (freedom *from* government intrusion) instead of positive ones (freedom *for* or freedom *to* a diverse media system).[1] Not surprisingly, the benefits of this arrangement mostly accrued to media corporations rather than to the public. This rise of corporate power, abetted by an emphasis on negative rights, has only increased in the postwar era, especially around corporate speech. Recent developments include the Supreme Court's *Citizens United* decision (Teachout 2014) and arguments used against Internet policies like net neutrality (Crawford 2014). The combination of negative rights and corporate power arguably poses a dangerous challenge to democratic society.

One way of understanding this challenge is considering the key distinction between market-driven and democracy-driven speech (Edström & Svensson 2016). While the former is dictated by the power of money (Leys 2001), the latter takes broader normative objectives into consideration, including the degree of diversity/pluralism within a media system and questions regarding equal access to the media system. A democracy-driven model may go beyond simply guaranteeing important negative liberties (e.g., privacy protections from various forms of surveillance) to also provide for positive ones. Barron suggested this when he noted that "While we have taken measures to ensure the sanctity of that which is said, we have not inquired whether, as a practical matter, the difficulty of access to the media of communication has made the right of expression somewhat mythical" (1967:1652). In other words, while there might be formal freedoms of expression, actual existing democracy might be hindered by unacknowledged structural constraints and inequities.

Despite arguments such as Barron's, the US has witnessed the market-driven model become increasingly dominant in recent decades, with an emphasis on libertarian negative rights. This paradigm's further ascendance in the 1980s was perhaps best articulated by Fowler and Brenner (1981) who called for a 'marketplace approach' to media regulation. Serving as the Federal Communications Commission (FCC) Chair during the deregulatory era of the Reagan administration, Fowler would gain noto-

riety for his statement that television was nothing more than 'a toaster with pictures.' His treatment of media as primarily products that were defined by vulgar 'supply and demand' economics led to the FCC casting away many public interest protections that were perceived as impediments to an unfettered free market. This approach fails to acknowledge structural limitations and biases in a commercial media system, enabling a 'market censorship' that systematically constrains the range of voices and views that are represented (Baker 2002).

This laissez faire orientation in American media policy continues to impoverish discourses around positive speech rights and press freedoms. Ideological assumptions about American 'freedom of the press' trace back to key formations in the immediate post war years. For example, the Hutchins Commission, despite articulating what later became known as the 'social responsibility model' of the press, essentially reaffirmed the earlier libertarian model by concluding that government could or should do relatively little to promote public service journalism. Implicated in wide-ranging deficiencies in the American media system, this libertarian paradigm colours many assumptions about American journalism, especially the presumed natural relationship between the press and government. In fact, it is largely presumed that no relationship exists, which of course is a libertarian fantasy – the government is *always* involved – usually in ways that benefit corporations like copyright laws, the relaxation of antitrust protections, spectrum giveaways, and many other direct and indirect subsidies. Therefore, the real question is *how* the government should be involved. Challenging this corporate libertarianism requires a counter-narrative.

Positive freedoms as foundations for media reform

While the negative/positive dichotomy is not flawless (see the chapters in this volume by Kenyon and Karppinen for a thoughtful consideration of some of the strengths and weaknesses of such framing), any progressive media reform agenda depends on a clear articulation of positive liberties. Indeed, addressing media inequality in an age of corporate libertarianism is almost impossible without a nuanced understanding of how different conceptions of freedom emphasise and omit different aspects of individual and collective liberties. Although privacy rights and freedom of expression are founded on negative liberties that shield us from state tyranny, a progressive agenda must also include a strong case for why other sources of tyranny (like concentrated corporate power), and why positive liberties in general, require affirmative protections from the state. A growing body of literature on the importance of positive liberties for democracy includes earlier articulations (Meiklejohn 1948; Barron 1967) as well as more recent manifestations (Ammori 2012; Kenyon 2014). But only rarely has such thinking seeped into mainstream law and policy discourses in the US.

Historically, American normative discourse has been framed in negative terms, exemplified by an absolutist understanding of the US First Amendment ("Congress

shall make no law…abridging the freedom of speech, or of the press…"). But largely forgotten traditions drawing from a positive rights discourse also exist. Global examples include Article 19 of the Universal Declaration of Human Rights, which codified the right to "receive and impart information and ideas through any media," and the UNESCO-led "Media and Information Literacy" campaign (UNESCO, N.D.), which aims to foster "equitable access to information and knowledge" and "free, independent and pluralistic media and information systems." Although global manifestations are more common, even the largely negative US policy discourse holds important historical exceptions where articulations of positive freedoms rose to the fore. Americans can reclaim these tools from the American past to revitalise their regulatory imagination as they look ahead.

A prime example of an earlier powerful articulation of positive freedoms is the Supreme Court's 1945 *Associated Press* (AP) case, where the AP tried to argue for antitrust exemptions based on its First Amendment rights. The Supreme Court dismissed this argument, stating that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society…freedom to publish means freedom for all and not for some." The court further explained, "It would be strange indeed...if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." Therefore state-guaranteed, public-interest press protections were legitimate: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

Similar articulations of the sanctity of positive freedoms and the necessity for the state to affirmatively protect them appear at various moments throughout American history. Another high-water mark of this positive-rights discourse was the Supreme Court's 1969 *Red Lion* decision upholding the Fairness Doctrine, which determined that "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Although this logic has been in retreat in recent decades, a brief discursive window of opportunity emerged more recently during the years of 2009-2011 at the height of the journalism crisis. This moment witnessed a sudden ascendance of radical ideas for media reform, including new normative foundations for media policy based on positive freedoms that emphasised journalism's public service mission. Policy proposals ranged from direct press subsidies to creating a government-supported journalism jobs program (Pickard 2015c). Although short-lived, a similar moment could reoccur, and reformers should be intellectually prepared for such an opportunity.

Indeed, intellectual foundations for a new reformist moment appear to be emerging. For example, historically-informed critiques are beginning to contest corporate libertarian assumptions. Recent scholarship like Zephyr Teachout's book *Corruption in America* and Susan Crawford's *Captive Audience*, as well as the growing attention within both academic and popular discourses to various forms of inequality (and

seeing the state as the most effective means by which this injustice can be addressed), point to a nascent but growing intellectual movement. Moreover, policy discourse around ongoing net neutrality debates suggests that arguments for positive liberties are beginning to hold greater sway in the US. The FCC Chair Tom Wheeler countered corporate libertarian claims that net neutrality amounted to a government takeover by asserting that net neutrality "is no more a plan to regulate the Internet than the First Amendment is a plan to regulate speech" (Collier 2015).[2]

These signs notwithstanding, most of the current political momentum seems to be heading in the opposite direction, especially in the courts. One such troubling development is sometimes described as a return to the 'Lochner era,' a period of legal history in the early 1900s when the courts held economic regulations under intense scrutiny and often sympathised with arguments that such governmental interventions violated corporations' constitutional rights (Crawford 2014). Thus the term 'Lochnerization' refers to the courts invalidating law under a perverse reading of 'due process' that guarantees such constitutional rights to corporations (essentially treating corporations as people). Verizon used a similar line of reasoning during the net neutrality case in its arguments to the DC Circuit Court (which refrained from specifically addressing this part of Verizon's argument), and similar arguments are currently being advanced in lawsuits against the FCC's net neutrality ruling. Such corporate libertarian arguments aim to exploit the First Amendment to de-legitimate government intervention and thus render the state powerless to address deep structural inequities. To oppose this ideological framework, legal and normative rationales for state intervention are necessary.

One important starting point is the argument that news media serve a special role in democratic society. In the 1945 AP case, Justice Frankfurter argued that "The business of the press…is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes … [that have] merely a commercial aspect." This underscores the key argument that news and information belong in a special category not subjected to the standard 'supply and demand' relationships that define commodities. Put differently, news media are not simply 'widgets' or 'toasters with pictures.' Rather, they are essential for a healthy democratic society.

The position that information produced by news media should be treated as a public good has gained greater US visibility in recent years (Baker 2002:8; Hamilton 2006:8-9; Pickard, Stearns & Aaron 2009:1-9; McChesney & Nichols 2010:101-103; Pickard 2015a:213-215). Because public goods are non-rivalrous (one person's consumption does not detract from another's) and non-excludable (difficult to prevent 'free riders'), they differ from other commodities, like peanuts and potatoes, within a capitalistic economy. Many public goods – artificial light, clean air, knowledge – also produce tremendous positive externalities (benefits that accrue to parties outside of the direct economic transaction) essential for a healthy society. We could go even further to say that news media qualify as 'merit goods': goods that society requires but individuals

typically undervalue (are unable or unwilling to pay for), leading to under-production in an unregulated market (Musgrave 1959; Leys 2001:97-98; Ali 2013). This brings us to the concept of 'market failure' (Pickard 2015a).

Many scholars conclude their analysis with the invocation of public goods, but we should extend the argument to highlight structural flaws that justify – indeed, necessitate – state intervention into media markets (Pickard 2014). Far from being a radical Marxist critique, 'market failure' derives from neoclassical economic theory, generally referring to the market's inability to efficiently allocate important goods and services (Taylor 2007:15). This typically occurs when private enterprise withholds investments in critical social services because it cannot extract the returns that would justify expenditures, or when consumers fail to pay for such services' full societal benefit. Although the history of American media is in many ways a history of systemic market failure, these recurring patterns usually go unrecognised in mainstream policy discourse (Pickard 2014). Addressing this failure brings us to the questions of what would positive freedoms might look like in a digital age, and what policy interventions are required to protect those freedoms. In the following I sketch a reform agenda tailored for the American case, but many of these reforms are also applicable to other national contexts.

A reform agenda for the Internet

To challenge the laissez faire market fundamentalist model in the US, a two-pronged reform agenda could work towards actualising positive liberty principles, with one focus on reining in Internet oligopolies and the other focus on creating alternative communication infrastructures, especially with regards to ownership and control. Both approaches would be founded on positive rights of access by striving to close the still-significant US digital divide. Several policy reforms could facilitate building out infrastructure and making broadband rates more affordable. For example, revitalising antitrust practices to intervene against local Internet monopolies would help to create meaningful competition, a structural safeguard that goes beyond the non-discrimination principles protected by net neutrality. Establishing municipal broadband networks that are owned and controlled by local communities is another important measure to help circumvent the artificial scarcity created by Internet monopolies. As it now stands, around 20 states have passed laws (often in response to intense lobbying by the big Internet service providers) making such local initiatives exceedingly difficult. The FCC has begun to selectively 'pre-empt' these state laws, but this action has not yet become a broadly implemented regulatory action.

Beyond these specifically Internet-related interventions, the US should also build a more robust program for the government provision of public service journalism. A reform that I propose in more depth elsewhere (Pickard 2015a:222-229) is to leverage already-existing public infrastructure to help support the production of local news

content. More specifically, I suggest transforming post offices and public libraries into local community media canters that provide not only news consumption and Internet access, but also enable the actual *production* of local news. Other reforms geared to expanding public service journalism might involve subsidies for an expanded public media system, tax incentives for struggling media institutions to transition into low- and non-profit status, and government-sponsored research and development efforts for new digital models that may include public/private hybrids. Together, these initiatives would remove or reduce market pressures and help restore journalism's public service mission. But these reforms cannot happen without new normative foundations based on positive freedoms that emphasise media's public service mission.

Such a democratic-centric approach treats journalism as a vital infrastructure, not merely a business commodity. Instead of being used as a shield against structural reforms, the US First Amendment should help encourage actual *opportunities* for speech and press freedoms. While a healthy democracy requires both negative and positive rights, freedom of speech cannot be assumed simply by the absence of state interference (Kenyon 2014). Freedom of speech requires a proactive state to help create the necessary conditions, especially within media systems governed by a commercial logic (Pickard 2013). This calls for a social democratic orientation that assesses a media system's value by how it benefits *all* of society rather than how it serves individual freedoms, private property rights, and profits for a relative few.

How do we define this project? Such an approach privileges the ideal of having diverse voices and viewpoints in the media system. It is as sceptical of private concentrated media power among corporate actors as much as governments. Applicable to digital and global contexts, it must protect the collective rights held by publics, audiences, and communities over the individual rights of corporations. And it must elevate positive liberties in which universal rights of access are at least as important as the individual freedoms most cherished within libertarianism and classical liberalism. In today's highly inegalitarian world with media power concentrated among a handful of corporate actors (Freedman 2014), this project legitimates an activist state that redistributes communication resources. It values a mixed media system with structural alternatives to commercial models. But we cannot advance this project without first countering corporate libertarianism. This will require intellectual work – work that scholars are well-positioned to take on.

Notes

1. This framework is loosely based on Isaiah Berlin's classic essay, *Two Concepts of Liberty* (Berlin 1969).
2. Net neutrality arguably protects both negative and positive freedoms – it protects Internet users from corporate censorship, but it also assures *access* to an open Internet.

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5.

Europe's Many Crises and the Confinement of Democracy-Driven Free Speech

Katharine Sarikakis

Abstract
It is almost impossible to speak of media and freedom of expression in Europe without considering the complexity of the impact that the financial crisis has had on the continent, affecting not simply its markets, but most significantly the public sector and its public sphere. The media play a double role within this context: on the one hand, as market actors they are influenced by fluctuations in the financial system and, on the other hand, they have a pivotal role in supporting citizens' efforts to make informed decisions. These two roles are not necessarily compatible as media financial interests are often intertwined with political ones, compromising the ability of journalism to provide access to information for citizens, especially in circumstances of political dissent. This chapter discusses the ways in which the contemporary intersection of policy, practice and politics in the governance of media in Europe is resulting in non-pluralistic, homogenous content with dangerous polarisations and restrictive public debate.

Keywords: journalism, financial crisis, governance, social movements, Greece

It is almost impossible to speak of media and freedom of expression in Europe, any more, without considering the complexity of the impact that the financial crisis has had on the continent, affecting not simply its markets, but most significantly the public sector and its public sphere. It would be an error to assume that this 'financial crisis' in Europe is solely a crisis of the financial and economic organisation of markets or that it is concentrated in the 'unruly' European South.[1] What started as a global banking crisis mutated to a long-term hurdle in not only financial and market connected areas, but also across all aspects of social and even political life.

The media play a double role within this context: on the one hand as market actors, they are influenced by fluctuations in the financial system and on the other hand, they play a pivotal role in supporting citizens to make informed decisions. These two roles are not necessarily compatible as the press financial interests are often intertwined with political ones, compromising the ability of journalism to provide access to information for citizens, especially in circumstances of political dissent. Under such tensions, free speech in the sense of democracy-driven deliberation is

endangered, while so called market-driven free speech – that is commercial content – is left intact.

The following discussion surveys the multifaceted dimensions impairing free speech, under the lens of extended and multiple crises in Europe. It situates the increasing dependency of media to 'market-driven' content and the decreasing quality of conditions for 'democracy-driven' free speech within the complex context of financial and political dependency of media industries and conflict of interests; journalists' precarious labour conditions; legal change and institutional dismantling. These factors produce crude and indirect, structural and ideological limitations in democracy-driven free speech, curtailing dissent and critical, non-dominant narratives in the era of crisis in Europe. The chapter addresses two separate, yet interrelated media conditions: the developing status quo of European presses producing mono-dimensional narratives of the crisis connected to their political economic place in the market and politics; and the counter efforts by publics and disenfranchised journalists to create deliberation spaces through new journalism projects. The chapter argues that to understand free speech, we need to expand our view of governance beyond identifying legal frameworks and to consider intangible factors, such as ideological underpinnings of media normativity, as well as the broader institutional architecture of given societies. It aims to take stock of and connect recent trends in media freedom under the lens of financial crisis in particular, as a condition that may favour market-driven content and present serious confinements to democracy-driven freedom of speech.

"Crisis is many": State, market, political legitimacy

In the crisis-hit European countries, and as a glaring 'testing-ground' in Greece, public institutions have undergone an intense dismantling of their functions and reach: on the one hand, human resources, and with them intellectual capital, are lost, due to the drive towards the shrinking of the public sector 30 per cent during the period 2009-2014 by mass lay-offs (Zahariadis 2014). On the other hand, budgets for public services have been reduced radically under the policy philosophy of 'austerity'. With weak constitutional backing and against widespread public outcry, a series of changes to the services run by the welfare State have effectively 'switched off' the State as the actor regulating national affairs, even those of the State. Arguably, the State has been 'switched off' from its main role as a regulatory power even in the case of national budgets, as these are ultimately controlled by external actors (IMF, Central European Bank, the 'Eurogroup'). As a consequence, structural resources channelled for public services are subject to severe cuts across all sectors (Zafiropoulos 2014), and in particular those sectors to which the most vulnerable social strata turn and on which they depend, such as housing, unemployment support, and auxiliary pension funds for those at the bottom of pension pay. The unemployment rate in November 2015 was 24.6 per cent in Greece,[2] the reduction in main pensions was 20 per cent, 40 per cent for early

retirees and lump sum reduction ranged from 2 per cent to 83 per cent (Symeonidis 2015). The minimum wage in Greece was 683.76 EUR in December 2015 according to Trading Economics (2016), and the purchasing power of the Greeks went down 25 per cent during the period 2010-2014 (Kathimerini 2015). Universal services, such as health, education and utilities (water, electricity) have been driven to sub-functioning and ultimately are being laid out to privatisation. Hence, a complex, yet clear, picture of the political economy of the region's assets emerges, whereby services and goods aimed at the most vulnerable groups in society are being depleted – and systematically privatised (Christodoulakis 2011). This political economic change affects further the functions of the State, its legitimacy and that of related institutions, which might be as distinct and varied as, for example, the police, public service media and the justice system. Such profound institutional and social transformations, operationalised in a very short time, have a strong impact on the ways in which people experience and exercise citizenship, not in abstract terms, but in concrete and immediate ways and spaces. Not only the structural and subsequent institutional re-organisation of the country's resources, assets and political system are traits of the austerity philosophy, but also the communicative landscapes have been affected in two major directions: on the one hand, an array of mass media have visibly sided with a one-dimensional narrative about the crisis, producing a homogenous and severely limited debate (Tzogopoulos 2013; Prinos 2014). Compounding this is the fact that media organisations were forced to close, leaving thousands of journalists and media workers unemployed, producing an even weaker set of conditions for free speech.

On the other hand, from within the context of austerity and polarisation, new forms of journalism emerged in an effort to counter-balance the lack of pluralism and diversity in content. New print media with attention to reviving investigative journalism and sharp commentary, such as Hot Doc, Unfollow and The Editors' Press (Efimerida ton Syntakton) have managed to raise journalism standards in the country.[3] Electronic or purely online media have also emerged with the aim to add to the enrichment of the public debate and also to counter an increasingly restricted communicative environment. In the context of the crisis, it is important to note that it is not 'simply' the financial difficulties that put media under pressure. The media industry itself is part of the austerity rhetoric in that it is used systematically to provide grounds for the justification of unpopular and contested policies. Hence, on the one hand, the greater precarity of journalism jobs as a consequence of the decreased buying capacity of citizens, the decrease in advertising revenue and the complex relations of media owners to the politics of austerity and privatisation bring an explosive mixture of structural and political conditions, ultimately detrimental to free press. On the other hand, the very fact of polarisation and openly pro-austerity politics of the mainstream media have driven unemployed journalists to construct self-managed media spaces, adding great value to the opening up of the debate and to giving voice to widespread discontent.

These market conditions have favoured more market-driven content than democracy-driven content: the struggle for advertising revenue and sponsorship as a means to

finance the production of print media and broadcasters in the private sector in particular, has meant that investigative journalism is at a disadvantage, because it is costly and politically dangerous. To be clear: austerity measures and an almost one-dimensional mediated public discourse about the crisis (its causes, symptoms and solutions) on the domestic and European levels have impacted upon human rights in profound ways. Consultation procedures in public policy are ineffective (or even unknown as in the case of Greece), while politics has systematically ignored public opinion and the visible deterioration of living standards leading to a humanitarian crisis. As Morison shows in this volume, participation in public life, as invited by public authorities in the making of important public policy decisions is either non-existent or meaningless. Not even the lowest degrees of public involvement through consultation have been pursued, a fact that the established media in Greece, for instance, have failed to point out. This, the lack of consideration of citizens' views and citizens' experience of the crisis and austerity politics, and the lack of response on behalf of elite groups in the political and media environment is perceived as the active exclusion of people from decision-making. The symbolic and factual exclusion from public affairs has underpinned an increasing loss of trust in both the media and the political institutions, at home and abroad. This disconnect, which I discuss elsewhere (Sarikakis 2016a), expands to include distrust in the media. A cynical approach to the ties of dependency of media with politicians and the industries involved in their owners' market portfolio has accompanied the public's view of the media and journalism for a long time. However, it is the crisis that exacerbated the gap between citizens and the media. The too close ties to the political establishment, through homogenous, noncritical reporting of the crisis, and to private interests through the increase in paid and sponsored content are the two interrelated determining factors. The power of financially strong organisations to enter media markets, even in cases of emerging democracies or of transitional societies seeking more democratic governance, is a story one finds repeatedly. A mixture of legal and informal mechanisms ensure a tight grip over journalists.

The setting-up of new print and electronic media in crisis-hit countries is a response to this disconnect. Morison writes this volume: "As power is operationalised and transmitted along the chain there is opportunity for resistance and modification. People are not simply passive objects of power, but rather 'active subjects' who not only collaborate in the exercise of government but also shape and inform it". Within this context, freedom of expression has been one of the first casualties, despite the fact that the countries involved have active public spheres and numerically, at least, a great deal of media outlets. According to Freedom House (2015), Greece ranks 52 globally in press freedom (in a rank from 0 for the most free to 100 for the least free), dropping around 25 places in the past 20 years; Italy ranks 31, staying in the same position during the past 20 years, and Spain ranks 28, dropping 6 places in the past 20 years. Countries not affected by the crisis have not dropped in the rankings this period. For the rest, institutional disempowerment and resources-famine have exacerbated the precarity dominating the labour conditions of journalism under the

strains of job insecurity, closure of media organisations and the shrinkage of their public service media with the exceptional case of the shut-down of the Greek Public Service Broadcaster for two years.[4]

Under the given conditions – of crisis – it is useful to not lose sight of the 'exceptional' and 'urgent' vis-à-vis the 'normal', whereby a state of exceptionality and emergency turns into normality, as a status quo of freedom of expression in Europe, in order to understand the dynamics of limitations to freedom of expression. Restrictions over journalism and free speech do not derive so much from the scarcity of financial resources, although such scarcity poses its own set of challenges, but rather from the political decisions surrounding the determination of availability of resources and from the now established financial market failure to cater for social needs. Hence, claims of 'necessity' or 'exceptionality' that want freedom of expression effectively constrained as a way of providing a 'solution' to the financial crisis and as temporary, extreme, or provisional measures serve only to undermine and silence dissent over the political course of crisis management that has led to prolonged humanitarian crisis. Communicative democracy is undermined by the decline in the quality of protection and facilitation of freedom of expression. Not only the legal framework governing journalism and public speech directly, but also policies governing the day to day operation of media industries, as well as the relation of journalism to the State, shape the conditions of free speech. Moreover, factors other than the law have proven to be of crucial importance in the exercise of free speech, which made the Council of Europe invest renewed energy in the initiative for free press by raising awareness about the importance of 'enabling environments' in Europe (Sarikakis 2015). Hence, contextualising constraints within a systemic and systematic attempt for media control allow us to better comprehend the contradiction that has accompanied the crisis in recent years with renewed attempts for communication control over citizens and initiatives constructing new communicative spaces. The European territory is one of political power as well as a social space for resistance.

A growing disconnect between society and the state, society and institutions, including the media, has characterised the first half of the 2010 decade: distrust in institutions, as well as elite politics, including the political decisions of the European Union as a polity, has driven citizens to exploring ways of connection with each other, among social groups, across geographies and political convictions. Social projects of self-governance, of solidarity and transnationalism are replacing State and media functions, filling in the gaps caused by the withdrawal of the welfare State, as it drags with it the most vulnerable and as it is creating new vulnerabilities (Giannitsis & Zografakis 2015). These forms of connectedness, from the so-called 'social medical centres' run by medical and nonmedical volunteers to alternative in-kind credit economies, from open, community-run soup kitchens and self- organised environment protection and anti-gold mining 'squads',[5] to the very self-governed and employee run factories and public service radio and television stations, intensified processes of 'doing' citizenship are witnessed across the country and generally the South of Europe.

My contention is that these acts of citizenship are integral and vital elements of a struggle for citizens to regain not only some control over the distribution of resources, but also to regain a sense of dignity and autonomy through the materialisation of freedom of expression in concrete ways.[6] This freedom is one inextricably connected to processes of recognition of a person as a legitimate interlocutor.

Freedom of speech is understood in human rights law as a multilevel freedom interconnected with both the personal level of the individual and the structural level of institutional guarantees and institutionalised mediated forms of public speech. In the case of austerity Europe, the social contract between citizen and the State has been undermined through the shrinkage of public communication spaces. The Greek government's decision to deprive citizens of a public service media has parallels with policies of dismantling PSBs across several European countries (Sarikakis 2016b).

Structural constraints to freedom of expression

Across European countries, the proclaimed expectations of increased freedom of expression have not been fulfilled, although changes to the structural underpinnings of media industries have been taking place for over two decades. Such changes – market liberalisation and de/re-regulation – have been accompanied by the discursively constructed justification of increased freedom of expression and freedom of choice – in particular vis-à-vis State media monopolies and controlled markets – to be brought about by technology and the market (Christensen 2010; Piotrowski 2012).

Instead, a process of silent redefinition of freedom of expression has been underway, most vividly exemplified through the sociocultural effects set in motion by a fundamental change in legal frameworks inconspicuously claiming to address areas 'other than' – and indeed claiming to protect – free expression and citizen participation, and ultimately the very regime of western democracy. They concern mainly processes of securitisation of communications and international policy; surveillance and the criminalisation of individual behaviour; and the privatisation of public communicative spaces (Bently et al 2010).

Non-law based restrictions concern the political interference that most countries experience in the running of their public service media but also in the unholy interconnections and dependencies of the press, business and political worlds. Such interference may not be direct, yet freedom and accountability in the governance of the media leaves much to be desired. The complex interconnection between markets and political elites in Europe creates a stronghold over content, leading to problems of biased reporting. Meanwhile, in the crisis stuck press, advertising is being replaced by market-driven content (Donders 2012; Sarikakis 2016b).

These new conditions do not concern merely 'new' democracies or counties conveniently characterised as 'corrupt' or unruly. Instead, they dominate the media landscapes of countries such as the UK, Germany and Spain. Major comparative studies

in the legal status quo of the media in Europe, such as the one led by Psychogiopoulou (2014), demonstrate the multiple, yet, worryingly similar ways in which control over the media is effectively applied through economic interests, financial control, governing positions, and the regulation of specific functions of the media across nations. Compounding that are two more factors: first, the systemic lack of transparency governing these relations; second, the lack of regulatory provision for media pluralism. Both these factors contribute to the concentration of control – and markets – into a form of oligarchy. Structurally, therefore, the position of the media industries is one of dependency – political or economic – and of impaired accountability.

Deriving from this system of governance as an ill-effect is the precarity of journalism and media workers' jobs and the professions. A set of changes in journalism practice as the outcome of a 'mutated' newsroom, which depends on technology and the prioritisation of profit, determines the quality of resources available for proper reporting and for, ultimately, the quality of communicative democracy. Labour conditions are characterised by casualization and temporality of contracts, withdrawal of protection of authorship, decreasing real salaries, and increasing demands to produce content for multiple platforms. At the same time, increasingly, producing 'news' in a bulk format is expected not only without additional but with reduced resources, while, responding to 'stories' as they develop means using aggregators, news agencies and limited sources, which leads to a homogenous storytelling of events. The combination of these structural characteristics together with the lack of transparency and the connections to political and financial elites create a toxic environment for journalists who aim to produce investigative – and therefore critical – journalism.

The era of overarching surveillance, after the Snowden and Wikileaks revelations, impose additional restrictions and constraints on freedom of expression. We cannot yet fully assess the range and depth of the impact of surveillance processes on journalists' work. To what extent does the securitisation of communication, translated in the very distinct practice of surveillance, endanger informants as well as journalists? To what extent, in their effort to avoid extensive risks, media workers apply self-censorship and to what extent do such tactics result in a chilling effect across investigative media? What does it mean for the production of dissenting media and grassroots media? Ultimately, what does surveillance mean for the participation of citizens in the public sphere and in democracy? These developments are unfolding as we speak, but we have already experienced the weight of consequences by whistleblowers Edward Snowden and Julian Assange, whose attempt to reveal violations of freedoms has been met at a high personal cost and has affected those journalists working with the released material (Greenwald 2015; Lyon 2015).

Nevertheless, one of the main observations in recent years has been a renewed need for citizen derived media and communicative spaces, deriving from and assisted by social movements, such as Indignados, Occupy, anti-austerity and feminist movements, and social resistance movements in various geographies around the world and the current emergence of 'Nuit Debout', a series of nightly public places assemblies that

kicked off in Paris. Particularly in spheres of acute crisis, whether political or financial, speech constraints are operationalised in ways including but not limited to legal frameworks.[7] Since 2009, when the global banking crisis 'hit' Europe, Greece has been at the centre of debates in the public sphere, as the 'crisis country'. With discourses about the crisis resembling an epidemic, Greece being a 'sick' patient, and worse still with discourses of moral wrongdoings that brought upon the country the 'punishment' of financial crisis, the international press has held almost in its entirety a homogenous narrative. It resembles that of political and financial elites and leaves out narratives from the perspectives of citizens and societies at large, not limited to those of Greece.

Outlook

These structural constraints on freedom of expression make up a depressing list whose impact expands beyond the world of professional journalists to the freedom of expression and communicative liberties of citizens. The effects on the quality of democracy and the exercise of citizenship are yet to be assessed. It is imperative that communication and legal scholars engage fully with the pressing need to advocate for the protection of freedom of expression and the material and immaterial conditions that create enabling environments for free press and free speech. A silent redefinition of freedom of speech has been taking place across too many a front to be listed in detail in this chapter. It consists of structural constraints, and governance practices that are mirrored in the content output of media corporations. It is also reflected in the prohibitive stance of the state and its instruments in not tolerating public dissent, protest and non-conformist patterns of association and assembly. Finally, it consists of a range of tactics aimed at controlling self-governance and deliberation, by symbolically annihilating the interlocutor, be it a dissenting citizen, a refugee, the investigative journalist or an academic. At the same time, the rise of claims and legal instruments to assign 'speech' status to corporate-led communications and commercial content is another sign of the shrinkage of genuine public spheres and their associated public assemblies.

Notes

1. According to Eurostat (2014) more than 40 per cent of Europeans cannot afford unexpected financial expenses and one in ten people are affected by severe material deprivation.
2. See Eurostat: http://ec.europa.eu/eurostat.
3. See http://hotdoc.gr, http://unfollow.com.gr and http://www.efsyn.gr.
4. The Greek Public Service Broadcaster ERT (Elliniki Radiofonia Tileorasi) (www.ert.gr) was shut down, unconstitutionally as this was never ratified by Parliament, by the then Samaras Government on 11 June 2013. ERT quickly became ERTOPEN (www.ertopen.com) run by its former employees, who continued broadcasting for 24 months until the reopening of ERT on 11 June 2015 under the SYRIZA government.

5. This refers to social movements against the privatisation of water, as well as against gold-mining in Northern Greece at Skouries (http://antigoldgr.org/en) among other acts of environmental exploitation and destruction.
6. 'Citizen' should be understood as the 'citizen-at-large', the subject who is entitled to social, cultural, economic and political rights irrespective of their legal standing within the boundaries of a jurisdiction.
7. See e.g. the so called 'gag law' Citizens' Security Law in Spain, as well as the 2014 Amnesty International Report on the Greek Police (Kassam 2015).

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6.

The Democratic Dynamics of Government Consultations

Speaking Freely and Listening Properly

John Morison

Abstract

There is a growing use of consultation and e-consultation procedures by governments. This chapter seeks to examine the role of consultation as part of a new technology of government. Consultation on policy development can reinvigorate democratic engagement but often it can silence views through a sort of participatory disempowerment; it can loosen the democratic anchorage of the public service within the state. The chapter develops a governmentality perspective interrogating what participation, democratic engagement and free speech mean in this context, and how ideas of publicness are constructed, managed and controlled. The focus is on the nature of consultation, its relationship to ideas of free speech and speaking freely, and its potential to empower subaltern counterpublics which can formulate oppositional interpretations and urge alternative conclusions. The aim is to develop an idea of the democratic adequacy of the consultation process and draw out a sense of how democratic engagement here can be structured – for good or ill.

Keywords: key consultation, participation, governmentality, new technology, e-democracy, democratic adequacy, UK

Consultation procedures are being used increasingly world-wide. In part this is about accentuating voice, and trying to bring democratic engagement closer in circumstances where formal electoral politics often seems sterile (Lewis et al. 2005). A consultation exercise is often seen as a necessary precursor to a policy initiative or simply a way of measuring public opinion or bringing government closer to the governed (Morison 2007). New information technology seems to offer particular possibilities of directness and immediacy for governments here.[1] It promises to establish a government's credentials as a modern force appropriate for a web based society (Coleman & Shane 2011). There is also the potential to draw in the 'wisdom of the crowd' in a policy making context (Noveck 2009; Lodge & Wegrich 2012), and perhaps even a suggestion that voices that might otherwise not be heard can join in on equal terms.[2] Many initiatives now – from community development programmes to planning processes to sustainability initiatives – require a 'community planning process'. Here some

version of 'the community' must be 'engaged with' before government action can be taken (Bentley & Pugalis 2013). Although it is arguable that the political culture of the United Kingdom is not conducive to participatory innovation (Bogdanor 2009), the UK Government's website page for 'Consultations' lists 948 consultations published in 2015 alone, out of a total of 2,948 since the decade began.[3] In various fields, especially governmental planning and the environment (Stern et al 2009; Schulz & Newig, 2015), there is particular interest in obtaining the benefits of the Internet. These advantages centre around the immediacy, reach and interactivity that the Internet and related technologies can bring to the business of government (Sæbø et al 2008; Kamal, 2009; Macintosh et al, 2009; Sudulich 2011).

Many public institutions such as the BBC now invariably seem to offer opportunities for interaction either through websites, Twitter or Facebook. Large companies selling everything from washing powder to jam will have a Facebook page or Twitter account (see for example, https://www.facebook.com/daz and https://twitter.com/hartleysjelly). From the citizen side there are emerging expectations about consultation, as well as a belief in its efficacy. Part of this may be a consequence of the online culture with its belief in the power of crowdsourcing, the participatory dynamic of open source working, the sharing economy, and a sense that free, democratic speech can be expressed through a mouse click. As Johansson and Bengtsson argue in this volume, the Internet makes us think differently – in various different ways, depending on a range of variables – and younger people in particular tend to be more positive about Internet life. A whole range of online resources have emerged to capture this positive interest such as such as Change.org, 38 degrees, GetUp.org, Avaaz.org, although of course the central example of online activism remains Kony 2012 – a YouTube video with 120 million viewers in 5 days which raised $16m in an unsuccessful effort to secure the capture of a Ugandan warlord.[4] Many of these sites offer the facility to start a petition, with, for example, ipetition.com and Petitionbuzz.com enabling users to set up an online petition in less than a minute.

However the TripAdvisor-style ratings that these outlets inspire remain a very mean / thin version of democratic power. Is civic duty really met by simply clicking 'like' on a website? What happens next?

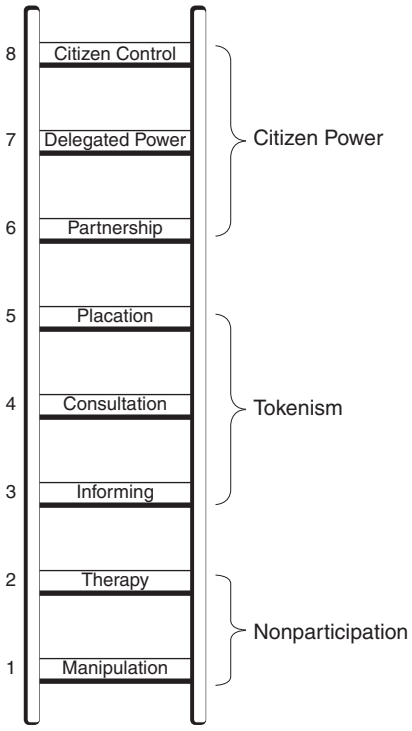
Even the various government websites with their own petition sites offer only a rather dubious guarantee of action with, for example, the main UK site promising that 10,000 signatures will receive 'a response' and more than 100,000 signatures will result in the petition being 'almost always' debated in a committee.[5] This seems redolent of mediaeval rituals where the common people (or at least those with access to ICT) petitioned their masters – and perhaps about as effective. Indeed it may close down dissent and divert activism as people remain disconnected from others with the same views in contrast to real political movements which bring people together to create energy for change.

Beyond this attempt (possibly) to reinvigorate established democracy, consultation is increasingly used to fine-tune the sort of market-based service delivery models that

many modernised states have developed for public services. Again there are a series of arguments to be made here about democratic *adequacy* when we put public services into a consumer model, atomise individuals into customers and more or less specialised 'communities', and seek their input only in the form of 'plans for community provision, false 'choices' between different providers, and satisfaction surveys.

If we go back (with no apology for doing so) to Arnstein's (1969) classic account of the levels of participation and their relationship to democratic adequacy (see figure one below) it can be seen that much of the interaction in this brave new (often online) world is of a fairly limited nature.

Figure 1. Eight rungs on a ladder of citizen participation



Source: Arnstein 1969.

Increased use of consultation in both the traditional formal style, and more and more in ways that develop the new possibilities that the online environment offers, is not necessarily leading to either citizens speaking more freely or government listening more seriously. The qualities of increased interactivity, greater reach and enhanced immediacy that online interaction has brought to our everyday world do not inevitably radically improve the *quality* of democratic interaction. As some commentators have tried to establish, perhaps echoing Arnstein, there is a difference between

e-information, e-consultation, e-decision-making and e-empowering with only the later implying a more direct citizen involvement (Dahlberg 2011; United Nations 2003, 2009; Tambouris et al 2007). Now we may be able to speak more freely in the sense of it being easier to express ourselves with the click of a mouse but is the citizen voice being heard?

Perhaps we are better thinking of this as a new technology of governing within a governmentality paradigm (Foucault 1994; Rose 1999; Miller and Rose 2009; Dean 2007; 2010). Here the focus is on the nature of consultation: its relationship to ideas of free speech and speaking freely, the ability to shape and control the terms of debate, and its potential to empower subaltern counterpublics which can formulate oppositional interpretations and urge alternative conclusions. There is certainly room for a wider project both to develop an idea of the *democratic adequacy* of existing consultation processes, and to draw up an idea of *democratic sufficiency* for any proper and genuinely participatory engagement.

The democratic adequacy of government consultations

The space of interaction, dialogue and free speech provided by a government consultation exercise, with its assumed corollary of voices being listened to and appropriate action taken, is in reality a more complex and certainly less democratic arena than it may first appear. Indeed, the actual operation of participation structures suggests that they may not always be a space for equal exchange between official and participant views.

There may well even be a controlling agenda in place. As this author has developed elsewhere (Morison 2010), a number of critics have noted how official constructions of 'the public', and of community and citizenship, not only help shape the conceptions that officials draw on as they establish new forums for participation but also condition the conceptions members of such forums themselves bring to the process of dialogue (Price 2000: McLaverty 2009: Davidson & Elstub 2014). Government very often controls the form of the debate, its agenda and the sources of information (Smith & Wales 2000). Invitations to participate are issued by Government, consensus is invariably sought, and the records are kept by officials. Within the debate perceived expertise and notions of 'science', 'fact' and 'evidence' may trump more everyday versions of knowledge. This suggests that far from being an occasion where people speak freely and government listens properly, the whole event may be as much about de-politicising and avoiding conflict as it is about hearing new voices in governance. As Lewis in this volume reminds us, developing Couldry's (2010) analysis of voice within market economics, for voices to have meaning or significance they must be *heard*. Indeed, the very occasion of being consulted may limit potential for dissent as the experience of the wider community is disabled by the force of a process where the views of a selected public have been presented as authoritative.

Indeed in the context of consultations about how public services are delivered it may be suspected that efforts to re-work 'the public', and the emphasis on ideas of empowerment, may in fact conceal not only attempts to move away from conceptions of the public that accord with older ideas of a welfare state and universalist notions of public good, but also a shift of power towards existing authority – whether within the state directly or in associated private bodies. For all the rhetoric about user involvement, the participation of users in public services in the role only of mere consumers does not necessarily ensure that public services remain political in character, and so public or democratic in a wider sense.

Much of the rhetoric about consultation suggests new levels of public participation and engagement with government as well as a re-engineering of public services to make them more responsive to their end users. However, adopting a governmentality perspective, it may be argued that much of this involves the implementation of a wider process of governing through constructing and reconstructing ideas of the public, community and individual citizen-consumers who can then take on a role in their own governance. This particular governing construct involves the dispersal of state power through individual citizen-consumers and self-regulating bodies or agencies who govern themselves in accordance with templates of power contained in notions such as localism and community, participation and dialogue, choice and personalisation, service and outcomes etc. These governing ideas are set up in opposition to (or rather, instead of) traditional ideas of equal state provision. Indeed, it has been argued that ideas of participation are used to detach public services from an integrated public sector and loosen what has been termed the 'democratic anchorage' of public services within the state. There is on offer instead a more fluid concept of public participation and stakeholder involvement within a hybrid model of provision where 'public' has changed its meaning (Sørensen & Torfing 2006). As some critics argue, it involves the creation of "'ordinary peoples' – who can be summoned as partners or participants in new assemblages of rule." (Clarke & Newman 2008:46; Rose 1999). Not only are the public to be seen acting as consumers and citizens they are also participants, expert in their own condition and able to represent the experience of being a consumer or user of services as they participate further in their own governance.

Clearly government consultations, whether deploying new technology or not, may not necessarily result in an open space of enlarged thinking or communicative democracy in a Habermasian sense. There are familiar problems about inclusion and contention, while universalist notions, drawn up without full recognition of gender, race and other difference, may well mask the problematic access to citizenship for many groups (Nash 2014). However it is important to develop fully the understanding of power that the governmentality approach provides which suggests that power is never monolithic or operating in one direction only. Power exists in many sites: it is rhizomatic. As power is operationalised and transmitted along the chain there is opportunity for resistance and modification. People are not simply passive objects of power, but rather 'active subjects' who not only collaborate in the

exercise of government but also shape and inform it. This occurs in consultations and e-consultations as elsewhere. There are opportunities for what Fraser describes as 'subaltern counterpublics' to mobilise, circulate counter discourses, and formulate oppositional interpretations (Fraser 1997). Indeed as consultation moves increasingly on line it is sure that the characteristics of Web 2.0 will make this almost inevitable. As some of the experience of the Arab Spring illustrated (albeit ambiguously) counter publics with different views can spring up online and mobilise almost (if never quite) on an equal basis to more official sources (Morozov 2012; Drache 2008). Citizens may be irreversibly consumers now but in the online environment there is a choice if they are to become simply new model citizens within a wider state-sponsored programme or more defiant, active and assertive citizens within their own governance projects.

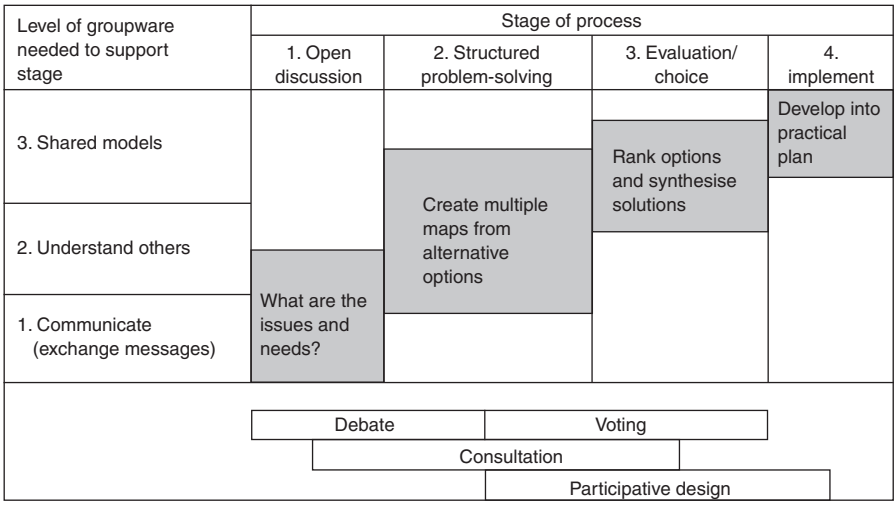
Towards criteria for democratic sufficiency in government consultations

There is certainly room for a wider study that might parse the elements of democracy as they are put into action in the various consultation contexts where the ideas of speaking and listening freely are on offer (Dahlberg 2011; Wright & Street 2007). Figure Two below offers a first attempt at suggesting how technology, participation and democratic decision making might operate together. At this more detailed level what is required is a better understanding of the democratic nature of consultation and its relationship to a wider process of governing. Such an audit of democracy might find the perfunctory nature of much government consultation to be indicative of tokenism rather than any fuller idea of participation.

In the absence of such an audit it is interesting to note how judges have increasingly become interested in the quality of consultation as a number of cases have come to the courts in the UK, including the Supreme Court – many resulting from the austerity agenda producing challenges to public spending cuts, particularly against local authorities. Some of these relate to various statutory duties to consult and others go some way towards suggesting that there may be something approaching a common law duty to consult arising out of a common law duty to act fairly. However as we shall see, these are fairly minimal conditions of fairness rather than a recipe for any sort of enlarged space of Habermasian free speaking and careful listening.

In the UK the basic principles of fair consultation have been settled for many years. Most recently in *Moseley (Moseley R (ota) v London Borough of Haringey* [2014] UK 56) the Supreme Court endorsed the long standing 'Sedley Principles' formulated by Stephen Sedley QC in argument in *R v Brent LBC ex p Gunning* ([1985] 84 LGR 168).[6] Essentially these state that in order for consultation to be fair, a public body must ensure:

Figure 2. A model for online decision making



Source: John Morison.

- that the consultation must be at a time when proposals are still at a formative stage;
- that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
- that adequate time is given for consideration and response; and that the product of consultation is conscientiously taken into account when finalising the decision.

A series of cases have shaped the law further, holding mainly that consultation as an element the duty of fairness is intensely case-sensitive.[7] However the overall position remains that the courts generally allow public bodies a wide degree of discretion as to the options on which to consult, and this perhaps only shows the very modest limitations of consultation as presently policed by law.

If it is not to the courts that we should look for standards of democratic sufficiency (except in the most egregious cases of maladministration) where should we look?

Conclusion: A new project to rescue democratic consultation

This contribution like many others in this section, and in this volume generally, sees threats to free speech. Unlike most other contributions it concentrates on how the particular speech that is involved when government and citizens interact is threatened, and it sees this threat mainly coming from the way that this potentially democratic interaction is structured in such a way as to allow the powerful not to listen properly to what is

being said. It has pointed to an area where government purports through its consultation mechanisms to offer a platform for citizens to speak freely about policy and services. In return there is an expectation that government will listen to these citizen voices.

Deploying a governmentality perspective it can be seen, however, that what we have here is not a properly democratic exchange. Voice is not being privileged despite appearances. There is instead an idea of consultation as part of a new technology of government, involving a set of programmes, strategies and assemblages designed to mobilise local communities and other targets of consultation to become agents of policy as well as simply objects of policy. We can see also how ideas of publicness here are constructed, managed and controlled. In the context of consultation around service delivery such techniques of governmentality relating to participation can be used to re-configure public services into a consumerist model, detach them from an integrated public sector, and undermine the idea of public services within the state being an expression of the public. In the wider context of legitimating governance, consultation can be conscripted into a process of remaking the public sphere in ways that have a justificatory veneer of democratic engagement.

This calls for a new project not only to develop our understanding of consultation as it is presently practiced, but also to rework its relationship to ideas of free speech and speaking freely. We need to develop the capacity of consultees to shape and control the consultation process, and develop further the potential of subaltern counterpublics to formulate oppositional interpretations and urge alternative conclusions. This new project must develop an idea of the *democratic adequacy* of the consultation process and draw out a sense of how democratic engagement here can be structured – for good as well as ill.

The new project which is being urged here involves also looking at how we might rescue consultation, make it a proper instrument of democratic renewal, and what that this might mean. Part of this involves connecting some of the e-technologies with proper understandings of democracy (rather than more flashy ways of simply harvesting clicks and creating apparent consensus). Another part of this involves looking in detail not only at the outworkings of democratic theory into techniques of consultation but also at more practical quality controls on consultation as it is deployed to garner views employing geographic information systems (GIS) and other visualisation systems, complex votes and counts, as well as the power of the crowd and access to big data in a process which presently is often very far from democratic. It involves harnessing the web 2.0 technologies, co-opting the interactive, user-generated nature of a process that can reach many people more cheaply and effectively than normal consultation methods, and ensuring that it is deployed in ways that are genuinely emancipatory.

Unlike many contributions to this volume this one is not about the bigger issue of free speech, speaking truth to power or even offering up opinions that may be beyond the mainstream but ought to be heard and protected nonetheless. Rather it is about the much more quotidian business of citizens connecting with their own governance. This is however also of importance. It involves working with the new

information technology to give citizens a real voice in how they are governed. This must be a *conversation* where government must actually listen rather than turning this exercise into a participatory de-politicisation by covering up voices while simultaneously claiming to hear them.

Notes

1. See for example David Cameron's 'No 10 dashboard app', which is designed to provide real time feeds of financial and polling information to the UK Prime Minister, is perhaps one of the most egregious example of a politician seeking to be associated with new technology reaching out to the public. (Cabinet Office 2014).
2. Of course as Justin Lewis points out in his contribution to this volume, in the real world there are several dynamics operating to narrow the range of contributions.
3. See https://www.gov.uk/government/publications?publication_filter_option=consultations (accessed 15 January 2016).
4. See http://invisiblechildren.com/kony-2012/ (accessed 4 February 2016).
5. See further http://www.parliament.uk/business/committees/committees-a-z/commons-select/petitions-committee/. At the European level there is the European Citizens' Initiative. Here a proposal from seven EU citizens based in seven member states, backed with at least one million signatories from across the EU member states, will receive "careful examination" by the Commission – although it "is not obliged to propose legislation as a result of an initiative". See further http://ec.europa.eu/citizens-initiative/public/basic-facts.
6. This was subsequently approved by the Court of Appeal in *R v Devon County Council ex p Baker* [1995] 1 All ER 73 pp 91 and 87 and in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 [108]; and see also *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134 [9] where Arden LJ described the Sedley criteria as "a prescription for fairness").
7. Interestingly however in the *Moseley* decision the Supreme Court were prepared to develop the 'Gunning Principles' to suggest that a the Council did not only have to consult on its own proposals but also provide a brief outline of the alternative proposals which the Council had considered and rejected, and some explanation for this. This is in contrast to the position in *Vale of Glamorgan Council v Lord Chancellor* [2011] EWHC 1532 (Admin) and *R(United Company Rusal PLC) v The London Metal Exchange [2014] EWCA* Civ 1271 which decided that decided that there is no common law obligation on a public body to consult on options it has discarded.

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II. In Between Advertising and Journalism

7.

The Commercial Constraints on Speech Limit Democratic Debate

Justin Lewis

Abstract

Because the digital media revolution has provided many more outlets, forums and opportunities for free speech, it is often assumed that this makes our culture more open and democratic. This chapter focuses on the way in which commercial media and communications systems continue to place limits upon free speech, narrow our cultural horizons and circumscribe the spaces for open, democratic debate. It examines three ways in which this happens: 1. The ideological impact of the increasing centrality of advertising as a way to pay for information and culture. 2. Cultural industries' increasing reliance on a small number of large-scale information providers. 3. The commercial news industry's challenged business model after the digital revolution. The voice of advertising has become so loud that it now drowns out other possibilities. If more energetic freedom of expression is to be created, we need to promote other ways of funding creative industries. At the moment, these possibilities – for a positive freedom of speech – are shrinking before our very eyes.

Keywords: free speech, advertising, democratic media, commercial media, voice, funding media content, UK

The digital media revolution has provided many more outlets, forums and opportunities for free speech. It is often assumed that this makes our culture more open and democratic – and yet the democratic potential of the digital world has been constrained by the dominance of a commercial media and communications system. This system – structured by certain economic imperatives – places limits upon free speech, narrows our cultural horizons and circumscribes the spaces for open, democratic debate.

To explore this point, it is helpful to distinguish between market-driven and democracy-driven free speech. Traditional ideas about free speech tend to be democracy-driven: campaigns for free speech are generally located in a broadly political sphere, and it is the suppression of political ideas (in their broadest sense) that tend to cause most concern. Market-driven ideas of free speech are less well articulated, although they are increasingly influential in the interpretation of legislation limiting speech (especially in countries like the US), and often assume an equivalence between free

markets and free speech. I will argue that this equivalence is problematic, and that the market itself privileges certain kinds of speech and suppresses others.

I want to begin by distinguishing between three forms of restraint on free speech. The first involves a focus on governmental restrictions, such as censorship. These restrictions are bound up in legal structures and, as a consequence, carry a series of sanctions to be wielded upon those who violate them. In less democratic, more repressive regimes these limits on free speech often constitute a direct and persistent infringement upon people's freedom of expression. In well established, more open democracies, such restrictions are used more parsimoniously, based on the principle that free speech can only be curtailed if it causes harm. How this harm is defined – whether it involves notions of 'national security' or the incitement of hatred – is, of course, a matter of considerable discussion and debate (see, for example Hintz 2012).

The second form of restraint is similarly bound up in legal structures, but is policed or operated not by government but by corporate entities. In the digital age, Arne Hintz points out, the lines between corporate and governmental restrictions on free speech are becoming increasingly blurred, as private entities become increasingly bound up in forms of government surveillance (Hintz 2014). The digital era has also meant the increasing use – especially by global conglomerates – of intellectual property (IP) law. While IP is intended to protect creative expression, it is increasingly used as a way to limit – or put a price on – free speech (McLeod 2001; 2005). So, for example, my freedom to write a book about advertising is restricted by copyright and trademark law.

The third restraint of freedom of speech is the softest, in the sense that it generally not regulated by statutory law. To understand this form of restraint, we need to look at the way in which freedom of expression is bound up with unequal structures of power. Because these power structures are usually based on economic rather than legal principles, they tend to be taken less seriously than more legal or quasi-legal restrictions on free speech or free expression. And yet in most 'open' democracies it is these constraints that are far more pervasive and influential in people's everyday lives.

My focus is on these softer yet no less profound limits on freedom of expression. This is a clear move away from dominant corporate conceptions in the US – which, as Victor Pickard points out, sees freedom of speech in terms of freedom *from* government intervention – towards what Andrew Kenyon calls 'positive free speech' – a system that encourages freedom *for* a multiplicity of different voices.

The ability to be heard

If a tree falls in an empty forest, does it make a sound? In the digital age, this old conundrum might be rewritten thus: if someone speaks and nobody listens, have they really expressed themselves? Or if someone post a YouTube video that nobody watches, does it have any meaning? The answer, in strictly legal terms, is yes – a technical truth that rests upon philosophical niceties rather than practical realities.

Nick Couldry's analysis of the notion of 'voice' in market economies makes an important conceptual move that advances our understanding of freedom of speech (Couldry 2010). His starting point is one that most liberal democracies would embrace: that democratic citizenship relies on the ability people have to voice or express their ideas, concerns and identities. But he goes one step further: for voices to be effective, he points out, for them to have meaning or significance, *they must be heard.*

Market economies, Couldry argues, grant citizens a theoretical freedom of speech but – depending on who they are and their access to economic or cultural power – simultaneously limit their ability to be heard. One of the clearest examples of this is through the private ownership of the news media, which privileges some voices (those who share the ideological world view of the proprietors) and excludes others (those who don't). The more freedom we allow private media owners – through, for example, the deregulation of constraint on monopolies or the relaxation of rules on impartiality (as, for example, in US broadcasting) – the more we limit the possibilities for other voices to be heard. In such a landscape, research suggests, the space made available for citizens to speak is both limited and highly circumscribed (Lewis, Inthorn & Wahl-Jorgensen 2005).

It is this inequality of voice that provided the ideological backdrop to the Leveson Enquiry into the Press in the UK. Opponents of press regulation often argued that many of the publicised misdemeanours that prompted the enquiry – notably phone-hacking – were already subject to legal constraints. But they also assumed that the structural inequalities implicit in a system in which large amounts of capital are required to run a successful newspaper were a normal state of affairs. The market-driven conception of free speech assumes that ideological bias is bottom-up, and that newspapers simply reflect the views of their readers.

While there is clearly *a* correlation between the views of newspapers and their readers, the idea that newspapers represent the political views of the citizenry is plainly untrue. So, for example, in the 2015 UK General Election, the *Sun* newspaper campaigned vociferously for the Conservative Party (Deacon et al. 2015). Although many *Sun* readers did vote Conservative, a majority (53 per cent) did not, while nearly a quarter voted Labour, a party regularly lampooned and ridiculed by the *Sun* during the campaign. Even the *Daily Mail* – remorselessly unsympathetic to the Labour Party and perhaps the British newspaper most closely identified with a right-wing 'Middle England' perspective – had a small but solid percentage (14 per cent) of Labour supporters (Kellner 2015). Labour voters who want a mid-market newspaper in the UK have little choice: there are only two options (the Mail and the Express), both of which are firmly on the political right.

Since the days of the British Press barons in the first half on the twentieth century, most newspaper proprietors have tended to lean to the right (often exuberantly so), and their newspapers have been more a reflection of *their* views than an effort to represent their readership. The political economy of media means that this is, indeed, a fairly likely outcome, when the primary basis for media ownership is access to wealth. For

many *proponents* of press regulation, the aim was to create a less lop-sided structure and to thereby allow *more* freedom of expression.

One of the abiding myths of the digital age is that the Internet – with its open structure and low cost of entry – bypasses media oligopolies and allows a multiplicity of voices to be heard (see, for example, Curran, Fenton & Freedman 2016). This can and does happen to a degree, of course, but, as Couldry suggests, even in the digital world the current rules of our market economy create a series of structural constraints on freedom of speech by promoting certain views of the world and limiting the space for a more open exchange of ideas. Indeed, as Bengt Johansson and Stina Bengtsson demonstrate in their chapter, the Internet has extended the commodification of the media audience in a variety of ways.

In a world characterised by a superfluity of information sources, big media players are as important as they ever were, providing people with an easy way to navigate their way through the information clutter. The history of capitalism – without regulation to prevent it – shows a consistent drift towards monopolies, a point demonstrated with remarkable speed by the new media oligopoly that has emerged to dominate the online world (McChesney 2013). Once certain companies – like Google – claim a dominant position, the market power they accumulate makes it difficult for others to compete.

In this chapter, I want to focus on a different and often neglected aspect of market-driven speech: the increasing centrality of advertising as a way to pay for the provision of information and culture. As the ability to make profits from *selling content* diminishes, media have become more dependent upon *selling their audiences*. Advertising has thus become our dominant creative industry, both in terms of its size and its reach (Lewis 2013). Advertisements are everywhere, cluttering or endorsing most forms of creative expression and dominating many (so, for example, on many TV channels, advertising has become the main programming genre in its own right). This, I will suggest, has an ideological impact, narrowing both what can be said and the range of discourses we use to understand the world.

Advertising circumscribes speech

The Internet was created during a period when governments were inclined to believe that the growth and development of the creative and communications media was best left to the market place. In the space of little more than a decade, what began as a public space for the exchange of ideas became a largely commercial space funded by the selling of audiences to advertisers. With a mixture of amusement and dismay, I noticed recently that even my own Ted X lecture – which, like this chapter, takes a critical look at advertising – was sometimes preceded by an advertisement.

The ethos of the Internet has encouraged us to believe that our access to information – or indeed, most other forms of cultural expression – should be free. While there are some public service systems for content creation (such as the BBC), the business

model for most commercial content providers has become almost completely reliant upon advertising revenue. Hitherto, for example, newspapers were able to use advertising to supplement sales. In an online age, only the most niche publications are likely to earn significant income from selling their content.

At the same time all our creative industries have become more firmly entwined with the buying and selling of goods. In the music industry there used to be a clear demarcation between advertisements and popular music: now the two are closely bound in a symbiotic relationship. The music promotes the product, the advertisement promotes the music. Movies have been preceded by advertisements for some time – though in nothing like the volume of today's typical cinema montage of pre-movie commercials. But they now permeate the films themselves, with product placement and commercial tie-ins a routine part of the film industry. In most countries there are more ad-funded TV channels than ever before with the proportion of ads per hour (40 per cent of US TV content now consists of commercial messages) reaching saturation point (Lewis 2013).

Advertising plays a parasitic role in market economies – it clings on to popular content but is not there by popular demand. It is one of the few forms of cultural expression where – for all its wit and ingenuity – its presence is in spite of public preferences rather than because of them. The dominance of advertising in our culture, is, in this sense, something of a paradox: it has become increasingly intrinsic to creative expression in a market economy, and yet its presence has nothing to do with our desire for more advertising. It is there for producers rather than consumers – a kind of cultural tax that allows us to avoid more direct or collective forms of payment.

Advertising, nonetheless, is generally regarded as innocent if sometime irritating. And yet it limits freedom of expression in a number of ways.

1. Advertising limits citizenship and political diversity

Advertisements have, almost by definition, an ideological – and practical – bias. Even if websites or TV programmes do not extol the virtues of consumerism, the ubiquity of commercials means that, for example, for every hour someone spends in front of the TV, they are watching ten to 15 minutes of television devoted to celebrating the joys of consumption.

Programmes may vary, but there is a sense in which commercials themselves are, for all their symbolic excess, remorselessly repetitive. They all tell us that health, happiness, freedom, beauty and human comfort can only be obtained through the consumption of commodities. The ad-world's celebration of consumption means that the inequities of global production and the environmental consequences of distribution and disposal remain resolutely hidden.

In an era when the foundations of a pro-corporate consumerist ideology are being increasingly challenged by advocates for the environment, social justice and trade unions, the ideological consequences of these advertising messages cannot be

underestimated. Even when regulators insist on it for programming, there is no political balance here: as long as they refrain from explicit party advocacy, advertisers are immune from such strictures.

This point was graphically illustrated, for me, during the showing of a John Pilger documentary on ITV in Britain (The New Rulers of the World, ITV, July 18, 2001). The documentary was intended as a critique of the way corporations treat workers in the global economic system, and yet every 15 minutes Pilger's argument was contradicted by advertisements, some of which, like a Peugeot advertisement featuring inspirational images of black women, were designed specifically to comfort consumer concerns about sweatshop production and corporate ethics. Pilger's message was directly undercut by messages designed to soothe and divert. His freedom of speech was not so much silenced as smothered.

There is a double standard at work here. Advertisements that question (rather than promote) corporate activity or consumer culture are rare because there are few organisations with the inclination and resources to pay for them. And yet, unlike ads that celebrate consumerism, they are seen as political, and are likely to fall foul – where they still exist – of public service impartiality regulations. They are also bad for business, since they risk threatening the more lucrative funding streams from those they choose to criticise. So, for example, the *Financial Times* is happy to accept puffery in celebration of the virtues of various oil companies, but refused to accept an advertisement from Amnesty International that was critical of Shell's human rights record in the Niger Delta (Lewis 2013).

As Tamara Piety, Fredrik Stiernstedt and Eva-Maria Svensson point out in their chapters, the increasing permeability of the lines between news copy and advertorials is blurring the line between advertising and editorial content. The problem here is not just the specific biases of particular advertisers, but that advertising is – albeit unwittingly – a propaganda system for a whole way of life. So, for example, advertising has something to say about two of the most vital issues facing citizens in the 21st century: climate change and the terms of trade in a globalised world. Campaigns against low wages in the third world are pitted against advertising campaigns inspiring trust in brand names. As well as the PR campaigns designed to confuse the clear messages emerging from climate science (Oreskes & Conway 2010) environmentalists concerned about global warming have to compete against a flood of commercial messages that urge us to consume without worrying about the consequences. Little wonder that climate change still struggles to become a serious electoral issue. Advertising tells us, over and over again, that all that matters is that we carry on consuming, regardless of where goods come from, how they were made or the environmental consequences of their production, distribution and disposal.

The advertisement also takes a position in relation to the politics of food. It reflects – and normalises – the dominance of a particular system of food production and consumption. This system tends to favour the manufacture of processed food, which has more potential for 'adding value' to set of cheap ingredients and is often more

profitable than, say, selling fruit or vegetables. It may be healthier to avoid eating too many processed ready meals, but in the world of advertising we are far more likely to see a pitch for pre-cooked lasagne than for lettuce, leeks or lentils. With no sense of irony, advertising has thereby naturalised the buying and selling of processed, less natural food. The health consequences of this – in both the developing and developed world – are calamitous. This raises a question about another kind of freedom *from* such expression – one I shall return to shortly.

2. An ad-based system favours some audiences over others

As political economists have long pointed out, advertisers discriminate in favour of certain groups – notably young people (who are yet to be 'branded'), and those with high levels of disposable income. Thus a programme that gets the largest share of the audience is not necessarily the most responsive to advertiser demand. An advertiser may well choose a smaller, wealthier, younger audience over a larger, poorer, older one: hence TV programmes have been cancelled even though they were the most popular show in their time slot. Popularity, in such a system, is trumped by youth and prosperity.

As Laura Stein points out, this means that "efficient market behaviour systematically favours the interests of advertisers, shareholders, and more valued audience segments over those of the broader populace, including the poor, the very young and old, and racial and ethnic minorities" (Stein 2006, p.172). Advertising, in this sense, compromises freedom of speech by pushing content providers away from producing content aimed at audiences with less disposable income. Or to put it another way, in the market place of expression, some people have more votes than others. Market-driven and democracy-driven notions of freedom of expression are thereby, in a purely mathematical sense, incompatible.

3. Advertising discriminates against certain forms of content

Advertisers want to buy viewers who will be receptive to their commercial messages. This favours the kind of content – whether they be magazine articles or TV programmes – that do not overshadow or detract from the commercials that punctuate them. Content that is too compelling, too profound or too serious to be easily interrupted is thereby producing a 'bad' product (i.e. an audience irritated by the interruption).

The most overt political consequence of this is that messages that contradict a pro-corporate, consumerist ideology – which most advertising either depends upon or promotes – are unlikely to please advertisers, regardless of the interests of viewers. But there is also a consequence for creative practice. Commercial television programmes – whether sport, drama, comedy, news or documentary – carry the significant aesthetic limitation of being designed in a way that makes them suitable for commercial breaks. In developed commercial cultures like the US, programmes have been written around commercial messages since the early days of radio.

A primer on TV writing in the USA reminds the aspiring writer that "television shows (are) structured around commercial breaks". This means, for example:

> For hour-long dramas or action-adventures, the stories are built in four acts, often with a teaser and tag. Each act needs to go out on a strong hook, especially at the half-hour mark, when viewers are most likely to change the channel. (Brennan 2001)

This is an obligation that makes the kind of sustained action, drama or mood we associate with quality television manifestly undesirable – a constraint on freedom of expression that is generally overlooked.

Freedom from advertising?

In the developed world, I pointed out earlier, many of the deadliest and most common health problems are the product of the over-consumption of precisely the kind of foodstuffs favoured by advertising. Advertising is, in this sense, quite literally bad for your health. This has given rise to the emergence of a new conception of freedom of expression – the freedom *from* advertising. Or, to put it more positively, the freedom *for* forms of expression unconstrained by the logic of advertising. Eva-Maria Svensson and Maria Edström (2014) explore a similar point in their discussion of the intervention needed to create a *wider range* of (non-stereotypical) images of gender in advertising.

Citizens groups have campaigned, for example, for the removal of advertising (especially for unhealthy food) from children's TV programming. Indeed, Richard Layard, in his (2011) book reviews the scientific research on well-being, and argues that placing limits on the volume of advertising would enhance well-being more generally (a range of other scholars – such as Kasser, 2002 – have linked the emergence in consumer culture with a drop in people's well-being).

Even though it is difficult to think of an argument *in favour* of advertising junk food to children (aside from corporate profit), the grip of advertising on creative culture is so firm that, with the exception of a few countries like Sweden, these campaigns have generally been unsuccessful. This takes the battle for freedom of expression to a new, quite different place. Advertising has become so pervasive that the freedom to experience communication or culture which has *not* been constrained or permeated by advertising's repetitive logic is increasingly valuable.

In the current UK debates about the future of the BBC, one the BBC's most important characteristics is often ignored. The BBC – alone amongst British broadcasters – does not have to craft its output around advertising. This has a number of creative and political consequences – it does not have to focus on the financial consequences of offending corporate voices, limit its creativity to fit around commercial breaks or to focus on the disposable income of its audience. But perhaps most importantly, it gives people the freedom to listen or watch without being interrupted by commercials they did *not* choose to watch.

To return to Nick Couldry's notion, the voice of advertising has become so loud that it now drowns out other possibilities. As a society, we are suffering from what Maria Edstrom calls "advertising fatigue". If we are to create less tired, more energetic freedom of expression, we need to promote other ways of funding creative industries, allowing cultural forms – whether news, art or entertainment – to develop without the constraints of a commercial logic. At the moment, these possibilities – for a positive freedom of speech – are shrinking before our very eyes.

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8.

Killing the Golden Goose

Will Blending Advertising and Editorial Content Diminish the Value of Both?

Tamara R. Piety

Abstract

This chapter argues that the practice of blending promotional and editorial content – 'native advertising' – is destructive to both the advertisers' aims and of the integrity of journalism. It forces a Hobson's choice: permit governments to regulate media content for its truthfulness, something that seems to invite the censorship that freedom of expression should foreclose, or permit false and misleading promotional claims to be integrated into editorial content without legal oversight. Advertisers use native advertising to boost their credibility, but because its effectiveness depends on the continued distinctiveness of editorial content, its effectiveness will decrease over time if readers come to view editorial content the same way they do advertising, as untrustworthy. Native advertising threatens to kill the golden goose of editorial credibility, which advertisers so desire to appropriate; the attempt to do so may leave everyone worse off.

Keywords: First Amendment, free speech, public relations, third-party technique, credibility of advertising, commercial speech, corporate speech, credibility of journalism, USA

Native advertising involves disguising ads as editorial content in order to overcome consumer scepticism. This chapter argues native advertising is deceptive and threatens to spread advertising's low credibility to all content, thereby destroying the reason advertisers wanted to mimic editorial content in the first place. The blending of advertising and editorial content threatens to lead to heightened distrust of all media, as consumers discover editorial content is suffused with promotion. In other words, in pursuit of short term gain, native advertising may, in the long run, diminish the credibility of that content it seeks to mimic.

Native advertising attempts to "deliver paid ads that are so cohesive with page content, assimilated into the design, and consistent with the platform that the viewer simply feels that they belong"(Native Advertising Playbook 2013:3).[1] Put less euphemistically, native advertising is made to look like editorial content to benefit from the greater credibility of the apparently objective speaker, while not surrendering control of the message. Native advertising is "stealth marketing," (Goodman 2006)[2] which involves integrating advertisements into content in a way that conceals their status as

advertisements. Critics claim native advertising is deceptive and threatens to undermine journalistic integrity (Levi 2015). Defenders claim any deception is addressed by requiring disclosures and that further regulation is unwarranted (Sheehan 2016).

This chapter argues that native advertising threatens to undermine the credibility of the institutional press at a critical juncture when its survival is under assault (Baker 1994). Ironically, native advertising undermines its own effectiveness to the extent it undermines media credibility. If consumers find it difficult to know what is advertising and what isn't, they are likely to become more distrustful of *all* content.

Native advertising also presents challenges to regulating advertising in general. If it is harder to tell the difference between advertising and non-advertising, it becomes harder to defend regulatory regimes that subject advertising to more regulation than other types of speech (Piety 2011). This is a global problem. Although many countries, such as Sweden (see Svensson in this volume), have more extensive regulation of advertising, native advertising presents a particularly difficult problem for democratic societies dedicated to freedom of speech because it is 'advertising,' which has traditionally been subject to regulation, particularly for its truth, but it looks like 'content,' which has not.

According to the industry, the best native advertising is read and experienced as news, or editorial content, with the promotional aspect delivered unobtrusively. It is most commonly found on-line, in the digital versions of the traditional press, like the *Washington Post* and the *New York Times*, and in digital-only publications like the *Huffington Post* or *Salon* and can be (in theory) identified by disclaimers such as 'paid post' or 'sponsored content,' but those disclaimers tend to be relatively unobtrusive. You may have to be looking for them to discover they are there. "The best content marketing [native advertising] blends news, promotion, and customer engagement so skillfully as to be unclassifiable" (Meyer 2014). "[W]hen it [native advertising] is done with … flair, relevance and journalistic integrity …, it is a beautiful thing to see" (Sheehan 2016:2).

The problem is sometimes native advertising is *too* 'seamless.' *The Atlantic* discovered this with an advertisement sponsored by the Church of Scientology (Sebastian 2015). The advertisement looked like an article about Scientology but was actually a paid post. Many readers apparently did not realise the article was sponsored by the Church and were confused or outraged by the promotional tenor of the article and further incensed when they saw negative comments were being deleted (Moss 2013). According to one observer, the Scientology piece failed because "the *Atlantic* violated the spirit of native advertising by giving a platform to a controversial institution that didn't jibe with its intellectual tradition. Then it made things worse by censoring some of the negative reaction that filled up the comments stream" (ibid). This incident illustrates native advertising's potential to both deceive readers and to poison the well of journalistic credibility. Native advertising is attracting legal attention as well (Levi 2015). The Federal Trade Commission recently published guidelines for the practice (Barr 2015).[3] Unfortunately, the general thrust of these Guidelines is limited to disclosure.

The native advertising controversy

Independence

Native advertising is controversial because it violates a fundamental tenet of editorial integrity – it creates the risk that content will be dictated by the wishes of advertisers and other powerful interests (Pompeo 2013; Meyer 2014). Although newspapers and magazines have long been supported by advertising (Baker 1994), it used to be that there was a separation between the news/editorial side and the advertising side of the business. The separation was always imperfect and breaches in it are not a recent phenomenon (Kerr 2004).

What *is* new is that, until recently, most publications at least paid lip service to the idea that advertiser control of content violated journalism ethics. This is no longer a given. Today, according to an article in the *Columbia Journalism Review*, traditional "boundaries between editorial and advertising in journalism newsrooms aren't what they used to be. Editors at Time, Inc. now report to managers on the business side" (Meyer 2014:24). In an earlier era, that would have been a major breach of the ethic of separation.[4] The reason for the ethic of separation is that reliable sources of information are critical to the proper functioning of a democracy. But newspapers are under increasing pressure from mergers, the Internet and ad blockers which have disrupted the conventional relationship. That leaves advertisers searching for new models of reaching consumers.

For example, in the above *Columbia Journalism Review* article, Michael Meyer discusses an on-line newsletter, run by Purina, called *The Daily Growl*. The author observes that "the Purina operation is, in some ways, closer to a newsroom than journalists would care to admit" (ibid). "*The most obvious difference is that the team is explicitly aligned with the interests of the world's second-largest pet food company*" (ibid, emphasis added). But this difference arguably makes a great deal of difference in the content. The controversy about native advertising is not whether the employees of *The Daily Growl look* like reporters, but whether they *act* like them. For example, it seems unlikely that we can expect *The Daily Growl* to cover exposés of Purina's labour practices.

Many digital media news sources rely on native advertising for half or more of their content. Some, such as BuzzFeed, claim much more than half of their content is sponsored. In short, native advertising is ubiquitous. It was developed to get around advertising's two big problems: clutter and low credibility.

Clutter

Much advertising is easily identifiable as such: billboards, print ads, broadcast ads, pop-up and banner ads, point-of-sale displays, celebrity endorsements, etc.[5] "[T]he fields of view that haven't been claimed for commerce are getting fewer and narrower" (Crawford 2015). Indeed, there is so much advertising in the environment that it is

routinely described as 'clutter.' As Ken Wheaton, a columnist for *Advertising Age* put it, "Given a choice, consumers would rather not have their preferred content interrupted with advertising – even good advertising. They typically endured ads because they had to, or because the alternative cost money" (Wheaton 2015).[6] Advertisements waste consumers' time. So they block them whenever they can.

But where they can't block them, consumers are exposed to a cacophony of advertisements. So, in that environment, an advertiser's chief goal is to "break through the clutter." Native advertising can also often "survive the gaze of ad-blocking software" (Morrison & Petersen 2015:12) because it looks like editorial content. But even if the advertisers evade ad-blocking technology and capture consumers' attention, advertisers face another difficulty: will the consumers believe the advertisement?

Credibility and the third-party technique

Advertising has a credibility problem.[7] "Advertising has no credibility. Advertising is not believable because consumers perceive it to be biased. Advertising is the voice of the seller" (Ries & Ries 2002:75). Consumers expect an advertiser's incentives to sell will likely overwhelm whatever incentives it has to be truthful. Indeed, the likelihood a seller will engage in inflated claims about its product is so well-established there is a legal principle, called the 'puffing doctrine' in US law and existing in similar forms in many legal systems,[8] which denies a buyer compensation for a seller's falsehoods on which the buyer relied and by which the buyer was harmed, but which the court concludes no 'reasonable person' should believe.

Confronted with the twin problems of consumers' sensory and cognitive overload from too much advertising and the low credibility of advertising, marketers have been incredibly inventive in coming up with ways to get their messages to their target audiences more effectively by engaging in activities and communications which do not signal so overtly (or at all) their status as marketing.[9] Such marketing can be more credible because consumers don't identify it as advertising. 'Stealth marketing' encompasses all manner of techniques;[10] native advertising is a type of stealth marketing.

As noted above, although there is "no universally agreed upon [definition]" of native advertising, what "most advertisers and publishers aspire" to do in native advertising is "deliver paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they [the ads] belong" (Native Advertising Playbook 2013:4). This sense of 'belonging' involves what is known as 'the third-party technique' and it is fundamental to public relations practice.

Public relations at its most basic involves sending out a press release about the client's product in the hopes newspapers will cover the 'story.' In most cases, the success of public relations efforts depend on widespread press coverage of the client's press release. But it could also involve *creating* the 'news' through contests, product giveaways, concerts or 'protests.' Yet the thread running through these various stunts and

gimmicks is the press. The press agent's efforts will be for naught if they are not covered by the media. The media is the 'third party' that makes these promotional efforts work.

Edward Bernays, commonly referred to as the 'Father of Public Relations,' is often credited with having created the third-party technique. The third-party technique involves getting an apparently independent speaker to promote the seller's product. "Instead of assaulting sales resistance by direct attack, he [the propagandist] is interested in removing sales resistance" (Bernays 1928:77). As public relations professionals Al and Laura Ries observe, "Advertising is taken for what it is – a biased message paid for by a company with a selfish interest in what the consumer consumes" (Ries & Ries 2002:5). In order to "get something going from nothing, *you need the validity that only third-party endorsements can bring*" (ibid:xx emphasis added).

One shortcoming with relying on third-parties to transmit your message however, is they may not transmit it as you would like, or even at all. If the editor of a news source does not believe your product launch is newsworthy, she may not cover it. If you rely on word-of-mouth through social media you may have problems, even where the buzz is favourable, if that buzz is framed in terms that are in conflict with, or are 'off message' with your advertising campaign. Worse still, the buzz may be unfavourable. If you open up a review site and you don't control the posts, some of the posts may be negative, sometimes very negative. So the ideal third-party promotion is one where the advertiser completely controls the message. Of course, once it becomes well-known that advertisers control much of the content, the distrust that the public feels for advertising will likely spread to media generally, thereby obviating the value of mimicking content.

The third-party's perceived independence is what makes the message credible. This credibility advantage would disappear if readers knew that in fact the third-party had been paid to run the story. This is why it is apparent that disclosures are ineffective to combat the deception that native advertising may generate. Effective disclosure would reveal native advertising as advertising and thus not have the credibility boost that editorial content enjoys and would obviate the purpose.Therefore, advertisers *cannot* mean what they say when they claim to embrace disclosures. Advertisers embrace them because they know they will be ineffective.[11]

Conclusion

Bernays thought "[t]he conscious and intelligent manipulation of the organised habits and opinions of the masses" (Bernays 1928:37)[12] was essential to a democratic society. He believed the opinions of the masses were not so much reasoned, as formed by others into a sort of rubber stamp, "rubber stamps inked with advertising slogans, with editorials, with published scientific data, with the trivialities of the tabloids and the platitudes of history, but quite innocent of original thought" (ibid:48). He thought that in order to make the democratic experiment of rule by the masses work, it was

necessary for leaders to be able to "mold the mind of the masses that they will throw their newly gained strength in the desired direction…Whatever of social importance is done today…must be done with the help of propaganda. Propaganda is the executive arm of the invisible government" (ibid:47-48). As Bernays envisioned it, this function would be performed by the wise "public relations counsel" (ibid:63). Today, most of those public relations counsel are employed by the world's major corporations, entities which do not vote and whose legitimacy as directors of a democratic society are open to question Nevertheless, they often play this role. We are living in the world Bernays helped to create.

One of the most significant stories about the 20th century is the rise of various promotional industries – public relations, marketing, and advertising. This explains the popularity of the television show *Mad Men*. The story is not just the story of the growth of a world-wide, culturally dominant industry, but also of the making of consumer culture, one with its roots in America's past, but one that would also be developing in a new direction as Americans were urged to direct many of their political impulses to consumerism. Being a consumer, they were told, was like being a citizen, only more tangible and immediately satisfying (see e.g. Cohen 2003).

It is dangerous to assume any past time represented halcyon days against which we compare our present difficulties. Nevertheless, it seems obvious the boundaries between promotional and non-promotional content used to be clearer than they are today. The promotional opportunities in today's environment likely exceed even Bernays' wildest dreams. The opportunities to promote one's product are so numerous, so subtle, so ingenious that they seem almost limitless. Native advertising offers the opportunity to have a brand 'story' integrated into a news story in the pages of a major news organisation, one perhaps even written by their staff to integrate seamlessly into their other content, with only minimal, often ineffective disclosure of it as advertising. It is almost too good to be true.

And it may be too good to be true. There is, as always, a snake in this paradise of promotion. The whole purpose of making advertising look like content is so that advertising will enjoy the credibility of editorial content; but in a world where everything is promotion, the danger is that instead of advertising *gaining* credibility, journalism will lose it. If that happens there is little to be gained by trying to associate oneself with a 'trusted publication.' Journalistic integrity creates the 'golden goose' that native advertising seeks to appropriate. However, in so doing, it threatens to destroy its credibility, thereby leaving both advertisers and the public worse off.

Notes

1. The Interactive Advertising Bureau (IAB) has produced a white paper attempting to define native advertising and to describe what sorts of disclosures constitute 'best practices'; see http://www.iab.com/wp-content/uploads/2015/06/IAB-Native-Advertising-Playbook2.pdf, p 3.
2. For a discussion of the many types of stealth marketing see Goodman (2006).

3. See https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses.
4. However, Helen Gurley Brown is reported to have admitted *Cosmopolitan* never ran stories about the health risks of smoking to women because cigarette companies were major advertisers.
5. Such giveaways are particularly prevalent in pharmaceutical sales; see Elliott (2010).
6. Significantly, Wheaton suggests the best way out of this dilemma is to sue the tech companies. "I can't quite believe I am saying this, but how about suing the ad blockers out of existence?"
7. I focus on this problem from the standpoint of the development of native advertising. There are any number of other problems with advertising. I have discussed them at length in my other work: see Piety (2012).
8. For an excellent overview of the puffing doctrine, see Hoffman (2006).
9. 'Marketing' is an umbrella term for a broad range of promotional activities of which advertising is one type. Most large advertisers coordinate their promotional activities using an approach called 'Integrated Marketing Communications': see Shimp (2003:6). For a more extended discussion of the phenomenon and its significance for the regulation of advertising, see Piety (2006); see also Goodman (2006).
10. For a good overview of the subject see Goodman (2006).
11. For a discussion of the ineffectiveness of disclosures see Tushnet (2007).
12. This idea was not original to Bernays. As noted at pp.16-17 in the 'Introduction' to the 2005 edition of *Propaganda*, by Mark Crispin Miller, Bernays was deeply influenced by Walter Lippmann. *See* Lippmann (1922:34ff).

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9.

Upholding the Division Between Editorial and Commercial Content in Legislation and Self-Regulation

Eva-Maria Svensson

Abstract
The importance of a strict division between editorial and commercial content is, still, emphasised in legislation and self-regulation. Nonetheless, the practical situation differs: blurring the lines between editorial and commercial content in practice is increasing with phenomena such as advertorials, content marketing and native advertising. This article examines the division between editorial and commercial content in legislation and self-regulation in Sweden. It finds challenges exist in terms of maintaining the distinction in a context when new commercial models have emerged involving closer cooperation of journalism and business, when critiques have increased of public support for journalism and public service media, and when limits are relaxed such as those on the amount of broadcast advertising. These challenges raise questions about the ability of journalism to continue as an independent controller of both political and economic power.

Keywords: independent journalism, advertorials, content marketing, native advertising, media legislation, Sweden

The importance of keeping a strict division between editorial and commercial content is, still, emphasised in both legislation and self-regulation. Nonetheless, the practical situation is another: blurring the lines between editorial and commercial content in practice is increasing. This article is about the division between editorial and commercial content in legislation and self-regulation in the case of Sweden.

One important element in a democracy is to secure independent journalism. Independent journalism enables media to deliver quality content for the common good by promoting free speech, professional and ethical standards, watchdog journalism, and diverse voices. It is necessary to uphold a division between editorial and commercial content, and this basic presumption is anchored in free speech constitutional legislation, in market legislation and also in self-regulative codes such as ethical guidelines for journalism and for commerce. The division can be seen as essential for the rationales often given for protecting free speech, i.e. to aid in discovering the truth or developing knowledge, to serve people's interest in self-development or autonomy, and to be necessary for democratic forms of self-government (Eggen 2002:35-91; Petäjä 2006;

Kenyon 2010:701-706). The last reason, the democratic rationale, implicit in much work on independent journalism and media is by far the most commonly considered rationale for free speech within law (Kenyon, Svensson & Edström, forthcoming; Barendt 2005:20). In a Swedish context, the democratic rationale is clearly the most prominent argument (Axberger 1984:21; Bull 2006:334).

The rationale for free speech and the division between editorial and commercial content have connections. In the Swedish context, emphasising the democratic rationale for free speech and its importance in a participatory democracy goes together with lower protection for commercial content. The Swedish constitutional laws on free speech (which are contained in three separate Acts) have some unique features. First, the limits for free speech are decided by politicians (through legislation) and by publishers in their practices and only to a very limited extent by lawyers (in courts). Second, the approach is technologically specific unlike the ECHR (Bull 2009:79). For example, as a starting point, the Press Act (TF) embraces everything that is printed (according to a special definition of what is printed). In fact, however, everything does not have the same protection. Commercial content is not at the core of what is considered worthy of protection. In several ways this presumption is visible in the legislative and self-regulatory systems. In these systems it is considered important to uphold the division between editorial and commercial content, even though (in the wider Nordic context) arguments are raised to give commercial content more protection due to its importance in a market economy (Heide-Jørgensen 2013). Three phases have been identified in an international transformation towards giving commercial speech more legal protection (Heide-Jørgensen 2013). In USA, commercial speech has gradually gained more protection under the First Amendment and is today almost as protected as political speech, although the division is still present (Piety 2012).

Even though the Swedish legislative and self-regulatory systems are quite clear in upholding the division between editorial and commercial content, the media landscape shows a different situation. Editorial and commercial content is blurred. Journalists seem to be concerned, as does the marketing self-regulatory body Reklamombudsmannen (Edström 2015). What is at stake, is the legitimacy and reliability of media and journalism, and what is more, according to the Reklamombudsman, this is also at stake for the marketers (Trotzig 2015).

The division between editorial and commercial content in the Swedish legislative and self-regulatory system

The three constitutional Acts protect free speech as a fundamental right and as a common good (RF, TF and YGL). The first is comparable to the ECHR and contains the general right to freedom of speech, and the two latter apply to different types of media: TF to press and YGL to radio, TV, film, audio visual recordings, websites and blogs with a journalistic focus (Kenyon, Svensson & Edström, forthcoming). The common

purpose is to secure the free exchange of opinion, and availability of information. The constitutional regulation protecting speech is "incredibly more detailed" than in other countries (author's translation, Bull 2006:332). RF clearly states that the right to *communicate commercially* may be restricted.[1] This ability to restrict commercial communication has been used in TF and YGL (regarding advertisements for alcohol, tobacco and medicine) and in the interpretation of the constitutional limits when adopting statutory legislation, such as the Marketing Act (2008:486) and the Radio and Television Act (2010:696). In these Acts there are further restrictions, such as for advertisements directed to children.

The purpose of the Marketing Act is to promote the interests of consumers and business in connection with marketing products and to prevent marketing that is unfair to consumers and traders (section 1). The Act applies when traders market or seek to acquire products as part of their business activity, to television broadcasts by satellite that are governed by the Radio and Television Act, and when the Consumer Ombudsman fulfils his or her obligations as competent authority under the Regulation on consumer protection cooperation.

The Radio and Television Act (implementing the Audiovisual Media Services Directive 2013) contains provisions mainly regarding television and radio broadcasting. Parts of the Act concern commercial advertising, sponsorship and product placement. The distinction between commercial and non-commercial speech is upheld in both Acts, and both contain the obligation to inform audiences about messages that are advertising (with the Radio and Television Act also referring to the Marketing Act). The provision on identification of advertising in section 9 of the current Marketing Act states that:

> All marketing shall be formulated and presented in such a way that it is clear that it is a matter of marketing. The party responsible for the marketing shall also be clearly indicated. However, this does not apply to representations whose sole purpose is to attract attention ahead of follow-up representations.[2]

Also in the Radio and Television Act there are provisions on identification of advertising (Ch. 6-8, and Ch. 15). Advertising must be *signalled* according to a certain procedure and sponsorship must be *communicated.* Another interesting provision showing the importance of the division between editorial and commercial content is the prohibition preventing individuals who play a prominent role in news radio broadcasting from appearing in advertising (Ch. 8 Section 8 and 9).

In the self-regulatory Code of Advertising and Marketing Communication Practice from 2011 there is also a provision on identification of advertising (Art. 9).

> Marketing communications should be clearly distinguishable as such, whatever their form and whatever the medium used. When an advertisement appears in a medium containing news or editorial matter, it should be so presented that it is readily recognisable as an advertisement and the identity of the advertiser should be

> apparent (see also article 10). Marketing communications should not misrepresent their true commercial purpose. Hence a communication promoting the sale of a product should not be disguised as for example market research, consumer surveys, user-generated content, private blogs or independent reviews.

In fact, the problem of non-identified advertising was considered by the market long before the legal provisions were introduced. *Näringslivets Opinionsnämnd*, a self-regulatory body practising the ICC code of conducts, which functioned until 1971 when the Market Court and the Swedish Consumer Agency were established, had developed practice about identification. This practice influenced the ethical codes for advertising that the International Chamber of Commerce (ICC) adopted in 1966 (Nordell 1999:847, with reference to SOU 1993:59 p. 390). Developed in business and long part of self-regulatory systems, it was not expressed in legal provisions until the Radio Act in the beginning of the 1990s (prop. 1990/91:149 p. 88), and the Marketing Act in 1996.

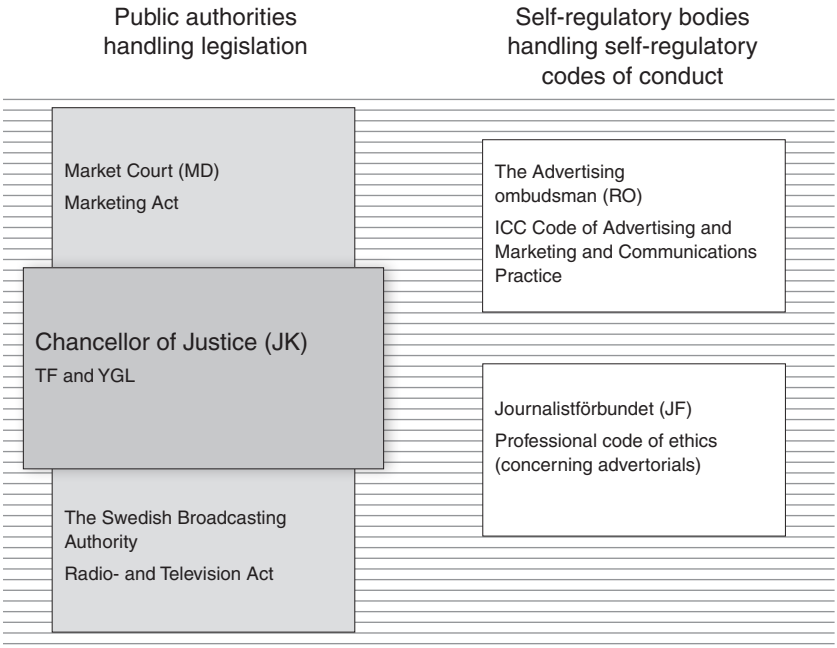
The division between advertising and editorial content is also held to be important from an editorial point of view, in ethical codes for the press (Riktlinjer mot text-reklam). This division exists to maintain and strengthen the integrity and credibility of journalism (SOU 1993:59 p. 390 f). The importance of upholding the principle was repeated in the preparatory work to the now current Marketing Act (Prop. 2007/08:115 p. 82). The principle has not become weaker than previously, on the contrary, heavier sanctions introduced in the latest Marketing Act have strengthened the obligations for marketers to identify advertising. Also, through the Unfair Commercial Practices Directive (appendix 1, section 11) advertisements in an editorial form are prohibited (Prop. 2007/08:115 p. 82). The above shows that, on paper at least, constitutional and general Acts, as well as self-regulatory codes for advertisers and journalists, uphold the division between commercial and editorial content.

The actors upholding the division between editorial and commercial content

The division between editorial and commercial content expressed in the above laws and self-regulatory codes, is upheld by several actors, both public and self-regulatory bodies.

The Chancellor of Justice (JK) aims to ensure that the limits of freedom of the press and other media are not transgressed and acts as sole prosecutor in cases concerning offences against freedom of the press (TF) and freedom of expression (YGL). If speech is considered commercial it is normally not dealt with by the JK. It is left to the Swedish Market Court, which is a specialised court that handles cases related to the Marketing Act as well as cases involving the Competition Act (2008:579) and other consumer and marketing legislation. In cases related to these laws, the Market Court is the highest court of appeal. If speech is considered non-commercial the

Figure 1. The division of legislation and self-regulation concerning editorial and commercial content in Sweden



Market Court has no authority to try it. It might be a matter for the JK. In addition, the Swedish Broadcasting Authority Review Board has authority to handle cases related to the Radio- and Television Act. The Board is part of The Swedish Press and Broadcasting Authority.

The Swedish Advertising Ombudsman (RO) is, despite its name, a self-regulatory organisation founded by the industry in 2008 (replacing two previous bodies founded in the late 1970s). RO receives complaints about advertising and assesses if advertising is following the ICC Code (2011) of Advertising and Marketing Communication Practice. The RO can refer the case to the RO Jury (RON). Until 2005 there was a self-regulatory body within the editorial organisations called *Textreklamkommittén* which monitored breaches of the guidelines on the division between advertising and journalism.[3] Today there is no self-regulatory body, but the Swedish Union of Journalist has its own ethical guidelines and the Swedish Media Publishers Association has its own checklist.

There is a certain overlap between the mandates of the different bodies. Cases with reference to both free speech and advertising may be prosecuted by JK through the normal courts and also considered by the Market Court. The issue on lack of identification of commercial messages is tried in the Market Court as well as by the self-regulatory body Swedish Advertising Ombudsman.

A study of the cases

This section focus on decisions from both courts and self-regulatory bodies with regard to the opinion held by different actors when it comes to the division between editorial and commercial content. This shows that the division repeatedly seems to be emphasised as important, and as such it implies that in the Swedish regulatory systems, commercial messages are to certain extent not protected under the scope of free speech (there are anomalies, however, see Svensson & Edström 2014).

JK decisions

The boundary between advertising and editorial content has to do with basic principles of free speech (Nordell 1999:848). The boundary is tried and upheld by both JK and the Market Court. In a decision from 2009 (2009-01-16 dnr 8360-08-30) JK states that taking action against advertising in print is possible if the message is of a *distinct commercial nature*, i.e. if the communication is (1) performed within a commercial activity, (2) has a commercial purpose and (3) the circumstances are purely commercial. This is the same statement as has been used for many years and JK gives reference to earlier Supreme Court decisions (NJA 1975 s. 589, NJA 1999 s. 749) and previous JK decisions (2003-09-02 dnr 1116-03-30).[4]

The Market Court

The Market Court has considered the boundary of free speech (as the JK but from the opposite side) in several cases.[5] In the most recent one (MD 2009:15), a similar statement to that expressed by JK was repeated with the addition that if a message is mixed (contains both commercial content and opinion-forming content or news reporting) the two different parts of the message must be considered in relation to different rules, the commercial content in relation to the Marketing Act and the opinion-forming and news reporting content under the constitutional provisions. This means, as stated by the Market Court, that parts of the material (with a business actor as a sender) may be protected by the constitutional provisions on free speech, even if the objective with the publication is commercial and the content otherwise is commercial.

Whether the obligation to identify advertising in the Marketing Act has been fulfilled has been tried in a number of cases at the Market Court. Between 2000 and 2015 there were 8 decisions concerning *identification of advertising*.[6] The most recent one (2009:15) concerned a paper-based advertisement which, with its "tabloid format, text style, news articles, headings, ingresses, and body text (…) designed as a newspaper", could easily be mixed up with editorial content. Also, the fact that some parts of the paper had been marked as advertisement, strengthened the wrongful impression that the rest was editorial. Moreover, the paper was sent without an envelope which also made it look like a newspaper. Thus, the paper was misleading about its character in

relation to 'an average consumer'. In a previous case (MD 2006:15) the Market Court referred to a basic principle in marketing law (prop. 1994/95:123 p. 165) which means the consumer must, "with minimal effort", be able to identify an advertisement as such (with reference to the cases MD 2004:25, 1999:24, 1972:14).

This confirms the conclusion in Nordell's case study (Nordell 1999). The Market Court has mapped out distinct boundaries for the obligation to be open about commercial purpose and facilitate the possibility for consumers to identify marketing. Nordell also raises the relation to press ethics. The obligation in the Marketing Act to identify advertising has an element of press ethics, that is, it indirectly exists to safeguard the editorial or journalistic content protected by the constitutional provisions on free speech.

The Swedish Broadcasting Authority

The obligation to signify a commercial broadcast as advertising appears to be upheld in the cases tried by the Swedish Broadcasting Authority. In most cases the reported broadcaster is found to have breached the obligations. In two recent cases a radio program was condemned for not having identified a commercial in a program sufficiently (2014-10-27 dnr: 14/00471), in relation to Chapter 15, section 1 the Radio and Television Act. A special indication must precede and end every commercial broadcast. The on-demand television broadcaster, Aftonbladet, was considered to have breached the obligation to provide this indication, Chapter 8 section 5 in the Radio and Television Act (2012-10-29 dnr: 12/00). No indication at all was provided. The outcome of these cases confirms the statements in previous cases (259/06, 850/05, 1336/04, 780/04, 268/04),[7] that it is obligatory to signify a commercial broadcast as advertising, also pointed out by Fredrik Stiernstedt and Maria Edström in this volume.

The Swedish Advertising Ombudsman

Decisions from 2009 until today are searchable and there are 30 decisions regarding ICC article 9 on identification.[8] Only six of them involved acquittals, meaning that the majority were considered breaches of article 9. In the most recent decision, from 9 June 2015, it is stated that advertising must be easy to identify as such. If the advertisement is within a medium containing news and other editorial material, it has to be presented so the character of advertising is immediately apparent. The test is based on how the average target consumer will probably comprehend the advert. The advertisement in question (tried and upheld several times before) was designed in a way that reminds one of an editorial even if it contained some information about being an advertisement. The information is, according to RON, not clear enough and it is not immediately apparent that it is an advertisement. The decision was unanimous.[9]

Conclusion

The above cases show that the legal and self-regulatory rules on identifying advertising and upholding the division between editorial and commercial content are of great importance for both journalism and marketers. There is nothing that indicates the division is considered less important today than before. On the contrary, the importance of upholding the division seems to have been strengthened. For instance in a proposition to amend the Radio and Television Act it was stated that "the editorial independence of the broadcasters shall be assured when sponsoring and product placement are used"[10] (authors translation, prop. 2014/15:118, p. 1).

At the same time, as Nordell points at, the risk is that blurring the lines attracts some businesses, and despite self-regulatory efforts from both journalists and marketers, it seems prudent to have the judicial system and other authorities with the task of upholding the demand for openness about marketing. This is, not the least, important for journalism.

All that makes it easy to conclude that the division between editorial and commercial content has been confirmed over time and any problem does not seem to be in the legislation or self-regulation. In short, blurring of the lines is not accepted in the formal instruments. However at the same time, varying forms of line blurring seem to be used frequently by media and the advertising industry (Lu 2014; see also Fredrik Stiernstedt and Maria Edström in this volume). The rules are clear when it comes to separating and identifying distinct content as editorial or advertising. But what about branded content, that is, editorial content which is produced on demand from some commercial actor? And what about dependent journalism, sponsored content, product placement, partner studios and other recent innovations? What about transparency for the audience when it comes to these forms of content? What are the possibilities to uphold the distinction between editorial and commercial content, if it is not possible to even perceive that both kinds of content are present at once and that they are blurred? And, what is more, when new commercial models emerge of cooperation between journalism and business, when critiques increase of public support for journalism such as press subsidies and public service, and when activities such as sponsoring, product placement and time limits for commercials in broadcasting are relaxed in legislation, what strength do the judicial and self-regulatory systems have to maintain the division between journalism and advertising, to maintain journalism as independent and as a controller of both political and economic power.

Notes

1. The notion 'commercial speech' is not used at all, but instead commercial messages and commercial communication. This signifies a lower value and legal protection of the commercial content than if it is talked about as 'speech'.
2. Section 9 is not only about identification of advertising, but also about identity of the sender, which is related to identification but not in focus here.

3. In addition, the self-regulatory body The Press Ombudsman (PO) tries breaches of the ethical and professional guidelines Code of Ethics for Press, Radio and Television in Sweden reported (mainly) from individuals that think they have been ill-treated in the press. The issue on the division between editorial and commercial content is of no relevance for PO.
4. Other cases repeating the same opinion are (Supreme Court) NJA 1977 s. 751, NJA 2001 s. 319, (JK) 2004-11-05 dnr 3515-04-30, 2003-11-04 dnr 3139-03-31.
5. 1977:1 Vivo/Favör, 1987:5 Skoladan, 1987:27 Radoninstitutet, 1988:1 Året runt, 1991:15 Chromager, 1991:18 Vedums kök, 1992:19 Hempel Färg, 2005:11 Sveriges Spannmålsodlare AB mot KF, 2006:15 Metro, 2009:15 Postkodlotteriet.
6. No cases were found when searching on the Market Court's webpage (cases from the years 2000-2015 are available there) for "identification of advertising". After a contact with the Court (2015-06-26) I received a list of 7 cases: 2002:13, 2003:31, 2004:25, 2005:22, 2006:14, 15, 2009:15. In addition, searching in the journal *Svensk Juristtidning* I also found 2002:4. The Marketing Act Section 9 contains both an obligation to inform about the message's character of being an advertisement, as well as an obligation to inform about who is responsible for the advertising. Here I have mentioned only cases from the first category.
7. http://www.radioochtv.se/sv/sokverktyg/sok-arende/
8. The figures are other if searching is made based on the word (*reklamidentifiering*) or on one year at a time.
9. http://reklamombudsmannen.org/uttalande/metro-och-mariacom3
10. In Swedish: "*tv-företagens redaktionella oberoende ska säkerställas vid sponsring och produkt placering*".

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10.

Blurring the Boundaries in Practice?

Economic, Organisational and Regulatory Barriers Against Native Advertising

Fredrik Stiernstedt

Abstract

Native advertising is often perceived as the future of both media and advertising. Not only is it said to lead to better, more effective advertising, it is also thought to be part of the solution to journalism's current economic crisis. Both supporters and critics are convinced of its future success: the transition to native is supposedly both smooth and unproblematic. This chapter seeks to nuance such accounts, using the example of Sweden. There are at least three main dilemmas, or barriers – economic, ideological/organisational and regulatory – for those who wish to 'go native' or in other ways maximise the influence of advertising upon editorial content. Analysing them suggests some avenues for action, including targeted protection of particular forms of media content such as news, and greater public support for a structurally divided media system: if commercial media can no longer manage to uphold a 'wall' within their companies, then the 'wall' might instead run through the media system at large.

Keywords: media system, media policy, regulation, self-regulation, media legislation, Sweden

Native advertising, advertorials, content marketing, paid content, product placement, branded content and similar concepts are contemporary buzzwords within the media and advertising industries. They refer to practices in which advertising mimics – and is produced in order to be perceived as – editorial content. In what follows, I will use the term 'native advertising' for all of these practices.

Native advertising is not a new phenomenon per se; the border between advertising and editorial content has been fuzzy and contested from the very beginnings of mass media (Murray 2013). Arguably, however, during the last few years, technological and economic changes have led to new negotiations on how to draw the line between commercial and editorial content (Schlesinger & Doyle 2015). In the words of Robert McChesney (2013:193), the "Internet does not alleviate the tensions between commercialism and journalism; it magnifies them". Native advertising is flourishing online, and especially in online journalism, but it exists on all platforms and in all media genres.

The promoters of native advertising describe it as a serious endeavour. According to them, the intention is not to fool audiences into accepting commercial messages as news reporting or other forms of more trustworthy communication. On the contrary, they promote native advertising as having a considerable number of positive effects: being more engaging and less disturbing, and bringing more value to customers (Mathiasen 2015). Native advertising is also seen as a way of avoiding ad-blocking technologies. Critics, on the other hand, such as Tamara Piety in this volume, point out – and I tend to agree – that such a discourse is nothing more than the whitewashing of a rather dubious activity; an activity that uses the credibility of non-commercial messages (e.g., journalism) in order to promote commodities, services and ideas on behalf of paying advertisers and to create consumer confusion. For Nick Couldry and Joseph Turow (2014:1722), native advertising, in combination with an increasing personalisation, furthermore poses a serious threat to democracy as it contributes in creating a media landscape that is "cleared of one basic ingredient of democratic life: the reliable and regular exchange of common ideas, facts, and reference points about matters of common concern".

In the media and advertising industries, native advertising is often understood as the future; not least because it is seen as contributing to the solution of the current economic crisis within the media, and more specifically within journalism. Furthermore, for many of its commentators, it seems to be an *unavoidable* and *inescapable* future for media and journalism. Both supporters and critics of native advertising are convinced of its future success: the transition to 'native' is supposedly both smooth and unproblematic for practical application (Matteo & Dal Zotto 2015).

In this chapter, I would like to nuance such accounts. There are at least three main dilemmas, or barriers, for those who wish to 'go native' or those who in other ways seek to maximise the influence of advertising upon editorial content. These barriers are economic, ideological/organisational and juridical/regulatory. The context for the arguments that I put forward here is the Swedish media system. I use some examples from my own ethnographic fieldwork within a Swedish media company in the first two sections of the chapter. (For more information about this research project, see Stiernstedt 2013.)

Economic barriers

There are, of course, strong economic incentives for media industries not only to accept but also to promote and produce increasingly blurred lines between commercial and editorial content. However, there are also economic and structural forces working against this tendency. Media industries rely on at least two different kinds of commodities: texts and audiences. Texts are sold to users, while audiences are sold to advertisers. Both of these commodities are peculiar and full of contradictions: they are immaterial and elusive, difficult to create and enclose. Furthermore, media texts are 'public

goods' (Rowley, Tollison & Tullock 1988/2013) as well as being highly dependent on the constantly changing popular taste. These structural conditions make media and journalism a high-risk enterprise, with excessive costs for product development and limited possibilities for increasing efficiency in production (Hesmondhalgh 2007). Accordingly, media industries have developed a range of strategies to handle these risks. One such strategy is the 'creative autonomy' that is afforded to media producers in order to maintain characteristics such as trustworthiness and originality in media texts – without which these texts would not appeal to audiences and would hence lose their value as commodities on the market (Banks 2010, Holt & Lapenta 2010, Ryan 1992).

Creative autonomy, of course, does not mean that it is impossible to engage in practices such as native advertising. However, it does mean that native advertising must be done in a way that is at least partly accepted by journalists, editors and other media professionals (see below for a more elaborated discussion on ideological and organisational barriers of this kind). Furthermore, and more importantly, the commodity form of media messages makes it necessary to create native advertisements that in some way preserve values that appeal to audiences, such as credibility in journalism or creative originality in entertainment. Public trust is one strong barrier to what Couldry and Turow (2014:1719) has labelled a "seemingly unstoppable momentum" of native advertising. As discussed by Piety in this volume, the extensive use of native advertising might undermine this trust, and erode the credibility of non-commercial messages and that could be harmful for business, something that is well understood within the industries.

In my own research (Stiernstedt 2013) I have seen that within the industry itself, practices of native advertising are openly critiqued and resisted, not only because of ethical or professional standards, and not mainly with reference to regulation and law, but with crude economic motives. For example, one of my informants, a senior manager in a radio company, told me: "If we have to push products or let companies write our manuscripts, it won't be funny or creative, and if it isn't funny or creative, we will eventually have no listeners left. And then we don't have anything to sell." Interestingly, in this volume, Crystal Abidin and Mart Ots have traced a similar logic in contemporary fashion blogging, where one might think the divisions between commercial and editorial content would be weak, to say the least. However, the fashion bloggers studied by Abidin and Ots have developed a set of norms and standards on how to maintain a 'wall' in their practices, based on economic motives.

Ideological and organisational barriers

The 'wall' within media production has material grounds, as I discussed above, and can ultimately be understood as a consequence of the commodity form of media products. However, the division between commercial and editorial content is also and simultaneously an idea: a cultural and ideological construct that works through

routines and professional socialisation. As an idea, the boundary between commercial and editorial content has never been a wall in any strict sense of the word. On the contrary, it has always been a porous and nebulous thing, constantly changing and a continuous object of negotiation between conflicting interests and groups. Nevertheless, the boundary between the editorial and business functions of media organisations is, writes Mark Coddington (2015:1), "one of the foremost professional markers of journalism, a principle that is reinforced most strongly in the central sites of its socialization". Within journalism, this boundary has special importance and has long been an integral part of the professional identity of journalists. However, the boundary is not unique to journalism and can be found in various shapes and forms in most media and cultural industries.

The boundary between editorial and business functions is to a large extent an organizational issue. The dividing line between advertising, sales and marketing on the one hand, and producers, journalists and content providers on the other, has often been strict and heavily policed within media companies. The organisational divides are physical (e.g., being a question of location), structural (happening through practices and routines), mental (i.e., being in the minds of employees, regarding what they are and do), cultural (resting on shared beliefs and cultural expression, such as through different clothing) and ideological (i.e., providing explanations for actions and outcomes). When a media company wants to implement native advertising, or wants to cross the border between content and advertising in other ways, there are thus a range of organisational challenges (Stiernstedt 2013).

Between 2006 and 2010, I did ethnographic fieldwork at a Swedish media company that was in the middle of a dramatic organisational transformation. The company had the intention of 'tearing down walls' and integrating sales, marketing, editorial and managerial parts of the company. There were, however, great difficulties in achieving this goal. Several big organisational reforms were eventually rolled back, such as the integration of sales departments. New parts of the company, such as the 'Creative Sales' department, which had been formed with the intent to create native content, were – at least to some extent – failures. The managers behind the reorganisation had to engage in extensive campaigns trying to convince employees of the benefits of 'working together'. Many of these managers are no longer holding a position within the company. Dissidence was widespread. And this was not a journalistic enterprise; the company that I studied mainly produced and distributed entertainment radio and television. In this volume, Maria Edström points to ways in which owners and managers try to get around not only legislation but also conflicts of this sort, for example by using external production companies. However, the fact still remains that ideologies of 'the wall' and its resulting organisational realities make the introduction of native advertising messy and contested, so that it is far from being as easy and natural as many of the proponents and critics of native advertising suggest. There are naturally differences in this respect between different media systems and media cultures. In a highly commercialised media system such as the ones in North and South America,

some of these ideologies of the wall might be weaker, whereas the Scandinavian countries with a strong public service tradition, at least in the broadcast media, might be an exceptional case in this respect. It is also reasonable to imagine differences over time. The fieldwork that I have done ended in 2010, and the situation might have changed since then.

Regulatory barriers

A third barrier to overcome for those promoting native advertising is the legal and regulatory situation. As Eva-Maria Svensson points out in this volume, the Swedish authorities are quite clear on the distinction between commercial and non-commercial messages in the media. To a large extent, policymakers and politicians are accepting and embracing the necessity of a 'wall' between commercial and editorial departments and forms of media output. The idea of democracy-driven free speech is strong, and in many ways, the Swedish policy rests on claims that are similar to the professional ideology of journalists and media professionals: that the public debate and communication that take place in the media are of special importance for democratic society as such, and that they therefore need some kind of special protection.

For radio and television, medium-specific regulations uphold the boundary between commercial and non-commercial content. First of all, the very existence of a strong Swedish public service radio and public service television – which are non-commercial and financed through license-fees – is in itself a testimony to the political ambitions in this area and the perceived need to constrain and create alternatives to commercially funded communication. Swedish public service operators, like all terrestrial radio and television in Sweden, are governed by licenses allocated by the Swedish Press and Broadcasting Authority. The Broadcasting Authority is also responsible for auditing and reviewing the conduct of the broadcasting companies. The public service companies have strict rules regarding commercial content that prohibit all forms of 'unfair favouring' and product placement.

In addition to the permits and licenses issued by the Broadcasting Authority, all content is regulated by the Radio and Television Act. Section five of this law stipulates that a programme that is not a commercial shall not "unduly favour commercial interests". This legislation clearly prohibits the acceptance of money or goods in return for displaying products, talking about them in a favourable way or acting in any other manner that might cause commercial interests to benefit from the content of a broadcast. For example, even in gameshows and other contexts where prizes are distributed to contestants, broadcasters have to be careful not to describe the prize (product) more than once and even then must use strictly formal, non-evaluative language. However, this regulation has only resulted in 82 verdicts condemning broadcasters (17 public service and 65 commercial broadcasters) since the beginning of the Swedish Broadcasting Commission, which is the tribunal for these cases. This result might attest to

the fact that the commission generally only reacts to notifications from the public. In other words, as long as no one from the viewing or listening audience reports the programme, no action is taken.

In addition to the Broadcasting Act, the Marketing Act applies to print and digital media. The Marketing Act mainly focuses on two things: whether marketing is too aggressive or too deceptive. Publishers are legally allowed to print native advertising or other more or less deceptive forms of marketing, but the marketing act still clearly states: "All marketing shall be designed and presented so that it is clear that it is a question of marketing. It should also be clear who is responsible for the marketing".

Along with Swedish laws and regulation by Swedish authorities, attempts at self-regulation also work against a smooth transition to native advertising. In general, and traditionally, the press has had a rather limited amount of government intervention; instead, it has relied on self-regulation that is generally seen as more developed and robust than what is common in English speaking countries. The Swedish Press Council and its Press Ombudsman control the ethical conduct of Swedish print journalism (including digital platforms and social network media). However, their code of ethics does not include any specifics about the boundary between editorial and commercial content. The Swedish Union of Journalists has developed a code of conduct for its members. Although this code relates mainly to external and direct pressure from commercial corporations on individual journalists, it also calls for caution when reporting on or describing goods, services and brands. The Swedish Media Publishers' Association, the trade association for Sweden's newspapers, previously financed a "committee against advertising in editorial material", which was a self-regulatory tribunal taking on issues relating to native advertising. It was terminated in 2005, based on reasoning that it was 'anachronistic'. Together with the Swedish Magazine Publishers Association, however, the Media Publishers' Association has adopted recommendations on identifying advertising in which they conclude that "ensuring the credibility of the editorial text is of utmost importance".

Attempts at self-regulation in advertising are also present in the broader field of advertising and public relations. The Swedish Advertising Ombudsman is a self-regulatory organisation founded by the industry. On the basis of complaints from the public, it assesses whether companies follow the ethical code set up by the ICC (International Chamber of Commerce). The ICC code contains guidelines both for advertising in traditional media (television, radio, print) and for so-called interactive advertising on digital platforms. It includes several sections on identification as advertising, identity of the advertiser, as well as on clarity and legibility.

The international industry organisation IAB (the Interactive Advertising Bureau) – of which all established media companies and groups in Sweden are members – has published ethical guidelines concerning native advertising. Here, again, questions of clarity and legibility are the main concerns: "It is a fundamental principle that promotional efforts must appear as such. Advertising must not be designed so that it is perceived as editorial text, but should be clearly marked as advertising."

Final thoughts

Native advertising and advertiser-funded content are widespread, and the blurring of the boundary between commercial and editorial content seems to be the rule in much media output. This situation is not essentially new, even though it may be more common in contemporary – and especially digital – media than it has been historically.

However, there are also several forces – economic, organisational, ideological, political and regulatory – that work against this development. The transition to native advertising is not as smooth as both critics and advocates sometimes seem to think. The industry is full of dissidents, organisational structures tend to work against native advertising and the legal system and regulation are clearly restrictive. At the moment, however, the enforcement of existing laws and policies is weak. As Des Freedman (2008) reminds us, non-intervention is also a form of intervention, and as such, a form of political action. Perhaps it is not new norms or regulations that are needed, but better compliance and more interventions – not least in order to support those individuals and organisational structures that are trying to defend 'the wall'. There may well be a great deal of popular support for upholding a separation between commercial interests and editorial decisions. The question of deceit and dishonesty that is inherent in native advertising is one that interests and concerns many, and that sometimes takes a political turn, as for example in media reform movements.

On the other hand one must ask, is it plausible to expect existing commercial media industries to be able to uphold the lines between commercial and editorial content, especially in the face of economic crisis? We are still, as pointed out by Couldry and Turow (2014) just a few years into this change, and maybe some of the ideologies, organisational forms, habits and self-regulation that at the moment presents barriers to native advertising will wither and disappear? New regulation in this area, and increasing the number of interventions, may also carry the risk of working against the freedom and independence of the media and an unwanted amount of surveillance and control from authorities may be required in order to be able to intervene against native advertising practices. The main development within native advertising is in digital media, and the vast amount of such media platforms, as well as the fact that they are often owned and operated from abroad, further hinders effective interventions from relevant authorities. How then, to move forward?

One thing would be to reserve intervention against native advertising to some forms of media output. In the Swedish Radio and Television Act, news reporting already has a higher degree of protection than other forms of content against commercial influence. In other words, the legislator has already decided to differentiate between forms of speech. Elaborating this kind of protection further might provide a road forward for policy and political action in relation to native advertising. For example, some forms of media content could be given stronger protection, and the authorities could be given an expanded mandate to intervene in news and factual programming; while other forms of media content could be given more of a free rein in this area. This would probably

demand increased public intervention also in digital and printed media, and might therefore be a dangerous road to follow since other important values such as freedom of the press might be risked. Yet another possible form of intervention, which probably would be more successful but also is more politically difficult to achieve, is the creation of new services for market correction. If commercial media can no longer manage to uphold a 'wall' within their companies, then the 'wall' might instead run through the media system at large and be upheld with the help of government policies. The public service model could then be expanded and exported to digital platforms and perhaps even to more traditional media such as newspapers and magazines. This could be done in several different ways, there could be public service funds from which all media companies could apply for grants for public service productions, there could be new institutions created and old institutions could be given new roles, especially within the digital realm. This expansion would probably demand a combination of national and international initiatives regarding both policy and the practical creation of new public service institutions and the European Union would have an important role to play here. However, the current dominant tenor all over Europe has the opposite intent: to push back and delimit existing public service institutions, so at the moment this road might be too politically difficult to follow.

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11.

Audience Advertising Fatigue and New Alliances to Finance Content in Broadcasting

Maria Edström[1]

Abstract

In 2010, the EU Audiovisual Media Service Directive was revised by the European Commission and the regulations concerning improper promotion and product placement in television were sharpened. In sum, broadcasters became responsible for informing viewers about product placement if broadcasters gain from it financially. However there are ways around the regulations by using production companies and media brokers and agencies. This chapter explores some cases from Swedish commercial broadcaster TV4 where improper promotion of commercial interests and product placement have been questioned. It also addresses other types of blended content in Swedish public service television. Brand exposure to finance media content is currently being used with or without consent from the audience. These market driven changes are contextualised within the increasing advertising fatigue among the audience.

Keywords: improper promotion, television, brand exposure, advertising, EU Audiovisual Media Service Directive, Sweden

Commercial messages blended into editorial content are abundant, especially if one takes into consideration the global media entertainment industry and social media. As earlier research indicates, product placement manifests itself in almost all entertainment businesses, but more comparative research need to be done to fully understand the impact of these processes (Chan 2012). Media companies are currently testing new ways of financing content at a time when advertisers and users are moving away from traditional media. Television broadcasters are very much a part of this development. Within that process, new forms of content collaboration are being developed that challenge both the current legislation and the audience's trust. This chapter examines elements of the history and current trends in broadcast advertising and audience fatigue in the case of Sweden.

One purpose of the EU Audiovisual Media Services Directive (2010) is to harmonise television advertising rules in the EU in order to improve the financing of content. The Directive permits, among other things, 12 minutes of advertising per hour, more flexible scheduling and more possibilities for product placement and sponsorship. The

intention expressed in the Directive with regard to commercials is still that advertising should be easily recognisable so that the audience can distinguish editorial and commercial content (ibid., Article 19). This general view is reflected both in national legislation and in industry codes of ethics such as the International Chamber of Commerce Code (ICC Code 2011), and in most codes of ethics for journalists, including the Swedish code which also emphasises editorial independence from commercial interests (Code of Ethics 2010).

There are however differences in practice between countries, both in how authorities interpret the legislation and how broadcasters adapt to the new rules. For instance, in programs broadcast from Great Britain a "P" appears on the screen when there are product placements, whereas under the Swedish Radio and Television Act (2010:696) no marking is needed during the program. Instead, programs can only be broadcast with product placement if it is stated before and after the program and during commercial breaks (Chapter 6:4). As this chapter will show, Swedish advertisers have chosen not to use product placement and are trying other forms of collaboration with broadcasters. In 2015, the Swedish government proposed sharpening the Radio & Television Act in order to safeguard editorial independence, a proposition that can be interpreted as a concern over new forms of blending editorial and commercial content (Dir 2015:26). In 2016 the Radio & Television Act was modified to include a new paragraph (Chapter 7:3a) stating that sponsoring of a program should not affect editorial independence.

The Swedish television market consists mainly of domestic actors (80 per cent audience share), while the five public service broadcasting channels have a 34 per cent share of total viewing. Commercial Bonnier is almost equally strong (30 per cent audience share) with 17 channels, some within the terrestrial network (TV 4 Group). The third largest actor is the Stenbeck family with several channels within MTG, Modern Times Group (17 per cent audience share). Commercial television is still very profitable in Sweden, even though the audience is becoming tired of television commercials. For five consecutive years, the TV industry has reported record numbers in terms of advertising revenue. At the same time, the newspaper advertising market has been noticeably weakened compared to a few decades ago (Ohlsson 2015). Television has increased its share of the total advertising market in Sweden from 15.4 per cent in 2008, to a record-high of 18.9 per cent in 2013 (Media Development 2014; Medieutveckling 2015; Ohlsson & Truedson 2015.) The Nordic Television market as a whole show a similar pattern with 18.0 per cent of the total advertising market; the largest market remained the daily press with 25 per cent (IRM 2014).

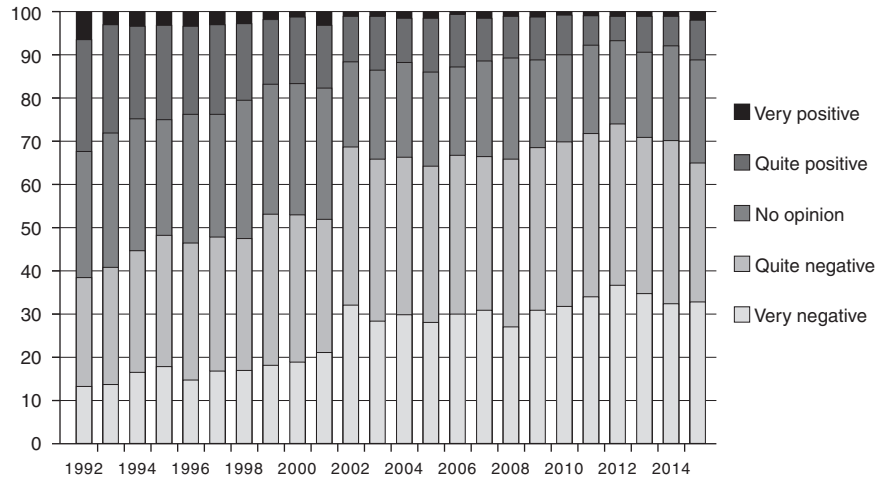
Audience fatigue

The success of television commercials, and thereby their financial potential, depends strongly on audience attitudes. For broadcasters it has been important to maximise

revenue from advertising without losing the audience's patience and trust. The notion of advertising avoidance is frequently discussed (Callius 2008; Callius 2015) as well as ways of blocking advertisements (Scherb 2004; Johnson 2013). With only a twenty-five-year history of television commercials in Sweden, the television industry and politicians have grappled with legislation regarding the placement and volume of commercials. At first, the Swedish legislation was rather strict, limiting both time and space for commercials (8 minutes per hour, and only between programs). Gradual changes have now brought the national legislation into line with the EU-directive, allowing 12 minutes of advertising per hour and commercial breaks within programs. The audience however, does not seem to have appreciated these changes.

The attitude towards television advertising has been measured every year since 1992 by the Swedish SOM-institute in their *National SOM survey.* The institute is an independent survey research organisation within the University of Gothenburg that address attitudes concerning media, politics and public services. Initially, over a third of the population was very or quite positive towards television commercials and only small minority of the population showed a distinct negative attitude towards TV commercials, see Figure 1. Over time the very negative and quite negative groups have grown into a vast majority. Attitudes towards commercial content tend to be more positive among younger generations in Sweden (Grusell 2008), a pattern which seems to continue, but negative attitudes still dominate the youngest generations in the study (born in the 1990s).

Figure 1. Swedish public opinion on television commercials 1992-2015 (per cent)



Note: The question was: *Are you positive or negative towards TV-commercials*? The figure shows the total sum of respondents that varied throughout the years between 1566 and 1880.

Source: The Swedish National SOM surveys. The figure was first published in 2014 by Börjesson & Edström in Bergström & Oscarsson (2014) The data from 2014 and 2015 is from Arkede et al 2016).

The changes in public opinion towards TV commercials can be compared with the with the changes in national and EU legislation on television commercials, every liberalisation and increase in advertising on TV preceded a boost negative attitudes among the audience. Attitudes towards TV-commercials are just one indicator of audience fatigue. The increasing use of paid streaming services, the development of both native advertisements and ad-blockers for web content are other indicators, as well as the use of online Influencers to promote products (see Abidin & Ots in this volume).

Commercial broadcasters: Complaints and responses

Under the Swedish Radio and Television Act, monitoring the regulations is done by the Swedish Broadcasting Commission, a part of the Swedish Press and Broadcasting Authority. In its decisions, the Swedish Broadcasting Commission aims to safeguard freedom of expression. The Commission monitors programs that have already been broadcast and its duty is to make sure that the regulations regarding content are respected (both those in legislation and those in broadcasting permits).

Initially, Swedish advertisers and commercial broadcasters did not seem to know how to deal with the new audio-visual legislation. Few advertisers wanted to use the possibility for product placement in the way that the Swedish Radio and Television Act demanded. An indication of that reluctance is that still, six years after the new legislation, there have been only 11 complaints to the Swedish Broadcasting Commission (2010-2015). Seven of these reached a decision by the Commission and the rest were dismissed. And of those seven, only two cases have been judged to be about product placement: placing a hot dog stand on a remote island in the entertainment program *Robinson* [Survivor] on TV4 received an unfavourable decision (11/03201); and a training program, *Lust, svett och tårar* [Lust, Sweat and Tears] on 24UNT received complaints about not having sufficient information on product placement (11/02750).

Instead, other parts of the legislation have been more tested. According to the Swedish Radio and Television Act programs may not 1) promote purchases or rental of goods or services, or contain sales-promotional features, or 2) promote a product or service in an improper manner (Chapter 5:5). These rules were challenged several times in the beginning of the implementation of the new legislation, but activity then settled to a level of 13 to 18 cases each year that reached unfavourable decisions. The most common unfavourable decision regarding commercial messages is improper promotion followed by sponsorship, see Table 1.

Table 1. Grounds for unfavourable decisions in reported cases concerning commercial messages to the Swedish Broadcasting Commission 2010-2015 by type (cases by number)

	2010	2011	2012	2013	2014	2015	Total
Improper promotion (unfair advantage)	27	8	4	6	8	5	58
Advertising	3	3	4	3	5	4	22
Sponsorship	15	2	6	3	5	5	36
Total number of decisions	*862*	*1198*	*167*	*166*	*130*	*154*	*2707*

Source: Swedish Press and Broadcasting Authority. www.mprt.se. Only about 5 per cent of all complaints received unfavourable decisions. The statistics concerns decision from commission meetings. The decline in totals numbers from 2011 to 2011 is due to administrative registration changes.

The few cases where there have been unfavourable decisions for broadcasters may indicate that everything is in order, the rules are clear and they are respected. However, the relationship between broadcaster and advertiser has become more complex and new ways of blending in commercial messages appear to be increasing. There is also an opening in the legislation for more financing from advertisers. In the Swedish legislation, product placement occurs if the *broadcaster* has benefited financially from it (Chapter 3:10), but the legislation does not directly address production companies or other parties involved. Therefore, television content can be produced that might receive complaints for improper promotion, but it can be difficult to investigate whether the promotion was intentional or not and which party, if any, gained financially from it, the broadcaster or the production company.

Here are some relevant points about recent cases that received complaints.

Improper promotion – sponsoring and guests who pay their way

The commercial broadcaster TV4 decided to try a new concept, letting advertisers pay for being present as experts in the TV show *Förkväll* [Before Evening]. The specific relationship with experts paying their way into the program was not tested by the law, but it was criticised by other media (Svahn 2009) and the show received several complaints. The Swedish Broadcasting Commission delivered a unfavourable decision against TV4 for improper sponsoring since the TV studio background consisted of wallpaper with the pattern of a company logo, and the expert speaking in the studio worked for the same company (Agria Djurförsäkring) (Decision 10/01502). In 2011 the show was closed down do to failing audience numbers (Aftonbladet 2011).

Product placement that was cleared

In 2010, the comedy drama series *Solsidan* [the Sunny Side] was launched by TV4 and quickly became one of their huge audience successes. *Solsidan* is also considered to be one of the greatest successes for product placement (Becker & Wålgren 2014).

However, it has never received unfavourable decisions about product placements. The show has received complaints for exposing products, but the Swedish Broadcasting Commission has found no grounds for unfavourable decisions, considering the character of the program, which takes place in a posh neighbourhood where the characters have a lot of gadgets and products. To avoid unfavourable complaints, the broadcaster TV4 also used the argument that the show was produced by a production company (Decision 11/00368).

Improper promotion

The development of external production companies delivering content to broadcasters appears to be a way to try to avoid the legislation. The case of *Kust och hav* [Coast and Sea] on TV4, received complaints for improper promotion of commercial interests because one show focused solely on one shipping company and the launch of their new cruising ship. It could never be stated if, or how much, TV4 or the production company, profited from the collaboration with the shipping company. The broadcasting company claimed it relied only on editorial decisions and the Broadcasting Commission was never able to clarify if there had been an influence from sponsorship on the editorial content. In this case, the Swedish Broadcasting Commission found that the program contained sales promotion and that is was an improper promotion of the shipping company and requested a 150,000 SEK (16 100 €) fine at the Administrative Court (Decision 13/00800).

"Brand exposure" – a type of promotion not tested.

Advertisers are aware of advertising fatigue and audience behaviours to try to skip commercials. That is why "brand exposure" has become a new field of business. Brand exposure is similar to sponsorship, but it involves not only broadcasters, production companies and advertisers. Media agencies are the key player, providing advertisers with agreements that provide exposure of their products in the program and the possibility for joint collaboration on other platforms and commercial areas, such as marketing with the TV logo on their product. In some cases they advertisers are also sponsors of the TV program, in some cases they only have a sponsorship agreement with the production company that is not visible to the audience.

In a student essay about the TV4 show *Hela Sverige bakar* [All of Sweden Bakes] all interviewed parties agreed that brand exposure is better than product placement. TV4 gets higher revenue, the exposure of products is tailor made, the media agencies increase their share of the total advertising market and the audience does not have to deal with direct advertising. However, this also means that the audience cannot differentiate between editorial and commercial decisions, nor discern why certain products are exposed and talked about (Grothén & Robertsson 2015:50).

In addition, no complaints have been filed with the Swedish Broadcasting Commission regarding the program *Hela Sverige bakar*. This could be interpreted as an acceptance of brand exposure or a result of the audience not being aware that it is going on.

Public service television: Complaints and responses

Swedish public service television channels do not have advertising, but they can still be charged for improper promotion, sponsoring and product placement. There have been several complaints and unfavourable decisions by the Swedish Broadcasting Commission regarding improper promotion in public service, in fact there are more unfavourable decisions regarding public service Swedish Television (SVT) than commercial TV4. (During 2010-2015 SVT had 17 unfavourable decisions regarding improper promotion, compared with 10 unfavourable decisions for TV4). This can indicate that public service broadcasters have more difficulty in upholding the distinction between editorial and commercial content than the commercial broadcasters. But it could also reflect the audience expectations on public service, to live up to higher standards of independence. Nine out of the 17 unfavourable complaints regarding SVT concerns sports programs and sport profiles. One complaint from 2012 concerns a story about a famous Swedish golf player. Logos on the golf player's cap and clothes were visible on every frame of the edited interview, this was found to be improper promotion. The argument from the broadcaster, that the reporter had been trying to make the golf player take off the cap, did not change the situation (Decision 12/00050).

After that decision, public service television started to cover more often any logos that people are wearing. Three years later, in 2015, another sports star, this time a skier, was the centre of an entertainment program *Flickvän på försök* [Trial girlfriend]. Some logos were blurred, but not all of them. This time the Swedish Broadcasting Commission not only found it to be improper promotion, it requested a 100 000 SEK (10 770 €) fine at the Administrative Court (Decision 15/03427).

Discussion

This chapter has considered some examples of where the audience has complained about commercial messages in Swedish broadcasting and where the legal boundaries have been decided to apply in practice. The legislation targets the broadcasters, and if the broadcasters have not financially gained from a collaboration, they rarely receive unfavourable decisions from the Broadcasting Commission. At the same time, more of the business appears to take place around the production companies.

There seem to be a gap between practice and the intention of legislation. Even when the product placement situation is well known, the broadcaster can claim that it has made no profit from it (e.g. *Solsidan*). The fact that there have been only two

unfavourable decisions on product placement in Sweden between 2010 and 2015 suggests that there is no product placement going on, that is it seamless in its visual presentation, or that the legal measures do not function.

Brand exposure can be seen as a type of commercial message that still has not been tested by the Swedish Broadcasting Commission even though it is visible on screen (e.g. *Hela Sverige bakar*). The broadcasters have developed new types of advertiser collaboration in order to increase revenue. Media agencies seem to have an important role as brokers between advertisers, production companies and broadcasters. Collaboration on brand exposure is a new type of financing that appears to get around the legislation. Neither the audience nor the authorities appear to recognise this new type of commercial message, or to have problems with. At least no complaints have been filed with the Swedish Broadcasting Commission about the program mentioned earlier (*Hela Sverige bakar*).

One might ask how well the advertisers and broadcasters know their audience and how far they can push these collaborations? Different scenarios are possible. Audiences may initially accept these forms of collaboration. On the other hand, audiences who are already tired of advertising might be sensitive to these forms of collaboration, once they discover the influence of advertisers. It seems that the television industry will need more refined strategies, in order to maintain its income though commercials without alienating audiences.

The question of genre and trust should also be considered when reflecting on the development of mixing editorial and commercial content. The examples given in this paper are television shows that are part of the entertainment programming of the broadcasters. It might be more problematic if these new forms of financing, which blur the line between editorial and commercial content, also become present in genres like news and current affairs. There is a concern that there will be a lack of trust in news when audiences no longer can identify who is behind stories (Austin & Newman 2015; Hernius & Rosenlind 2015). In Sweden, there are currently several attempts at finding new ways to finance news. A daily newspaper has a business reporter doing television interviews sponsored by a car company and the biggest tabloid financed a US-correspondent by a sponsor contract (Häger 2015; Nordling 2015). How this will turn out, both financially and in terms of audience trust, is yet to be seen.

The EU Audiovisual Media Service Directive from 2010 intended to harmonise advertising rules, but it is unclear if the Directive has facilitated this form of funding television content and if it has helped to uphold the line between editorial and commercial content. The public consultation in 2015 on further revising the EU directive indicates no clear consensus on commercial communications, but researchers raised some concerns about commercial messages and blended content on digital platforms. Sally Broughton Micova, for instance, suggests in her consultation comments that "One thing that could be considered in the future, perhaps though monitoring and periodic review for policy action, is the amount of advertising embedded in the on-demand catch-up services of commercial television channels". (AVMSD public consultation

2015). The results from that consultation will feed into the evaluation of the AVMSD and the Impact Assessment accompanying the legislative proposal in 2016.

Testing new ways of financing content has its risks. When mixing commercial messages and editorial content in new manners broadcasters have to be aware of the risk of losing the audience's trust as well as creating ethical dilemmas for the journalists involved (Edström 2015, Edström & Svensson 2016). On the other hand, if commercial messages are blended into the editorial content in such a way that the audience does not recognise it is happening, it could be profitable at least in the short run. But long term effects, once the audience learns about these types of collaborations, might still damage the relationship between audience and broadcaster.

In Sweden, the new paragraph inserted into the Radio and Television Act in 2016 clarifies that sponsors should not influence editorial decisions. How this rule will be implemented is yet to be seen. Another way to keep the distinction between editorial and commercial content could be to broaden the legislation to include production companies that deliver content to broadcasters. Broadcasters and the audience need to be aware that if broadcasters are not paying for the full cost of the production, someone else is. If measures are not taken, audience fatigue is likely to increase.

Note

1. Maria Edström served as a member of the Swedish Broadcasting Commission during 2007-2015.

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12.

On-Line Life in a Commercialised World

The Commodification of Mediated Social Relations

Bengt Johansson & Stina Bengtsson

Abstract

Media usage has always included aspects of commodification. The media audience has been targeted as a recipient of advertising when watching (commercial) TV or reading newspapers. The advent of the Internet has further developed this commodification of the media audience. In many ways, everyday space is becoming more commercial in its organisation, citizens are being transformed into consumers and, in the long run, free speech conducted online is not free as it will be tracked, saved and used for commercial purposes. This chapter draws on a Swedish national representative survey asking respondents about their views on different aspects of commodification of their life online. The results indicate a rather sceptical view towards different forms of commodification related to Internet use among Swedish citizens. However, younger respondents, those with liberal market values and frequent Internet users embrace a more permissive view of a more commodified media environment. Two avenues are suggested for resisting such developments, targeting media producers and users.

Keywords: commercialisation, audience, digital media, media ethics, opinions, Internet

The media are intruding into our everyday lives in many ways. When reading articles, buying products or interacting with friends on social media networks, we pass on information to the media industry, which can be used for commercial purposes such as advertising. This means that our digital lives become commodified: social relations and our behaviour are in the process of being transformed into commodities, which can be bought and sold. Research has tried to identify the nature and consequences of this development of commodification (Bollier 2002; Hesmondhalgh 2008; Berry 2008; May 2010; Bolin 2011) and has pointed out that extending the commodity as a form will also change social relations and values, which, previously, were not a part of a market. This has democratic implications since commodification of our digital lives also means that everyday space is becoming commercially organised, that citizens are transformed into consumers and that in the long run free speech conducted online is not free any more as it will be tracked, saved and used for commercial purposes (Lewis in this collection).

This chapter seeks to contribute to the research on commodification by focusing on people's experiences of living in a commodified, digital media life. We will (1) ask to what extent the public accepts or opposes different aspects of commodification of mediated social relations and (2) analyse which factors can explain different attitudes to commodification.

Theories of commodification

The increasing commercialisation of the media has been an often-discussed topic during recent decades (see e.g. Jönsson & Strömbäck 2007). At the same time, many have pointed out that the media have always acted within commercial markets, and that newspapers were among the first mass-produced commodities (Hallin 2008:44).

The second half of the 20th century, however, saw an increasing commercial organisation of the media. Koller (2007), for example, argues that the influence of political institutions on the media diminished after the Second World War, in favour of commercial agents. This is also linked to the increasing commercialisation of broadcasting in (many) European countries (Hallin 2008:44; Hjarvard 2008), changes which are also linked to larger cultural processes such as secularisation and individualisation (Hallin 2008:47). In Sweden, for example, Olsson has shown how we also started to prioritise individual rather than collectivistic forms of communication and ways of relating to others during these years (Olsson 2002).

There are two main ways of understanding these processes. Hallin argues neoliberal changes are often described as a process of de*politisation* in which the media lose their position as public institutions and start acting as commercial agents (Hallin 2008:43). In a more critical tradition these changes are on the contrary described as *driven by* political decisions, locally as well as globally, and thus linked to a larger process of neoliberalisation of society. Political decisions are therefore also part of the increasing commercial organisation of information and communication that we have seen during recent decades (Carlsson 1998; Prodnik 2014).

Besides power relations between politicians and media organisations there are also other kinds of commercialisation; David Buckingham for example argues that we see an increasing commercialisation of childhood, as children to a much higher extent than before are targeted by media companies and addressed as consumers. Their games, relations and everyday life are also subject to a commercial logic and measured by economic values (Buckingham 2007). This kind of commercialisation is called commodification and refers to the process where material and non-material phenomena are taken over by the logic of capitalism, and transformed into commodities that can be bought and sold. This can be when we start to pay for childcare, an area of human life that was formerly free from economic transactions. Another example is when our everyday activities, interests and social relations are capitalised by digital media organisations when information about our activities, interests and relations are saved

and sold to target commercials. New areas of our lives are now transformed into commodities and bought and sold on the market.

According to Marxist theory, one of the basic elements of the commodity is that it is produced in a capitalistic production process (Prodnik 2014), but many argue that we today see commodification processes in many different spheres of life outside manufacturing. These tendencies are especially visible when observing the field of information and communication, where also public service media today think and act as commercial agents, children are addressed as target groups, media users are tracked in order to expose them to the right kind of commercials, etc. (Smythe 1977; Terranova 2004; Fuchs 2012; Fuchs & Sevignani 2013).

Commodification processes

The first major commodification process started in England in the 16th century and peaked during the 18th century. This was when common land was enclosed and transformed into private property, a process that is often called the 'first enclosure' (Boyle 2003). Today we talk about a 'second enclosure', as new dimensions of human life, such as communication and information, are enclosed by commercial actors (Bollier 2002; Andrejevic 2007; Berry 2008; Hesmondhalgh 2008; May 2010).

This second enclosure, or 'digital enclosure', makes new areas of human life, public as well as private, subject to market rules. Information and communication today is saturating human life in a more fundamental way and thus is becoming more profitable as a commodity. This means that even though media content, apart from public service media, has always been framed by commercials, what we see today is commercials entering new, and formerly non-commercial, areas of human life: social relations (via social networking), in viral distribution patterns where people are addressing their contacts as customers, etc. Bolin (2011) even argues that today we see our consumption commodified as the items and services we buy are not merely goods we pay for, but that information about *what* we buy is also sold in order to track us digitally and to address us as audiences for commercials (ibid:55-59, 122). According to Andreas Wittel (2013:315) commodification of the life world is today a simple fact:

> There seems to be a broad consensus that commodification is a fact, the capitalist market has become increasingly powerful, pervasive and hegemonic, the logic of the capitalist market colonises and destroys the logic of community, and that the market swallows more and more areas and aspects of life that hitherto have not been regulated by monetary measurement and monetary exchange.

Others have also raised warnings that expansion of the commodity will transform social relations and culture (Schiller 1984:xiv; Thompson, 1991:ch 4; Harvey, 2009:55-56, 62-64; Wittel, 2013:314). Prodnik (2014) claims that these new enclosures of information and communication will change how we think, understand,

reflect, explore, create, question and critically relate to society, its political and economic order and to our lives. Against this background we will analyse how the Swedish public relates to different aspects of commodification in their everyday lives with digital media.

The National SOM Survey

The *National SOM Survey* is carried out by the SOM-institute, which is an independent survey research organisation at the University of Gothenburg. The institute collaborates with researchers from various disciplines, aiming to explore Swedes' attitudes and habits in a range of areas and to understand the evolution of the Swedish society. The central questions addressed in the survey regard attitudes concerning mass media, politics and public services. The survey is sent out every autumn in the form of a questionnaire mailed to a sample of randomly selected individuals, using the Swedish National Population Register as the sampling frame. The questions analysed in this chapter were sent to 3,400 respondents between the ages of 16 and 85. The response rate in 2014 was 54 per cent.

Commodified social relations on the Internet

Three questions aimed to capture different aspects of opinions about the relationship between digital media and commodification. The items were posed as proposals where respondents were requested to agree or disagree with four alternatives (agree totally, partly, hardly, not at all). The first question concerned the commodification of social relations in social media, and was posed as follows: *It is wrong to disseminate advertising to friends or followers in social media.* Social relations are not normally defined as commercial relations (Thompson 1991; Prodnik 2014). People can, of course, make friends to enhance their careers or receive other advantages, but most people have friends for other reasons. However, advertisements are, to a large extent, embedded in social media. As a user, you are prompted to 'like' pages related to commercial products and companies. You are also told if your friends already like this page or product. Other modes of commodification are discounts or free samples in return for disseminating commercials to friends in social media networks. Psychological research clearly shows that our actions are highly dependent on how our family and friends behave, and communication research has demonstrated that we are more inclined to change attitudes and behaviour if our friends or someone else we trust promotes an opinion or product (Katz & Lazarsfeld 1955).

The second question posed was more related to authenticity when social relations are commodified. The survey question asked if it was acceptable for bloggers to promote products on their blogs. A blogger is normally thought to not be primarily

a salesperson, but someone who writes about him-/herself or a subject of their interest. The variety of subjects on blogs is wide: a personal diary online, political opinion formation, fan-pages, etc. A common trait is that bloggers do not try to establish a primarily commercial relationship with their readers. Nevertheless, it seems to be an established custom that bloggers come to be paid to blog or promote products (Lowery, Patton & Meade 2011). The question is to what extent the public approves of this phenomenon. Do they think it is acceptable to commodify the blog-reader relationship or does it undermine the credibility and trust of this linkage (see Abidin & Ots, and Piety, in this volume)?

The third aspect of commodification is about exposure to commercial messages based on websites that one has recently visited (digital tracking). Advertising agencies always seek to optimise target groups. This is nothing new; the advertising industry has always attempted to match advertisements to audiences. What is new is that exposure to commercials is directly connected to choices made in visiting websites. The question we ask is to what extent the public approves of their personal media habits being registered and used to promote products and services on the Internet.

Table 1. The commodification of Internet use (per cent/balance positive/negative)

	It is wrong to disseminate com commercials to friends or followers in social media	It is ok that people are paid to promote products on their blogs	It is unacceptable that you are exposed to commercials based on the websites you have visited
Totally agree	37	21	45
Partly agree	33	38	33
Hardly agree	17	16	14
Do not all agree	13	25	8
Per cent	100	100	100
N	1,227	1,159	1,277
Balance pos-neg	40	18	56

Note: Balance is the share of "Totally agree"/"Partly agree" minus the share "Hardly agree"/"Do not all agree".

Source: The Swedish National SOM-survey 2014.

The general picture (Table 1) is that the Swedish public is rather sceptical towards different forms of commodification related to Internet use. A majority (70 per cent) agree totally or partly that it is wrong to disseminate advertisements in social media to your friends. Even more (78 per cent) agree totally or partly that it is wrong to use algorithms based on browser history to decide which advertisements you will see. However, the opinion is reversed concerning bloggers promoting products on their blogs. Here, we find a majority (59 per cent) who agree (totally or partly) with the statement that it is ok for bloggers to promote products. An explanation for these contradictory results may probably to some extent be explained by the question wording. The question about blogs does not make any distinction if the bloggers are open about their promoting of products or if it is concealed[1].

Thus, opinions about the commodification of Internet use are equivocal. There is strong resistance to a commercialisation of close social relationships and Internet use being connected to advertising exposure. Bloggers who take advantage of their role as bloggers for commercial purposes are not without controversy, but the majority sees it as acceptable. There seems to be an unwillingness to accept advertisements when they reach us in situations where we do not expect commercials (contact with friends) or if the advertisement is difficult to avoid (TV/radio/SMS/mail) in our everyday media use (Grusell 2008; Reuters Institute 2015). In a similar manner, we tend to be more inclined to accept commodification on the Internet when we seek out information. In the same way as we accept advertisements in the morning paper (which can be avoided) (Grusell 2008; Reuters Institute 2015), we find it more acceptable that blogs are commercialised, rather than friendship relations or exposure to advertisements based on our Internet habits.

Commodification – we think differently

The above is the general picture. However, based on previous research, we might expect different viewpoints from different groups of respondent. Research on media morality has revealed that opinions about what is right and wrong regarding digital media behaviour are largely determined by age; younger people tend to accept different forms of digital media use. With rising age, a growing share has a more critical opinion: using a cell phone while eating dinner with your partner; speaking loudly on your mobile phone in public; tagging others on social media or using speaker phone without telling the person you are speaking with (Bengtsson & Johansson 2015).

In Table 2, a multivariate model is used to analyse the impact of different factors on the commodification of our digital lives. The analysis makes it possible to discern the independent effect of different factors on opinions about the commodification of digital, everyday life. Choosing explanatory variables, however, is not self-evident. Here, independent variables are based on previous research into advertising and digital media use. We also include factors traditionally used in social science research to explain societal opinions, such as social class and education.

Research has shown that a person's political ideology is crucial in how different kinds of commercials are judged (Grusell 2008, Holtz-Bacha & Johansson 2014). Those who position themselves to the right of the traditional right-left ideological scale (Gilljam & Oscarsson 1996) are generally more positive toward different types of advertisement, compared with those who take a position to the left. In other words, those with a more neo-liberal ideological orientation also view commercials more favourably. However, opinions about advertisements are differentiated depending on the type of advertisement. Younger respondents are less negative towards TV commercials compared with older respondents, but the opinions are reversed when commercials in morning papers are assessed. Women tend to view advertisements in

papers more positively, but no gender differences can be found concerning TV ads. A general media habit also seems to be important. Grusell shows that advertisements in the morning press are more appreciated by regular readers, and those who frequently watch commercial TV channels are more accepting of TV ads. However, it should be noted that a majority is negative towards TV commercials in Sweden (Börjesson & Edström 2014). A bit surprisingly, education level does not reflect opinions about advertisements in a systematic way (Grusell 2008).

As mentioned above, when digital media use is evaluated, research shows that age structures how we evaluate what is acceptable and what is not. There are major age differences in what is seen as decent behaviour in terms of how we use mobile phones and the Internet (Bengtsson & Johansson 2015). In Table 2, we also include the social class claimed by respondents for the household in which they grew up. The independent variables are computed so that they vary between 0–1, and the regression coefficient (b) shows the effect of the factor on commodification when moving from the lowest to the highest value.

Table 2. The impact of different factors on opinions on commodification (b, regression coefficients)

	Disseminate commercials to friends or followers in social media	Payment to promote products on their blogs	Exposure to commercials based on the websites you have visited
Age	-1.02 ***	.97 ***	-.52 ***
	(.14)	(.16)	(.13)
Sex (male)	-.34 ***	-.03	.01
	(.06)	(.06)	(.05)
Social class (working class)	-.01	.01	-.05
	(.06)	(.07)	(.06)
Education (high)	-.13 *	-.02	.01
	(.06)	(.07)	(.06)
Political ideology (right)	.16 *	-.30 **	.29 ***
	(.09)	(.10)	(.09)
Internet activity	.71 ***	-.66 **	.49 **
	(.20)	(.22)	(.19)
Constant	2.87 ***	2.42 ***	1.75 ***
	(.19)	(.21)	(.18)
Adjusted R^2	14%	10%	5%
N	1,123	1,066	1,186

Note: * = p <.05, ** = p <.01, *** = p <.001. The variables sex (male=1), social class (1= working class) and education (high=1) are dichotomies. The other independent variables are standardised in that the regression coefficient measures the effect of moving from the lowest to the highest value. Political ideology is a five-grade scale where high value indicates a position to the right on a self-positioned evaluation. Internet activity is an additive index constructed in two steps of questions on digital media use (mobile phone and Internet use). At first, two separate indices were created. (1) Frequency of mobile phone functions (calling/SMS/mail/social media/seeking information/listening to the radio/watching television/news). (2) Frequency of Internet functions (using Internet/mail/social media/seeking information/watching television/news/reading or writing on blogs/gaming/commenting on news articles/purchasing products or services/library services/watching e-sport/reading news comments/visiting public authorities). These indices were merged and standardised.

Source: The Swedish National SOM-survey 2014.

Three factors have an impact on all forms of commodification: age, political ideology and Internet activity (Table 2). The rank order of these factors is identical for all three aspects of commodification:

- disseminate commercials (age, b = -1.02 / Internet activity, b = .71 / political ideology, b = .16);
- payment for promoting products on blogs (age, b = .97 / Internet activity, b = -.66 / political ideology, b = -.30); and
- commercial exposure based on Internet browsing (age, b = -.52 / Internet activity, b = .49 / political ideology, b = .29).

Younger respondents tend to be more positive to commodification related to everyday Internet life. They are, in general, more affirmative to advertising; they are more permissive in their view of digital media use and are not so anxious about being registered or aspects of authenticity. The results are, in this aspect, well in line with previous findings. The general tendency that liberal market values can be associated with positive views on advertising is also reflected in opinions about commodification. These values are strongly correlated with a tolerance of commercialisation of different spheres – in this case, the Internet and social relations. Those who more frequently use a variety of Internet functions have a more permissive view of a more commodified media environment.

All these factors have an impact independent of each other. For example, frequent users – in terms of performing many different activities such as emailing, surfing, seeking facts, using social media, etc. – will largely tolerate friends who pass on commercial messages in their social networks, independent of their age. A more detailed analysis reveals an even stronger correlation when explicitly using social media (on their cell phone or computer).

Moving on to the other independent factors, we can only find a few cases where they affect opinions about commodification. Women and highly educated respondents seem, to a larger extent than men, to accept that advertisements are disseminated in social networks on the Internet.

Concluding remarks

Commodification processes may severely interfere with democracy in the future, as our role as citizens is threatened in a truly commercial everyday environment. It also has implications for free speech: words will not be free any more when they are being tracked, saved and sold for commercial purposes. The most evident result of our analyses is the importance of age in the different ways to relate to these processes of commercial organisation of culture. Young people have far fewer problems with living in a commercially organised world compared with the elderly. In the long run this also suggests we will see the number of commodification critiques slowly diminish,

which may mean that free speech and democracy – in terms of maintaining space for speech outside these processes of commodification – is threatened. We mainly see two ways to resist this development.

The *first* perspective targets media producers and the other perspective media consumers. These are not mutually exclusive and if processes of commodification are seen as a societal issue, actions can be taken related to both media producers and consumers (see Svensson in this volume). In targeting media producers, the concerns could centre on demands of transparency in how media companies inform users about how they use content generated by the media audience, but also to what extent such data is collected. It could also involve the transparency of commercial messages to media users, i.e. to what extent users can detect product placement and commercials in media content (discussed by Svensson, Stiernstedt, Piety, and Edström in this volume). Both aspects can be the subject of legislation or an industry regulatory body, but are complex since they involve multinational companies. The transnational perspective makes national legislation and codes of conduct more complicated, and both national policy and international cooperation appear to be needed.

The *second* perspective targets media users and aims to enlighten users, not the least adolescents, about how social media are organised and the market driven logic behind these applications. This relates to the work done in the field of *Media and Information Literacy (MIL)* (see Arnoldsen-Granlund & Kotilainen 2010). Included in the concept as defined by UNESCO are skills to understand media as an institution (and function in society) and media content (to understand and produce). Our analysis points to the importance of understanding digital media as infrastructure and the (market driven) mechanisms governing this infrastructure. The unawareness and/or disinterest about economic aspects of the digital media landscape, especially among young people, show the importance of broadening the concept of MIL. If citizens are to be able to raise demands about how and to what extent their social lives are commodified, they need knowledge on how market driven logics are currently the prerequisites for our digital lives.

Note

1. Another explanation could be what in survey question research is called acquiescence, which refers to respondent's tendency to agree rather than disagree regardless of the question being asked of them (Krosnick & Presser 2010). This is however unlikely here because a fourth question about personal integrity and the Internet grouped together with the questions analysed shows no sign of acquiescence.

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13.

Influencers Tell All?

Unravelling Authenticity and Credibility in a Brand Scandal

Crystal Abidin & Mart Ots

Abstract

This chapter discusses the emerging practices of social media Influencers. In focus are six influential Instagram Influencers who were 'exposed' for involving themselves in campaigns aiming to discredit telecommunications providers in Singapore. In the absence of enforced legal boundaries and industry norms regarding advertising formats and advertising ethics, brand scandals are frequent, causing concern among regulators, brand managers, and platform owners. When starting to accommodate commercial brands and contents in social media posts, Influencers are constantly at risk of breaching their contract of trust with their followers. The case study shows how Influencers, followers, and eventually also the brand clients, are sensitive to what they experience as deceptive and unethical behaviours that will put normative pressures onto the Influencers to conform to certain ethical standards.

Keywords: Instagram, bloggers, social media practices, Influencer networks, advertising ethics, Singapore, Influencers

This chapter discusses the emerging practices of social media Influencers. In focus are Influencers in the 'lifestyle' genre who advertise products and services in the industry verticals of Fashion, Beauty, and Electronic goods on blogs and social media such as Twitter and Instagram. In the absence of enforced legal boundaries and industry norms regarding advertising formats and advertising ethics, brand scandals are frequent, causing concern among regulators, brand managers and platform owners. In this chapter we present illustrative examples and discuss a way to start analysing the mechanisms behind the formation of this emerging professional field.

In the transforming brand management landscape, we focus on a specific group of stakeholders – everyday Internet users who manufacture themselves into a new form of social media microcelebrity (Senft 2008) known as the 'Influencer' (Abidin 2015a, 2015b). Whereas the commercial use of Influencers is a growing global marketing phenomenon, the material for the included examples was collected through research in Singapore, between 2011 and 2015. Since 2005 in Singapore, many young women have taken to social media to craft 'microcelebrity personas' as a career. Unlike

mainstream entertainment industry celebrities who are public icons with large-scale followings, microcelebrity "is a state of being famous to a niche group of people" and involves the curation of a persona that feels "authentic to readers" (Marwick 2013:114).

Central to the success of the semi-professional Influencers is the management and growth of their personal brands. Studies have shown how they carefully aim to build awareness and audience growth (Marlow 2006), but also that central to their success is the deep and intimate relationships between their personal brands and their followers (Abidin & Thompson 2012). Their media brands constitute 'Lovemarks' – brands that are not simply respected, but trusted and loved (Roberts 2004; see also Fournier 1998; Ots & Hartmann 2015). Abidin & Thompson (2012) identified four practices used by commercial bloggers (a predecessor to Influencers) to create this intimacy with their mass audiences – endearment and personal language, authenticity through unaltered 'behind the scenes' material, commonality with readers by displaying shared mundane practices (despite a luxurious lifestyle), and real-life meetings with their followers. Beyond mere intimacy (Abidin 2015a), the success of the Influencers hinges on their own taste and credibility. McQuarrie et al (2013) accordingly showed how Influencers' conscious selective choice of text, images, and style led to the accumulation of social capital (building their celebrity status and personal brand) as well as economic capital (commercial success). In other words, credibility is important for the Influencers both for the growth of their own media brands and for their effectiveness as commercial product brand endorsers – this is crucial as followers and consumers are increasingly aware of the commercial nature of Influencer editorial content, but a pronounced sense of credibility serves as a safeguard against indiscriminately positive paid reviews. As shown by Johansson and Bengtsson in this volume, the commodification of social media network fans, followers, and contacts is not limited to Influencers alone, but the emergence of an Influencer industry can of course be seen as a manifestation of a 'third enclosure' – the market orientation of human life.

As commercial brands continue to abandon traditional advertising, marketers start to look for new carriers of their brand messages. In this process, Influencers are catching attention as their accumulated social capital and audience relationships have made them valuable as marketing intermediaries and brand endorsers (Chu & Kamal 2008: Kozinets et al 2010). Hence, in their most basic capacity, Influencers now produce advertorials on blogs and social media platforms in exchange for payment or sponsored products and services. Consequently, many bloggers have financial and contractual relationships and engagements directly with product advertisers, or indirectly via various agencies and content networks.

The professionalization of Influencer commerce

Influencers are one form of microcelebrities who document their everyday lives from the trivial and mundane to exciting snippets of the exclusive opportunities in their

line of work. Influencers are shapers of public opinion who persuade their audience through the conscientious calibration of personae on social media, as supported by 'physical' space interactions with their followers in the flesh to sustain their accessibility, believability, emulate-ability, and intimacy – in other words, their 'relatability' (Abidin 2015b). In this way, followers bear more attachment to the Influencer as a brand, than the actual product or service they advertise, or what Abidin and Thompson (2012) refer to as 'persona intimacy'. Influencers write primarily on commercial blogs and social media platforms (i.e. Instagram, Twitter, Facebook, YouTube) in the 'lifestyle' genre, where the women's lives 'as lived' are the central theme of their output. The main draw of these Influencers is that their web content is premised upon sharing the personal, usually publically inaccessible aspects of their life (Abidin 2014, 2015a).

These commercial 'lifestyle' posts are one successor of contemporary women's magazines. Kim and Ward (2004) define contemporary women's magazines as "mainstream adult magazines that are geared toward an adolescent or young adult female audience and that express the clear intention of providing readers with advice, scripts, and information about dating and sexual relationships" (2004:49). They also feature product placements (Frith 2009) and concealed ads (McCracken 1993). Commercial lifestyle posts bear similar offerings but with an underlying rhetoric of personalising 'advertorials' to readers engaged in aspirational consumption patterns role modelled by Influencers. The advertorial, Influencers' primary advertising device, is a highly personalised and opinion-laden advertisement written in the style of an opinion-editorial (Abidin 2014). The most effective advertorials have been those that are seamlessly woven into the daily narratives Influencers publish on their blogs and social media, such that readers are unable to tell apart 'paid opinions' from 'unpaid' sentiments. Often, these advertorials may take the form of complaints or praises for a product or service that is written in a tone that is personal, emotive, casual, and informal.

It has been noted that some Influencers count followers in the hundreds of thousands, or even millions, making their reach comparable to that of traditional media. At the same time the Influencers are becoming more professional and aware of their role in the branding process, offering various services to companies (Griffith 2011). They are not only part of a growing movement of consumer participation where everyone can become a media entrepreneur, but also participating in the shaping of brand management itself, its functions and processes (see also Dolbec & Fischer 2015).

> Now fashion bloggers are leveraging their followers to become marketing machines for brands other than their own (in other words, to earn money), augmenting those companies' advertising and PR strategies. They're taking on numerous roles including guest bloggers, models, designers, and endorsers. They're maintaining credibility with fans – they hope – by choosing partnerships discerningly, while discussing deliverables, audience composition, ROI, and conversions with their sponsors. (Griffith 2011)

Owing to their capacity to shape purchase decisions, Influencers' clients have progressed from small home businesses to blue-chip companies including Canon, Gucci, and KLM. The immense success and extensive popularity of the Influencer industry has garnered widespread attention from several other ecologies including multinational corporations, politics, education, social and humanitarian organisations, and the mainstream media. Riding on their extensive popularity and consistent readership, these sectors often invite Influencers to make special appearances to bring publicity to the project or special cause. Influencers are also invited to events as special guests and VIPs in acknowledgement of their unique status and the social prestige they have earned.

A case study: The SingTel/M1/StarHub incident

In a short case study we will demonstrate how Influencers exert pressure on each other to conform to certain implicit standards, norms, and ethics, when it comes to the publication of commercial content. Material from the data set was publicly disseminated by Influencers and pitched for public consumption, and Influencers are identified here by their public Twitter and Instagram handles.

In this case study, we explore the institutional effects of publicly revealing social media posts as 'commercial branding work'. In this case the actual brand strategy is leaked. Despite the fact that no legal boundaries have been crossed, two core norms of the Influencer industry (authenticity and credibility) are broken (Abidin & Thompson 2012; McQuarrie et al 2013). The breach of trust is used by competing Influencers to exert coercive pressure on the Influencer who is forced to make public accountability to her followers. Gushcloud, the Influencer agency behind the campaign, is also under normative pressure by the brand client to conform practices to the brand owner's norms and values. There are related cases when Influencers have been exposed as 'inauthentic' based on other pieces of evidence – such as inconsistency in product preferences over time, discrepancies between what posts say, and what pictures show, and incongruence with their overall profile and established brand values.

As mentioned earlier, effective advertorials are those that are so natural and personal in tone that readers are unable to distinguish them from the daily narratives which Influencers publish online. In the vignette that follow, we see how a group of Influencers published complaints and praises about a particular product or service in Tweets and blogposts, but were subsequently exposed by an Influencer from a rival company for 'masking' their advertorials following the anonymous leak of a campaign brief. Based on Abidin's fieldwork (Abidin 2015b), it is learnt that Influencer agencies exert some coercive pressures on the Influencers, defining their contractual relationships within each campaign and client brand. Agencies usually propose 'briefs' or 'story boards' advising Influencers on key points that have to be clearly addressed in their advertorials (i.e. highlights of a new product, how prospective customers can make purchases, suggested narratives based on the Influencer's lifestyle for crafting believable advertori-

als). However, in Singapore the content of each advertorial and the approach towards content dissemination is still largely the Influencer's prerogative, and has not yet been standardised nor regulated by any industry guidelines. In an international perspective, the situation in Singapore is far from unique as global industry practices are still in their infancy, but regulators are more and more concerned about how to apply and enforce, for instance, advertising regulation and tax regulation to social media Influencers.

The 'scandal' looks at how a group of six Influencers were 'exposed' for non-credible branding work of three local telecoms (i.e. SingTel, M1, StarHub). Two rival Influencer-management agencies are mentioned – Gushcloud and Nuffnang. Akin to modelling agencies that groom model talents and broker deals on their behalf, Gushcloud and Nuffnang function as intermediaries promoting port folios of contracted Influencers to prospective clients who wish to advertise with them. Influencer 'Xiaxue' is contracted to Nuffnang, while the others are contracted to Gushcloud. Such 'scandals' are usually framed by mainstream media as mere 'blogger spats' – a regular occurrence in the industry's history of a decade – as opposed to orchestrated controversies between rival agencies. As such, it is tempting to trivialise the incidents that unfold and overlook the productive work they do for the industry.

On 11 March 2015, an anonymous user 'leaked' a campaign brief for Gushcloud Influencers on a public Tumblr site. Titled the 'Gushcloud x Singtel Youth Plan x LG G3 Blogger Brief', it detailed local telecom 'Singtel' engaging Gushcloud Influencers to market its mobile phone subscription plan targeted towards youth. Such documents are usually highly confidential between the client, the agency and the engaged Influencers, since they indicate which social media posts that Influencers publish are paid advertorials and which are (unpaid) personal opinions and lifestyle narratives. Among many guidelines, the 'leaked' brief presumably prepared by a marketing manager from Gushcloud suggested that Influencers badmouth rival telecom companies:

> Complain/lament about competitor's (M1/StarHub) services/network connections and pinpoint with existing plan (Insufficient local data bundle and no unlimited SMS/MMS etc).
>
> To share with readers on how they have had enough of their current mobile plan not being able to fit their needs and currently have plans to sign up for new mobile plan!
>
> Influencers will ignite conversations where possible amongst their readers on their blog post(s) and social media accounts.

This revelation was contentious because it was made public for the first time that even Influencers' seemingly harmless and off-hand gripes against particular products and services could in fact be orchestrated advertorials. In its eleven-point 'Proposed Story Board' that was meant to be assigned to the engaged Influencers, the brief suggested that Influencers craft some narratives to naturalise their advertorial – a common strategy to avoid appearing too commercial or 'hard sell' when marketing products. Some of these were more contentious and dramatic:

> Phone bill, *kena* [get] scolded by parents. Then luckily, got youth plan for 10% discount.
>
> Phone spoilt. Oh no. Need new phone. Student not enough money, so thank god for this $50 voucher.
>
> Personal hotpost to tether to laptop/ipad. School wifi sucks. And outside no wifi. Last time 2Gb how to tether? Now, you can with 5gb!!

One even suggested that Influencers explicitly "badmouth" rival telecom company M1:

> M1 connection *jialat* [terrible] in Orchard Central. Eating at EwF [an eatery], then cannot upload photo on instagram. Pissed. Few days later, Got offered this youth plan plus so many freebies. Yay. Happy instagramming.

Three days later on 14 March 2015, prominent Nuffnang Influencer Xiaxue, wrote an extensive blogpost on this issue that went viral regionally. In this post, she collated screenshots of Influencers badmouthing SingTel's rival telecoms. At least six Gushcloud Influencers were publically named for allegedly making false claims against M1 and StarHub on their Twitter streams:

> My phone is ALWAYS getting "No Service". Urgh screw Starhub! -@LydiaIzzati, 26 Jun 2014.
>
> Thanks m1… Can't even get signal in MY HOUSE -@iatedork, 28 Jun 2014.
>
> Omg M1 seriously needs to like have better coverage. I can barely do anything with my phone now. Zzzz. – @ongxavier, 27 Jun 2014.
>
> So pissed off with the M1 server [crying face emoji] everywhere also no Internet & I'm on 4G [crying face emoji] -@symoneoei, 28 Jun 2014.
>
> Zzzz my starhub plan is always exploding!? I hate how they cap the data plan at such a low GB [dollar bills with wings emoji].. Someone save me [weeping face emoji] -@MarxMae, 29 Jun 2014.
>
> It's not funny M1!!! It's not nice coming home to such sucky connections. I'm so gonna switch to Singtel Youth Plan {NOT AN AD. I mean it.} -@EuniceAnnabel, 20 Jul 2014.

After the anonymous 'leak' of the campaign brief and Xiaxue's viral blogpost, some Influencers wrote blogposts bearing explanations and apologies. In his blogpost published on 18 March 2015, Xavier (@ongxavier) writes:

> I, Xavier Ong APOLOGIZE to anyone affected for posting negative comments towards M1 (while on a SingTel campaign) and not explicitly stating or revealing that I was on a campaign with SingTel. However, I would also like to add that during that period and even before, I was indeed unhappy and unsatisfied with the network and service M1 provided me with therefore I DID NOT lie. I understand that I should

> have stated clearly that I was on a campaign or at least inform that certain postings are advertorial/ sponsored posts and I am sorry for that.

Although there were no industry standards or guidelines prohibiting "masked" or non-disclosed advertorials at that time, Influencer Xavier acknowledged that his badmouthing of telecom M1 was related to the advertorial campaign for rival telecom SingTel to which he was contracted (i.e. "I should have stated clearly that I was on a campaign", "certain postings are advertorial/sponsored posts"). However, in a bid to reconstitute his credibility with readers, he claims that his complaints about M1 were genuine (i.e. "I was indeed unhappy and unsatisfied with the network and service… therefore I DID NOT lie.") even though he might have been paid to publicise them. More specifically, Xavier demonstrates how his bad experience with M1 predates his campaign period with SingTel by including several screen shots of his Tweets dating back to July 2011, when he was already consistently expressing frustrations against M1's connection problems. He writes:

> While I admit that I was recruited as one of the members of such brand of advertisement, not everything I said was unfounded. I had encountered many issues with M1 long before the deal was forged- perhaps it was my complaints before that would eventually get me handed the deal.
>
> These tweets date all the way back to 29 July 2011. Yes, I was REALLY unhappy with M1. I didn't lie for the campaign or money. So how am I lying or faking something up when I only took up the campaign on 30th June 2014 and my tweets about M1 has been going out since 29 July 2011 till 2013 and then finally up to 2014? I've constantly been ranting about M1, their network and their service. So… a lie?

Although many of Xavier's readers rallied behind him after this clarification by expressing support and solidarity on Twitter, some others remain unconvinced of the truth of his claims (i.e. the genuine complaints about M1) despite his predated evidence, simply because the Influencer had failed to disclose that some of these complaint-Tweets were motivated by a monetary incentive. While it was speculated that he lost some followers, there are no hard figures to prove this, and many followers are observed displaying supportive comments on his social media. In the wake of these events, a SingTel issued a statement to say that Gushcloud "did not adhere to SingTel's marketing standards", and their Vice-President of Consumer Marketing apologised to M1 and StarHub. A day later, the chief executive of Gushcloud issued an apology to M1 and StarHub. He added:

> We have started a process of auditing our practices, processes and people, to ensure that we can be a good agency and partner to our present and future clients. We aspire to higher standards, values and principles on which we will rebuild trust and confidence … In the coming months, we will keep the public and industry partners updated on these initiatives through our website.

Both telecoms have accepted SingTel's and Gushcloud's apologies, and although newspaper reports claimed the telecoms were considering legal options as of March 2015, no action had been taken as of April 2016. Instead, action groups and public forums have been set up comprising advertising authorities, Influencer agencies, Influencers, and other key stakeholders and prominent public commentators to research and develop guidelines for Influencer advertising.

Authenticity and credibility

In this chapter we have commenced some introductory work to understand how new brand management professions are institutionalised as amateurs and semi-professional Influencers and are becoming brand workers. Earlier studies have noted how these semi-professional online activities do lead to institutional market change (Dolbec & Fischer 2015) but that these new professions are ambiguous as they need to accommodate both communal and commercial norms (Kozinets et al 2010), that credibility and taste are central components (McQuarrie et al 2013) and that authenticity and intimacy are common, but not exclusive, strategies to build brand relationships with followers (Kozinets et al 2010; Abidin & Thompson 2012).

When starting to accommodate commercial brands and contents in social media posts, Influencers are constantly at risk of breaching their contract of trust with their followers. The case study displayed common campaign structures and the involvement of Influencer agencies that mediate Influencers and brand clients. It also showed how Influencers, followers, and eventually also the brand clients, are sensitive to what they experience as deceptive and unethical behaviours that will put normative pressures onto the Influencers to conform to certain ethical standards. This brand scandal exemplified the emerging normative and coercive pressures concerning the brand management practices. In the absence of legal boundaries and industry norms regarding advertising formats and advertising ethics, observing the dynamics of these pressures is a way to start analysing the mechanisms behind the formation of Influencers' publishing practices. Certainly, research in this area is especially crucial since following the wave of emerging Influencer commerce, national boards and advertising regulatory authorities (Manjur 2015) across the globe are now realising the importance of formalising and enforcing guidelines and transparency in Influencer brand management.

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III. Restrictions and Control of Media Content

14.

"Self-Regulate, or We Will Regulate Your Content"

Are State Threats of Regulation Threats to Freedom of Speech?

Torbjörn von Krogh

Abstract

Media self-regulation has historically been ascribed different motives among media actors, such as increasing credibility, legitimacy, professionalization and protection of press freedom. The freedom argument asserts that voluntarily defined restrictions of media conduct and content in an institutionalised context staves off restraining legislation. The relationship between the voluntary system and the state, which has varied with different media models, has been described as one of communicating vessels or thermostat ethics; when legislative steam is building the media lets out pressure by making amendments in self-regulation. As direct media regulation is succeeded by indirect media governance, and as old media monopolies are challenged by the Internet, the relationships between the state and the media regarding media content are becoming more complex. In this chapter, regulative threats in Scandinavia, the UK and the US are discussed in a media accountability perspective using four frames of reference: political, market, (media) professional and public frames.

Keywords: media self-regulation, media regulation, media accountability, frames of accountability, free speech, media ethics

Media self-regulation has historically been ascribed various motives like higher credibility, legitimacy, professionalization and protection of press freedom. The freedom argument asserts that voluntarily defined restrictions of media content in an institutionalised context staves off restraining legislation. These processes may vary with media models (Hallin & Mancini 2004).

Media self-regulation is often the solution to a conflict between media freedom and societal demands for a diverse and information-rich media environment. Self-regulation is normally initiated by media associations and encouraged by government. It contains elements of peer scrutiny of published news items. This process can be seen as both an expression of an informal social contract (Sjøvaag 2010) – with space for contract negotiations – and as an obstacle to structural media reforms (Pickard 2015).

When self-regulation is viewed as too slow or narrow and politicians consider that their ordinary bargaining tools have lost their power, they sometimes resort

to regulative initiatives perceived as threats of legislation from the media industry. The relationship between the voluntary system and the state has been described as communicating vessels (Funcke 2013) or thermostatic ethics; when legislative steam is building the media lets out pressure by making amendments in the self-regulation system (Raaum 2003). In this chapter, the framing of the problems leading up to threats of regulation that in turn promoted press/media councils in Sweden, the UK and the US are discussed in a media accountability perspective (von Krogh 2012a).

This chapter does not directly engage with the conceptual distinction between democracy-driven and market-driven free speech, at least not if it is viewed as a distinction between journalism and advertising. But it is possible to discern a frequent use of strongly market-driven arguments in order to oppose even media self-regulation, whereas proponents favour a democracy-driven reasoning. Viewing media users as members of an audience or as citizens is of importance for the democratic engagement in the media-government relationship.

Media accountability

Demands for media accountability developed from broader quests for social responsibility. Media historian Marzolf suggests an explanation: "Accountability implied some mechanism to enforce standards; responsibility was self-imposed" (Marzolf 1991:166). A widespread definition suggests that media accountability encompasses "all the voluntary and involuntary processes by which the media answer directly or indirectly to their society for the quality and/or consequences of publication" (McQuail 2005:207). McQuail (2003) introduces four frames of reference that cluster different ways of holding the media accountable, frames within which expectations arise and claims are expressed and handled:

Market frame. Laws of supply and demand are according to this frame expected to find a balance between the interests of the media industry and the interests of consumers – and by extension the interest of society.

Professional frame. This frame has a self-regulatory character that deals with both raising the quality of performance and the image of the media profession. Social responsibility and autonomy against lawmakers are important.

Public frame. In this frame, the media is urged to serve the public interest. Whilst the public as an audience is dealt with within the market frame, the public as citizens belong to the public frame. The demands concern social issues and roles.

Political frame. Accountability is moulded as liability through laws and rules that regulate free speech, protect rights and set rules against potential harm caused by the media. Political suggestions and threats of legislation – the process of policy formation that precedes legislation – are also included in this frame.

Earlier mentioned motives for media self-regulation as credibility, legitimacy, professional conduct and ideals and protection of press freedom are among the arguments used within the various frames when demanding media accountability from the media and in media responses to such demands.

Three examples of regulative threats

Three cases illustrate how different frames of media accountability were used and function in regard to media regulative threats in different media models and historical contexts. There are of course many other cases that could be studied in order to enrich our understanding, for instance Australia (the Finkelstein Report in 2012 and its aftermath), Ireland (threats of statutory regulation in 2003 and the establishment of the press council in 2007) and Germany (threats of statutory regulation in 2952 and the establishment of the press council in 1956).

USA

Against a background of rising media criticism for sensationalist news coverage and increased government inquiries into newspaper ownership structures (Pickard 2015), Henry Luce of *Time* and *Life* in 1943 financed the Hutchins commission on Freedom of the Press. Robert Hutchins, president of the University of Chicago, gathered leading academics who in 1947 concluded that the press "is not meeting the needs of our society" (Leigh 1947:68), that "freedom of the press for the coming period can only continue as an accountable freedom" (ibid:19) and that if the press does not become accountable "of its own motion, the power of government will be used, as a last resort, to force it to be so" (ibid:80).

Although the recipe of self-regulation based on a principle of social responsibility had been prescribed before (Marzolf 1991; Christians 2000), and although this recipe was meant to impede government intervention, the newspaper proprietors vehemently attacked the proposal as totalitarian, unconstitutional and communistic (Pickard 2015). The headline "Professors Blindly Try to Curb Press by Regulations to End All Our Liberties" from *The Knickerbocker News* in Albany, New York, gives a hint of the atmosphere in some quarters (Mayer 1993:257).

Regional media councils started 1970 in Hawaii (still running in 2016), 1971 in Minnesota (folded in 2011) and 1999 in Washington state (folded in 2014). A National News Council started in 1973, opposed by important news organisations like *The New York Times* (Isaacs, 1986), and folded in 1984.

Frames of accountability

Arguments within the market frame completely dominated the reception of the report. The American Society of Newspaper Editors condemned the bulk of the proposals

and declared that "'public judgement' alone should regulate the press" (Pickard, 2015:179). Dissenting positive voices in the press within the professional frame were dressed down (Isaacs, 1986); "anger and resentment" among publishers prevailed against efforts to "undermine public confidence in the American press as an institution" (Marzolf 1991:169).

Supporting arguments for reform from within the political frame were marginalised as the government's earlier New Deal orientation was replaced by a growing cold war rhetoric. "If the talk turns to enforcement, The First Amendment trump card is played and the discussion is over" (Craft 2010:48). The Hutchins Commission was an academic elite endeavour and had not built alliances with grassroots constituencies critical of the media (Pickard 2015), whose arguments within the public frame never came to the forefront.

UK

Government regulation of the press – in the form of prior licensing – was abolished in 1695. "The press became 'free' because government efforts at regulation failed" and this explains much of the "peculiarities of the British press" according to a historian of British self-regulation (Shannon 2001:3-4). Self-regulation commenced in 1953 with the Press Council. The idea of a press council did not originate within the press, instead it grudgingly went along with political pressure rooted in fears of sensationalism and monopolisation. It was the brainchild of a Royal Commission, headed by the Vice-Chancellor of the University of Oxford (a parallel to Hutchins in the US) which in turn was set up by Parliament after a motion moved by two Labour MPs (a parallel to actions by the Swedish social democrats). "Behind the scenes and façades of the 'important experiment' in press self-regulation was an industry that did not want and did not like it" (ibid:13).

Self-regulation of the press in the UK has since been criticised for inefficiency, investigated by several Royal Commissions, and somewhat modified over and over again. In 1989 a member of the British cabinet asserted that due to sensationalist news coverage "the popular press is drinking in the Last Chance Saloon" (Greenslade 2003:539) which led to yet another Royal Commission that this time suggested statutory regulation, should the self-regulation not become impartial, independent and more efficient within 18 months (Calcutt 1990). The government supported the scheme with caution, internally considering "the advantages of appearing tough with the press" (Bingham 2007:120). After a few years of continued allegedly inefficient self-regulation in the new Press Complaints Commission, PCC, combined with lame government threats of new legislation, the government issued a dressed-up do-nothing option (Dorrell 2012). Further unsubstantiated threats would have been "merely to advertise the government's weakness" the former minister declared in an internal memo at the time (ibid:8). However, Lord Wakeham, the chair of the PCC from 1995 to 2001, in closed meetings with Cabinet members welcomed government threats to

a certain extent; they made it easier for him to unite reluctant parts of the press for some reforms. "It was the threat of statutory intervention, which didn't happen, which made me persuade them to co-operate with me, which they did for the seven years or so I was there", he later explained under oath (Wakeham 2012:60).

In 2011 the phone-hacking affair erupted, uncovering a widespread practice in parts of the popular press to use immoral, if not illegal, methods when searching for sensational news stories. One of the methods used was hacking into the voicemails of mobile phones belonging to celebrities, crime victims and their relatives. Some of the professional, public and political anger caused by this affair was directed at the PCC, which had dismissed earlier signs of abusive phone hacking. After a lengthy inquiry led by Lord Justice Leveson a new version of press self-regulation, independent from media proprietors and with a statutory backdrop, was suggested (Leveson 2012). The Conservatives objected to parts of the Leveson recommendations, but a compromise with Labour and Liberal Democrats in Parliament resulted in a Royal Charter instead of a normal Act. The PCC was quickly abolished, but most newspaper companies have opposed the terms of the Royal Charter and have instead started yet another new council, The Independent Press Standards Organisation, IPSO, that refuses to seek recognition under the Royal Charter. IPSO has been described as a dressed-up press-dependent PCC that is efficient as a complaints handler but that has not managed "to clear out the Augean stables after the debacle of the hacking scandal" (Ponsford 2015). A new and much smaller organisation called IMPRESS, Independent Monitor for the Press, is seeking Royal Charter recognition and is awaited with anticipation by the journalists' union, media activists, researchers and victim's organisations among others (Barnett 2016).

Frames of accountability

Arguments within the market frame were manifest in the UK debate in 1990, echoing the red tops' large circulation figures and aggressive attitude towards outside criticism. Arguments within the political frame changed from mild confrontation under Prime Minister Major (1990-1997) to being more cooperative under Blair (1997-2007) and Brown (2007-2010); conceivable underlying threats were more likely to be directed to the politicians from the media than the other way around. Major, Brown and especially Blair spoke explicitly in the Leveson hearings about their fears of media harassment towards themselves, their families and their political ambitions should they try to confront media misbehaviour with regulative initiatives (Nord & von Krogh 2015).

Investigations into media misconduct and campaigns from solitary Labour MPs did not amount to much – until the phone-hacking scandal in 2011 shook the foundations of politics-press relations. A symbolic lid of silence was lifted and a flood of critique within the public, professional and political frames surged, creating action groups, new alliances and successful boycott campaigns in social media (Watson & Hickman 2012). Arguments within the market frame were no longer prominent; *News of the World* was shut down, and political promises for thorough investigations and strengthened media accountability instruments flourished.

After Leveson's investigation, yearlong deliberations in Parliament, trials, victims' statements, compensation negotiations, extended preparations for a new press council, a new conservative majority in Parliament, and rival regulators lining up – the problems unearthed by the hacking scandal are not yet resolved.

Sweden

Fierce competition in the 1960s between two fast growing tabloids, *Expressen* and *Aftonbladet*, led to a number of cases where the personal integrity and interests of celebrities, alleged criminals, victims and others were neglected. Criticism of the media's conduct flourished among readers, journalists, artists, labour unions, industry executives and politicians. This criticism, combined with fears for continued newspaper monopolisation, resulted in threats of legislation from leading social democrats (the governing party) in Parliament (von Krogh 2009); a government ombudsman that would oversee the press, should the press council created in 1916 (initiated and run by the press) not become much more effective.

Despite policy differences within the industry, the newspaper publishers' association took steps to give the Press Council sharper teeth and more resources. However, the politicians were not satisfied, and further concessions were made in direct negotiations between media organisations and Parliament. The end result was a National Press Ombudsman for the Public (not for the press, as the publishers had planned) and a Press Council that was no longer fully controlled by media organisations. On a parallel track, Parliament introduced state subsidies to ailing (mainly social-democratic) newspapers.

Frames of accountability

Arguments within the political and public frames dominated the debate, with support from within the professional frame (ibid). Arguments from the tabloid editors based on the market frame were not successful; it was commonly reasoned that the market could not solve the problem of diminishing quality content. When *Expressen* finally wanted to abolish the Press Council all together, calling the Council an instrument of obscuration after having been reproved in a complaint case, the debate became even more negative towards *Expressen*. A number of editors and media owners turned against tabloid journalism and backed arguments adhering to the professional frame concerning accuracy and responsibility. Journalists and media critics published books documenting media lapses, strengthening the case for social responsibility (Petersson et al. 2005; Weibull & Börjesson 1995).

Within Parliament the ruling social democrats were on the offensive, worrying about sensationalism and a liberal and conservative bias in the consolidation of the media market (von Krogh 2012b). They emphasised that the public to a large extent shared their concerns; that they themselves were interpreters of "a broad public opinion". Liberal and conservative MPs had a hard time trying to restrain the offensive,

they were forced to admit that there were some real problems with the press that needed to be addressed.

Sweden in a Nordic context

The Nordic countries are all firmly placed in the Democratic Corporatist media system model (Hallin & Mancini 2004), which contains instruments of self-regulation and combines constitutional protection of free speech with acceptance for state interventions in the media sector. State influence on media self-regulation has been manifest in various ways in all of the Nordic countries.

In Norway, media organisations proactively opened up their self-regulation after political threats of legislation in the early 1990s. Public service and private broadcasters joined the media council and the state abandoned most of its regulatory apparatus regarding ethical aspects of public service content.

In Finland, the state for a long time encouraged media self-regulation by financing a substantial part of the costs, arguing that the media council lessened the number of libel cases in the courts.

In Denmark, the state in the 1980s threatened legislation if the media organisations did not set up a media council. When publishers' and journalists' organisations could not come to an agreement, a media council was set up by law in 1991 as a form of regulated self-regulation. After 25 years of operation the council's constitution is not a controversial topic in Denmark.

Discussion

According to the typology of Hallin and Mancini (2004) both the US and UK belong within the Liberal model of media system with its "bias against intervention in markets" (Humphries 2011:343), although some important features separate UK from the US model: a strong public service broadcasting sector, a national press council and a wide political spectrum of national newspapers (ibid:319). Sweden belongs, as noted above, to the Democratic Corporatist model with a less adversary view of state-media relations.

Among the three cases, it is illuminative to place Sweden at one end of a state-market scale, the US at the other end, and UK in the middle, the same positions as Hallin and Mancini use for the totality of their media models (2004). Sweden had a tradition of broad agreements between representatives for the state and the market, some amount of mutual trust between them, pragmatic negotiations occurred on "quantum satis" ("how much is needed", Raaum 2003) of public influence over media self-regulation, and arguments within the market frame of accountability were contested even among editors and publishers. The negotiations resulted in a compromise where members of the public were given a few seats on the press council and where the press ombudsman was appointed by the press and the public in collaboration, not solely by the press as

initially suggested. In the US at the other end of the scale, media proprietors flinched at any suggestion of even indirect state intervention and actively opposed other arguments than those within the market frame of accountability. *The New York Times*, a leading opponent to the suggestions in the Hutchins report, continued to oppose press councils along these lines arguing that they might "encourage an atmosphere of regulation in which government intervention might gain public acceptance" (Brogan 1985:119). "We do not wish anyone to impose standards on us", *NYT* declared in 1973, explaining why the paper would not cooperate with the newly founded National News Council, "we will continue to be monitored and judged by those whose criticisms are vital to us – our readers" (ibid.).

The UK is somewhere in the middle, and has had on-going negotiations since 1953 between media organisations, reluctant to have any state action, and governments, more or less fearful of media power. The level of trust has not been high on either side, but continued efforts were still deemed beneficial by both sides. This has led to cyclical eruptions of sensationalist reporting and recurring calls for improvement. Internal government documents and witness statements under oath relating to the Calcutt Committee in 1990 and the Leveson Inquiry in 2012 have revealed a mixture of concrete negotiations offstage and a theatrical masquerade for the public, the press and Parliament onstage (Bingham 2009; Dorrell 2012). The phone-hacking scandal in 2011 entailed a fundamental change to this ritual, and arguments within the public and professional frames overtook the dominance of market frame arguments. Differences among media organisations became more visible as did political opposition to market-based reasoning against statutory underpinning of media self-regulation. The question of media accountability became a clear political issue.

Comparing approaches to self-regulation in Sweden and the UK, the importance of different historical starting-points is evident. Sweden, with a written constitution from 1766 protecting freedom of speech, a press-initiated press council from 1916, and strong media organisations, has developed a tacit relationship between media and government. After resolving problems of sensationalism and monopolisation in the 1960s that led to press subsidies and some public influence over media self-regulation, the state backed off. Legislative suggestions regarding media content have since then, on the whole, been rejected with reference to a functioning self-regulation. In UK, with a history of freedom of speech since 1695 that has not been guaranteed in a written constitution, with a wide span of newspapers with different views on media ethics and with a self-regulation from 1953 that was more or less forced upon the press from the outside, the quality of the self-regulation has been continuously challenged, investigated and mistrusted. Media representatives and Cabinet ministers have staged plays for internal and external audiences with a mixture of critique, threats, praise and victories. In Sweden, politicians used threats in the 1960s to reach multiple goals; in the UK, politicians – until the phone-hacking scandal – used threats as a ritual and backed down not to rock the boat and to reach other goals (von Krogh & Nord 2015). Consequences for self-regulation are still not settled.

Studying the prevalence of different frames of accountability permits a rough estimation of forces at play. It can, for example, be developed into analysing alliances between stakeholders, or groups within stakeholders, who choose arguments within specific frames.

Concluding remarks

Are state initiatives regarding media regulation, perceived as threats by the media, threatening freedom of speech? In one sense, yes, the legal area for free speech would shrink should direct state regulation be implemented. Free speech could also be impaired if media compliance to state threats lead to self-regulation that is not motivated by media ethics (Axberger 1994). The media sector, however, is seldom uniform, and there are situations where state threats may help to accomplish ethically motivated media self-regulation that otherwise could be obstructed by less ethically oriented media companies, that continue to favour arguments within the market frame. Media responses to criticism contain many aspects, such as thwarting state influence, snubbing critics, creating PR-effects and enhancing content quality (von Krogh 2014). Returning to the four frames of accountability, the responses to media criticism from the media vary in emphasis from frame to frame. In the market frame, the sheer size of the audience is a favourite media argument and successful at times. It has not proven very solid, however, should cases of grave media misconduct occur. In both Sweden and the UK, media misdemeanours paved the way for state initiatives that resulted in self-regulative counter measures from the media. In the US, it was the Jayson Blair affair with fake quotes and fake articles, that induced the *New York Times* to open its columns to institutionalised outside criticism. Not by way of a press council, but via an external reader's editor. In the professional frame, media arguments point to the legitimacy of journalism, achieved in part by adherence to professional norms and codes of ethics. In Sweden editors' and journalists' organisations both embraced the concept of self-regulation as expressed by a press council. In the UK journalists' organisations were more keen on this concept than the British editors, and in the US the resistance was strong all over. In Sweden journalistic autonomy was understood to be strengthened by self-regulation; in the US it was perceived the other way around. In the public frame, media arguments often deal with a commitment to journalism in the public interest; serving democracy with verified and multifaceted information. In the political frame contractual arguments can be heard in Sweden and in the UK, and was heard from the US Hutchins Commission in the 1940s. The media delivers a vital service for democracy and in return obtains measures for protection of freedom of speech. This is where the communicating vessels between law and voluntary system mentioned earlier are at work, at least where state threats are viewed as legitimate and plausible.

Threats are at times combined with rewards. Incentives to media self-regulation, including professional esteem, can be designed at various levels (Fengler et al. 2013),

but have not been explicitly used in the cases discussed above. With one exception. Leveson suggested that adherence to a recognised self-regulator would entitle a publisher protection from heavy court costs or damages. This has not appealed to the majority of British newspaper owners; at least not yet. But should a new regulative body like IMPRESS be recognised by the Press Recognition Panel, as stipulated by the Royal Charter, the matter may reach a new level of urgency.

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15.

Limiting Market-Driven Freedom of Expression by Regulating Sexist Advertising in Spain

An Evaluation of and Some Shadows from the First Decade

Marta Martín-Llaguno

Abstract

As public attention has been given to gender-based violence against women, some societies have given the media a prominent role in its solution. They have enacted regulations affecting media institutions, and more specifically advertising, to limit stereotypes and promote the prevention of violence. In 2004, Spain enacted the Organic Act on Integrated Protection Measures Against Gender Violence, which outlawed the use in advertising of reification of women's bodies and stereotyped behaviours that help to produce gender violence, as well as stipulating a national information and awareness plan against intimate partner violence. In Spain the regulation of sexist advertising has been emphasised, limiting in a sense market driven freedom of expression in favour of a fundamental right, gender equality. Yet, there are many problems in the law's implementation. More than a decade after the enactment, this chapter presents a review and outlines the substantial difference between what regulatory bodies and the public consider to be 'illegal advertising' and sexist stereotypes.

Keywords: gender stereotypes, gender violence, advertising regulation, sexism regulatory authorities

Gender-based violence, particularly violence against women – and more specifically intimate partner violence – has grabbed public attention in recent decades. Assuming a relationship between public discourse and intimate partner violence, some societies have given the media a prominent role in its solution. They have enacted regulations affecting media institutions, and more specifically advertising, to limit stereotypes and promote prevention of violence. In 2004, Spain enacted the Organic Act on Integrated Protection Measures Against Gender Violence (1/2004 of 28 December 2004),[1] which made it unlawful in all commercial communication (i) to use directly and particularly a woman's body, or parts of it, detached from the advertised object (reification) or (ii) using her image related to stereotyped behaviours that help to produce gender violence. The Act also included a National Plan for intimate partner violence prevention, including information and awareness campaigns. Thus, in Spain the regulation of sexist advertising has been emphasised, limiting in a sense market driven freedom

of expression in favour of a fundamental right, gender equality. Yet, there are many problems in the law's implementation. More than a decade after the enactment of the Organic Act on Integrated Protection Measures against Gender Violence, this chapter presents a review and outlines the substantial difference between what regulatory bodies and the public consider to be 'illegal advertising' and sexist stereotypes.

In 1979, the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, established that gender stereotypes are a form of discrimination against part of the population. Therefore, countries should take appropriate measures to eliminate them.[2] Although CEDAW refers to symbolic violence, and not specifically to media violence, media are fundamental socialising agents. Thus, the need for media regulation against sexism and to promote gender equality has been targeted subsequently in numerous international declarations and standards.[3] Especially significant, the United Nations Fourth Conference on Women, which was held in Beijing in 1995, emphasised the need for active measures to be taken regarding women and the media. It established a strategic objective to promote balanced and non-stereotyped portrayals of women in the media (Strategic objective J.2) (UN 1996). In this context, conceptual reformulations of the theoretical confrontation between the right to freedom of expression and the right to non-discrimination on gender grounds in media have been discussed.

In relation to the control of advertising there is a theoretical and political debate in which, as noted by Svensson and Edström (2014), two positions are commonly drawn. On the one hand, there are countries and parties reluctant to legislate because they perceive that legal control against gender stereotypes is a restriction on freedom of expression ('market driven freedom of expression'). This approach prefers self-regulation or co-regulation (USA and most EU countries). As Svensson and Edström point out (2014:503), "the perception that legal regulation of gender stereotypes restricts freedom of expression could be understood as an intentional presumption that gender stereotypes in advertisements are expressions worthy of protection under the notion of freedom of expression".

On the other hand, some countries and parties are committed to legislate these issues through various kinds of external regulation. From this position it is understood that commercial messages may not have the same degree of protection as news and other content; therefore advertisements must be subject to specific restrictions in order to protect other important interests, as in the case of gender equality (within 'democracy driven freedom of expression'). All this, without denying complementary self- or co-regulation, as is the case in Spain. For example, Spain has a system of advertising self-regulation, which is managed through the Association for Self-Regulation of Commercial Communication (Autocontrol), which comprises advertisers, advertising agencies and media organisations.[4]

The legal redefinition of sexist advertising in Spain

Recognition by the World Health Organization of gender violence as a serious public health problem in 1996, and the World Health Organization's request to states to make it visible to eradicate it, led over time to the enactment of legal measures against media sexist stereotypes in advertising (Martín Llaguno & Navarro Beltrá 2013). Spain was a pioneer with the *Organic Act on Integrated Protection Measures Against Gender Violence (1/2004 of 28 December 2004)*. This law amended the General Advertising Act (34/1998 of 11 November 1988) to establish that it was unlawful in all commercial communication to consider women in a vexatious manner by (i) the particular and direct use of her body, or parts of it, detached from the advertised object (reification) or (ii) using her image related to stereotyped behaviours that help to produce gender violence (Martín Llaguno & Navarro Beltrá 2013:281). Since then, other rules have promoted gender equality, prohibiting the dissemination of discriminatory messages, but none has specifically defined what constitutes a violation.[5] Thus, since 2004, in Spain the regulation of sexist advertising has been reinforced explicitly by the concept of stereotypes.

The Organic Act 1/2004 also included the launch of a National Plan, under which "public authorities, within the framework of their powers, will promote information campaigns and specific awareness in order to prevent gender violence". As one result, the General Secretariat for Equality Policies, through Spain's Institute for Women and the Special Delegation under CEDAW, has been responsible for developing institutional advertising campaigns to prevent this scourge (Ministerio de Sanidad Servicios Sociales e Igualdad, 2006). It is now more than a decade since the enactment of the Organic Act on Integrated Protection Measures Against Gender Violence. This chapter presents a brief overview and some reflections on its effects on the control of commercial communication.

Brief evaluation of the law

Since the amendments to the General Law on Advertising by the Organic Act 1/2004 took effect, Spain has seen only one judicial decision.[6] The Malaga court held that Ryanair had illegally objectified women in advertising. In addition, there have been two cases before the Full Advertising Jury of Autocontrol and 16 before the sections of the Jury with respect to advertising sexism (Autocontrol, 2015a, 2015b, 2015c, 2015d, 2015e, 2015f). Twelve of the 16 cases were fully or partially considered; most of them involved reification of the body, or an attack on women in general. With regard to the perpetuation of stereotyped roles and behaviours, Autocontrol upheld only three complaints, which were related to Christmas toy catalogues. Related data reinforces the idea that issues related to stereotypes have been rarely resolved: Copy Advice® is the main service offered by the Technical Office of Autocontrol and is a non-binding assessment of the correctness of advertisements or advertising projects, prior to their

issue. Of the 20,147 advertising projects reviewed in 2013 by the Technical Office, only 48 were found to include material that might be contrary to the dignity of women (0.24% of total prior consultations). Of these, 43% were related to the dignity of women in general, 37% were related to the use of women's bodies in advertising, and 20% involved matters of stereotypes matters. Similarly, the Observatory on the Image of Women, which was created in 1994 to comply with European and national requirements to promote a balanced and non-stereotyped portrayal of women, considered a total 1002 complaints about sexist advertising between 2013 and 2014, but called for the withdrawal or rectification of campaigns in relation to only 33 companies.

Moreover, according to data released by the Ministry of Health, Social Services and Equality (and without prejudice to what may have been done by other administrations), since 2005 this institution has carried out 12 campaigns to prevent gender violence nationwide involving 41 million euros. Public administration has directed most of its efforts to encouraging women victims of gender violence to make reports. To a lesser extent campaigns were also focused on raising awareness in society and on encouraging the reporting of violence by relatives and acquaintances. From 2008 the aim was to publicise an '016' telephone number (Turno & Martín Llaguno 2015) to support the making of complaints. None of the campaigns focused on stereotypes and gender violence.

Some problems

Since 2010, the increase in complaints by victims and families suggests greater public awareness of violence against women. Nevertheless, the number of deaths from this cause is almost unchanged (Turno & Martín Llaguno 2015). In relation to commercial communication, two years after the reform of the General Law on Advertising, the Observatory of the Image of Women had already observed that the legislative amendment was an awareness raising seen "through institutions exercising control over broadcast advertising messages" (Observatory of the Image of Women, 2006). The Observatory noted in particular the modification of the "communication strategies of some advertisers, mainly home-related products" (ibid). The prior control of Autocontrol, through Copy Advice, would tend to confirm this. However, assessments of the impact of the legal changes at advertising conferences suggests little has changed (Beltrá Navarro & Martin Llaguno 2012) and nothing in regard to stereotypes.

Concerns about sexism advertising were already reflected in legislation in the original law. In the earlier 1988 version, illegal commercial communication was one "that threatens the dignity or violates the values and rights recognised in the Constitution, especially in regard to children, youth and women." Despite the positive impact on awareness of the reforms, particularly in the advertising industry and advertisers, over the decade since enactment a major problem has been detected: legal ambiguity has hampered the applicability of the law.

Objectification has been relatively easy to assess (Martin Llaguno & Navarro Beltrá 2012). However, as Rodriguez (2008:155) states "the law did not specify the content of the illegal advertising related to the use of stereotypes associated with the image of women that help to generate gender violence" and the issue has been extremely open. In this sense, the legislation has led to a complex interpretation (Tato Plaza 2006) which has resulted in difficulty in its application.

The amendment of the General Advertising Act (Ley 34/1988 *General de Publicidad*)[7] was "inefficient and complex" (Tato Plaza 2006:2) and it "has added nothing relevant and could even worsen the situation" (Rodriguez 2008:155). Thus, the original wording of the law condemned the most hurtful and serious sexist and discriminatory advertising. However, an excessively lax and flexible interpretation of the existing wording permitted some serious cases of sexist advertising (Tato Plaza 2006:2). At the other extreme, it could be considered that the new wording "prevents the advertising representation of women performing any activity, traditionally reserved for women" (ibid: 4). So, Rodriguez (2008) and Tato Plaza (2006) propose that the new wording is interpreted to apply (a) when they appear playing a role traditionally associated with females and (b) in the advertising message it is clear that this task uniquely belongs to the female population.

The problem of uncertainty and lack of indicators in the law is not trivial when taking into account the scarcity of research on the process of media reception on these issues (Beltrá Navarro & Martin Llaguno 2012b). The interpretation of 'sexism' has hardly been analysed. Recent studies suggest that it varies depending on values, circumstances and sex (Beltrá Navarro & Martin Llaguno 2012b; Vidal Vanaclocha & Nuño Angos 2014).

In this context and given the disparity of claims made by individuals and supervisory bodies, one could suggest that there is a very substantial difference in terms of what the controller (either the court or Autocontrol´s Jury) and the population consider to be 'illegal advertising' and sexist stereotypes.

Conclusion

In the context of a needed review of the Organic Act 1/2004 (which has failed to reduce or even eradicate gender violence) there is an important issue to discuss in relation to the media. The key question is "What is the actual relationship between sexism in media and the exercise of, or suffering from, violence?" It is urgent to provide empirical evidence about the relationship between advertising and gender violence discourses in order to build tools and indicators with which to judge the messages. To determine the contribution of sexist advertising (whether involving reification or stereotypical portrayal) along different dimensions – (a) cognitive, (b) attitudinal, (c) behavioural and d) neurological – of domestic violence is fundamentally important. Only from these premises may people be able to operationalise concepts, to construct indicators and to build up a truly effective legal control of sexism in advertising.

Notes

1. Under Spanish constitutional law, Organic Acts have an elevated particular status compared with ordinaries Acts; they require a particular parliamentary majority for passage; and they must be used for certain areas, for example laws on constitutional rights and freedoms.
2. Spain signed CEDAW in 1980 and ratified it in 1984.
3. For a review of European policy instruments that refer to the importance of eradicating stereotypes in the media see Svensson and Edström (2014) and Navarro Beltrá (2013).
4. This system is based on Article 39.2 of the Organic Law 3/2007 of 22 March for the Effective Equality of Women and Men, which states that public authorities shall promote the adoption by media regulation agreements that contribute to the fulfilment of the legislation on equality between women and men, including advertising and sales activities.
5. Law 29/2005 of 29 December on institutional advertising and communication; Law 3/2007 of 22 March for the effective equality of women and men; Law 7/2010 of 31 March, General Audiovisual Communication, plus some regional laws.
6. JUR\2013\375143.
7. Advertising in Spain is regulated by different laws, but the General Advertising Law (*Ley General de Publicidad*) is the main one, affecting editorial advertising, general television advertising, Internet advertising, and radio advertising. There have been several updates to the *Ley General de Publicidad*, the most recent in December 2012. An earlier update took place by the amendment of the law by the Organic Act 1/2004 in order to adapt it to the *Organic Act on Integrated Protection Measures Against Gender Violence* (1/2004 of 28 December 2004).

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16.

Hate Speech and the Distribution of the Costs and Benefits of Freedom of Speech

David Brax

Abstract
This chapter presents a broadly consequentialist argument in favour of hate speech regulations. The argument proceeds in two steps: First by exploring the familiar point that hate speech does harm by undermining the speech of targeted groups. And second, by considering the distribution of costs and benefits for allowing hate speech, which is unlikely to be fair or equal. The harm caused by hate speech primarily befalls people that are already among the worst off in our society. According to the principle that costs and benefits that befall those worst off matter more, morally speaking - a view known as 'prioritarianism' or 'the priority view' - distribution matters. I argue that this approach offers the most plausible argument in favour of hate speech regulations. Hate speech should only be unregulated if the predicted benefits are likely to outweigh the predicted costs, when the distribution of costs and benefits is also taken into account. It should be unregulated only if the predicted benefits are likely to outweigh the predicted costs, and the distribution of costs and benefits is also taken into account.

Keywords: consequentialism, fair distribution, free speech, liberalism, deliberative democracy, speech regulation, hate speech

The aim of this chapter is to provide a rather straightforward argument in favour of hate speech regulations. The argument is a highly general one, and as such can be applied in contexts spanning from campus speech codes and media guidelines to criminal law and international conventions and agreements (Such as the European Convention of Human Rights, and the Council Framework Decision on Racism and Xenophobia). The argument is broadly consequentialist: It is based on a cost-benefit analysis of restricted vs. unrestricted free speech. The argument can be roughly divided into two parts. The first is the familiar point that hate speech does harm by undermining the speech of targeted groups, which means that the utility that free speech exists to serve is diminished. The second part takes into account the *distribution* of these costs and benefits. The distribution of costs and benefits for allowing hate speech is unlikely to be fair or equal. The harm caused by hate speech primarily befalls people that are already among the worst off in our society. This, I argue, is a reason in favour of hate

speech regulations, even if there would be a net benefit in 'absolute' terms for allowing such speech. The argument thus depends on the intuition that equality has normative weight. It is, however, not based on the egalitarian principle that equality has *intrinsic* value. It is based on the principle that costs and benefits that befalls those worst off matters more. I argue that this normative theory, known as 'prioritarianism' or 'the priority view', offers the most plausible argument in favour of hate speech regulations.

Free speech and deliberative values

Respect for principles of free speech is a vital part of any well-functioning society. Arguably, it is even more vital in less well-functioning ones. That is when people, especially those in opposition and/or in minority positions, really need to be able to speak truth to power without fear of repercussions. In the ideal theory of a *deliberative democracy* associated with the works of John Rawls and Jürgen Habermas, free speech is key to citizen participation, which in turn functions to facilitate good political decisions, both in terms of being conducive towards the greater good and in terms of being legitimate in the eyes of those citizens. Free speech is intimately tied to the rights of individuals in relation to the state: people ought generally to be free to do what they want, as long as that behaviour does not harm others (Mill 1978 [1859]) or infringes on the equal freedom of others (Rawls 1971). The rights that a state needs to safeguard concern what people can and cannot do to each other.

While the more exact function and value of free speech are contested notions, it is at least in part dependent on the value of the activity in which it allows agents to participate. The value of freedom of speech is at least in part determined by the value of agents' abilities to engage in speech, and their ability to use speech to influence the conditions under which they live. In short, the value of freedom of speech is partly determined by the value of autonomy.

Most accounts of the value of freedom of speech recognise that freedom, which we may have a right to, occasionally comes into conflict with other values. In *On Liberty*, Mill describes the conflict between freedom and the authority of a state (Mill 1978, [1859]). Others point to the conflict between freedom of speech and equality (Fiss 1996, Brink 2001, Svensson & Edström, 2014), or with the protection of dignity (Waldron 2012). Utilitarians argue that the value of freedom depends on its utility. While freedom makes the effective pursuit of happiness possible, it does not secure it. Freedom in general is compatible with a great variety of outcomes. If the value of free speech is purely *instrumental* it can be evaluated accordingly. Whether or not hate speech regulation is warranted then depends on whether it can be shown to diminish the harm caused by hate speech while having no (or acceptable) detrimental effects on the utility of free speech in general.

In the minimal sense, freedom of speech is merely the absence of censorship, but there are more or less broad senses that are of greater interest (see Kenyon 2014, for

a discussion of the positive, as opposed to negative notion of freedom of speech. See also Karppinen in this volume). Deliberative democracy relies on voices being heard, yet, the right to vote aside, there is no *right* to be heard corresponding to the freedom of speech. The fact that you are allowed to say what you want does not correspond to a duty for others to take your opinion into account in their own deliberative processes. It merely *allows* for that to happen. In order for free speech to realise its full potential, then, the conditions for participation need to be favourable, and this may go way beyond the mere absence of censorship. Restrictions of free speech can therefore be justified with appeal to the values served by freedom of speech itself. Being free to say what you like does not guarantee that your speech gets a fair hearing, or that your influence in the deliberative process is determined by the quality of your argument. There is a large set of conditions and restraints, as reflected throughout this volume. Even if we were to accept the 'market place of ideas' metaphor for speech, implicit in the works of John Stuart Mill and explicit in a famous statement by Justice Oliver Wendell Holmes (1919), people do not start out on an equal footing, and the conditions can hardly be described as fair. A person, a politician, say, with a large budget will have a much easier time of getting his/her point across than a politician with more modest means. In the US, famous for its commitment to free speech, this fact has led to an intense debate regarding campaign financing (see Sunstein 1993). Inequality is built into this process, meaning that different agents have different capacities to begin with. The value of freedom is arguably based on the value of giving everyone an equal chance to succeed in his/her projects, but there is a risk that freedoms combined with inequality at the outset may lead to increased inequalities. Mere procedural equality need not serve the deliberative process and may even lead to discriminatory outcomes. In this regard, equality as an ideal may easily come into conflict with freedom as an ideal. If equality is of value, this is one reason in favour of restrictions and regulations. However, such measures are particularly controversial when it comes to speech. Whereas many restrictions on speech exists, in particular in advertisement and broadcast media, any restrictions on speech are always a matter of concern

Hate speech and harm

The aim of this chapter is to present a utilitarian argument in favour of hate speech regulations with appeal to the harmful consequences of hate speech. As mentioned, the argument is intended to be highly general, and thus not tailored to defend any specific item of hate speech regulation. For the purposes of this chapter 'hate speech' is understood quite broadly as speech that targets people based on group characteristics and portray the members of that group as "not worthy of equal citizenship" (Waldron, 2012). Whereas hate speech thus defined potentially cover all types of groups, it is particularly harmful when it targets disadvantaged groups, and we may therefore decide to narrow the scope of a hate speech regulation so that it protect only such

groups. There are issues concerning how to define 'disadvantage' on a group level, however, that I will sidestep for now. I take it for granted that words can do harm in a broad sense, and that this harm goes beyond the mere taking of offense. The way words hurt is familiar from studies of bullying, harassment, threats, provocation, libel, defamation and the "infliction of emotional distress" (Delgado and Stefancic 2004; Fiss 1996). Among the effects of being victimised by hate speech is the tendency to withdraw from social and public life, which means lost opportunities for interactions and social and economic loss. Of course, not every instance of what qualifies as hate speech has this effect. But, as Jeremy Waldron points out: hate speech can be understood along the lines of pollution, or like a slow-working poison (Waldron 2012:96). Hate speech is, in effect, polluting the social environment. More specifically, the harm of hate speech which is of particular interest here, considering the argument in the previous section, is the detrimental effect on the speech of others: its effect is to (and often intended to) silence them.

The argument is broadly Millian in nature: it connects the value of free speech to deliberative values, but in a purely instrumental manner. Deliberation serves autonomy, which in turn serves the successful pursuit of happiness. Mill is a utilitarian, after all (see Brink 2001; Sunstein 1993). Freedom of speech is supposed to secure the availability of diverse views and arguments from which citizens are able to make informed decisions. If we thus treat the value of freedom of speech as instrumental, and some modes of speech can be shown to do harm by undermining this function, we can make an argument in favour of restricting it, and claim that such speech is not worthy of protection. If speech is merely 'formally' free, and fear and disadvantage constrains what voices are being heard, rectifying this state of affairs may very well be in the state's legitimate interest. Hate speech in the sense regulated against in most European countries contributes very little to the furtherance of the ends of deliberation and is largely detrimental to it – and to the extent that it does contribute, it *is* protected by most hate speech regulations (see Bleich 2011).

On legal and moral wrongs, and the utility of freedom

While it seems quite obviously morally wrong to engage in hate speech, we have the right to do some things that it is clearly wrong for us to do. Ideally, we would not need to restrict free speech, because people would refrain from harmful speech on their own accord. But the freedom to behave badly may be an important freedom: to recognise this is what valuing autonomy is all about. The legitimacy of speech regulations hinges on how narrowly we can tailor these laws to target harmful speech without having a detrimental 'chilling' effect on open debate. But it also depends on the value we assign to letting moral behaviour develop as informed by non-legal reasons. It should be recognised, however, that such considerations have not stopped us in general from taking up legal measures when social norms fail to keep people from harming

each other. Taking the harms of hate speech seriously at the very least requires taking regulation into consideration despite its clash with freedom.

In a recent paper Marcus Schulzke (2015) offers a version of a typical consequentialist argument for protecting hate speech. He does so by appeal to the social benefits of exposing prejudices. Protecting hate speech may facilitate societal trust by allowing a broader range of views to be expressed, and it also gives an opportunity for 'counter speech' that in turn can influence the views of the speaker. This argument, then, depends on the estimate that hateful views will continue to exist and do harm even if they are no longer expressed due to fear of punishment. It also depends on the estimate that hateful views will tend to be successfully countered. This is an interesting argument. It is, however, difficult to believe that people harbouring such views would remain quiet if faced with hate speech bans. As noted above, most hate speech laws are quite narrowly tailored to target those modes of speech that are likely to do harm. The question, which is admittedly open, then is if allowing hate speech would have the positive effect that Schulzke projects, and, if it does, if it would be strong enough to outweigh the loss of speech resulting from being victimised by hate speech, mentioned above. I will return to this in the next section, which deals with the consequentialist calculus.

While the best response to hate speech may be 'more speech' and 'counter speech', this solution is not always available, is not always available to everyone, and is not always effective. Indeed, it is precisely because there are people who will have nobody standing up for them that there is a need for law in this and similar matters. Just as Schulzke argues, it is important that these views are met and argued against, but in fact, there is no evidence of decline in the discussion about racism and bigotry in countries that carry hate speech laws. It is primarily under circumstances where the effect of hate speech is to silence targeted individuals and groups that regulation may be called for.

To some extent, the critics of hate speech regulations are right: These regulations are intended to have a 'chilling' effect on public speech. The intention is to chill speech that is harmful in a sense similar to that of libel or defamation. There are direct and indirect, short- and long-term effects on the targeted communities and the social standing of the people belonging to those communities. The intention behind hate speech regulations is, among other things, to have a chilling effect on speech that has a chilling effect on *other* (high-value) speech. These regulations, then, are motivated by the same deliberative values that favour the protection of free speech in the first place. They are aimed at securing, rather than limiting, the availability of a broad spectrum of ideas and opinions. It should be noted that this mode of reasoning is strictly viewpoint neutral (see Sunstein 1993). Hate filled content is often the *medium* through which these harmful consequences are brought about, but the reasons for regulation are neutral insofar that *any* content with the same sort of effect could be banned on these grounds. In jurisdictions that carry hate speech provisions, such as those existing in most European countries, there is normally an exception made for truly deliberative contexts (see Bleich 2011). This means that hate speech laws are rarely blanket bans on expressing certain view-points; in a context in which racism,

for instance, would take the form of an articulated point of view, such speech would not be banned.

A second argument against hate speech regulations is based on the fear of government intervention, and the suspicion that allowing speech restrictions sets a dangerous precedent. While current governments may introduce and courts uphold such laws with good intentions and to good effect, there is always a risk that subsequent governments will abuse such laws to silence critics. This broadly libertarian argument has some merit, and it is clearly in the public interest to carefully tailor such laws in a manner that will leave minimal room for abuse. However, this risk must be weighed against both the abuse made possible by the *lack* of regulation *and* the likelihood that an oppressive government will find ways to infringe on the liberties of its citizens even in the absence of hate speech laws.

The relevance of the distribution of costs and benefits

This last section is devoted to the more precise normative basis of hate speech regulations. Freedom is often posited against other values such as equality, utility and the freedom of others. As mentioned, freedom may *serve* other values by making it possible for people to pursue them. But it does not *secure* such values. A free market can serve the wealth of a nation, but it offers no *guarantee* that the wealth is maximised, and certainly no guarantee that the wealth is distributed equally or fairly. Freedom can typically be limited when there are other compelling interests at stake. Regulations of markets arguably exist in order to heighten the probability that utility is maximised and/or distributed in some gainful manner.

Let us now assume that the benefits of a relatively unregulated freedom of speech are considerable, and that the costs considered above do not outweigh the benefits. This argument relies on the claim that any attempt to curtail speech, even if restricted to the kind that typically has harmful effects, will have a negative net worth. Arguably, if hate speech could be somehow isolated, its net contribution would be on the cost side of the calculus. The argument against legislation, then, must be that the benefits of free speech in general would be undermined if an exception was made and hate speech was regulated. For the sake of the argument, let us assume that this holds: the net worth of free speech where there are no hate speech restrictions is greater than the alternative.

What about the fact that the cost and benefits are not distributed *equally?* There are two considerations that would then apply: One is that equality (or fairness, if you prefer) might be of value in itself. The other, which is the argument that I put forward, is that distribution matters in the utility function. According to the view called 'prioritarianism', or 'the priority view' (Parfit 1997) more weight should be given to costs and benefits that befalls those that are worst off in a society. So even if there is a net benefit of unrestricted free speech, we must take into account whether the worst off

benefit or whether they are stuck with most of the costs. And if they do suffer most of the costs, this should be given more weight than the benefit for those that are better off at the outset. The advantage of this theory over egalitarianism is that it avoids the 'levelling down'-objection: that is, it does not say that you can improve on a situation merely be bringing those best off down a peg, which seems to be a consequence of intrinsically valuing equality.

The result of a prioritarian approach is that, other things being equal, a cost should be given greater weight if it disproportionally affects those worst off in a society. This effect, mind, can take place even if the immediate target of hate speech is not him/herself in a particularly disadvantaged position – indeed, there is a tendency for hate speech to target those individuals who, despite belonging to vulnerable and normally silenced groups, have achieved some sort of societal status. Whereas the harm in such cases does not befall a person that is among the worst off, the harm befalls a group that is. These groups, because of their marginalised position, are at a general societal *disadvantage,* and thus not in an ideal position to engage in successful counter-speech (Wolff and De-Shalit 2007). An argument in favour of unrestricted speech would, on this theory, need to be one that was acceptable to those that carry a disproportionate part of the costs. But if hate speech has such a detrimental net effect on those worst off, there is a strong case in favour of legislating against it, even if you believe that the benefits of unrestricted speech outweigh the costs in absolute terms. Note, however, that this is still a matter of consequentialist calculus. It does not mean minority interests will always trump majority interests. It merely means that in this calculus, the interests of those worst off count for more.

Concluding remarks

We have a right to behave in ways that it may be wrong for us to do. Morally, I should be chided for disrespecting people, but I should probably not be legally prohibited from doing so. While morality and law are intimately related, they do not coincide. Having a sphere of optional actions, even actions with moral importance, is crucial for human flourishing in general. The limits concerning what we should be allowed to do to each other are arguably given by the rights of others, primarily the right not to be harmed. People often point out that we do not have a right not to be offended, and that hate speech laws wrongly imply that we do. The same people often recognise that we have a right not to be threatened, libelled, bullied, perhaps even a right not to be humiliated. Given that the accumulative effects of hate speech have effects similar to threats, libel and bullying, the case for legislating against it should be given a fair hearing.

The argument put forward in this chapter is that the harms of hate speech should be given particular normative weight when it hits those that are worst off in society. This is a broadly consequentialist view insofar as the value of free speech is given by a utility function. It should be unregulated only if the predicted benefits are likely to

outweigh the predicted costs. But the weight of those consequences should take the distribution into account.

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17.

Breaking the Ban

The Use of Televised Political Advertising in Norway

Magnus Hoem Iversen

Abstract

Political advertising as a genre exists at the centre of the tension between market driven and democracy driven freedom of expression. Although political advertising on television is banned in Norway, there have been several instances of different actors breaking the law on broadcasting to get their message across. This chapter examines the role of televised political advertising in the Norwegian context from 1995 to 2015. I argue that the advertising has not had much persuasive influence in the traditional sense. However, it has influenced debates, has led to changes in legislation and high-profile court cases, and not least has been a means to attract attention for television channels. The Norwegian ban on political advertising stands as a lesson on the difficulties of making effective policy in a climate which has been in rapid change since the onset of digitisation.

Keywords: political campaigning, media policy, limitations on free speech, television

What is the use of broadcasting political advertising on television in Norway when it is banned and sure to attract sanctions and negative publicity? Despite the ban, political advertisements have been aired on several occasions. This chapter is based on an empirical examination of those instances. After examining the advertisements themselves, as well as the aftermath in both media reception and court sanctions and actions, I argue that these films have had three notable functions. For political parties and organisations, the function has been in drawing attention to a political issue. For broadcasters, the functions have concerned provoking change in the relevant legislation, and seeking good public relations through acting as champions of free speech.

The ban was initially intended to protect democracy against the negative consequences of market logics entering the domain of democratic political communication. Proponents of the ban have argued that it is an acceptable limitation of free speech, to ensure a healthy public sphere as a whole. The genre – seen as both political *speech* and persuasive *message* – exists at the centre of the tension between market-driven and democracy-driven freedom of expression. These concepts describe different forms of rationalities relating to ideas of freedom of expression (Edström & Svensson 2016:4). A

democracy-driven rationality considers *free and independent* information and expression as fundamental for democracy, and deems information and expression with ties to commercial interests as less worthy of protection (Edström & Svensson 2016:4-6). The market-driven rationality regards all forms of information and expressions as worthy of protection, regardless of potential interests or ties (Edström & Svensson 2016:6-8). Under the market-driven rationalist, advertising should be protected by free speech as much as other forms of speech are protected. The distinction is theoretical, but can be observed empirically in law and jurisdiction at given times (Svensson & Edström 2014:503).

Norway, as the other Nordic countries, belong to what Karppinen calls a tradition of public interest-oriented media policy (Karppinen 2016:2). This 'media welfare state'-model emphasises an extensive cultural policy for the media, meant to influence the media through positive freedom – mainly aimed at countering the effects of market forces (Syvertsen et al 2014:18). This is reflected in the arguments for putting the political advertising ban in place (and later maintaining it). The arguments show scepticism towards television as a powerful and potentially manipulative medium. Advertisements were deemed suspect, because of their intention to persuade, their lack of trustworthiness in not providing evidence and the difficulty of identifying them because they can be mixed together with editorial content (NOU 1984:5). Worries were voiced as to advertising having an adverse effect on democratic processes – it would unduly simplify matters and would overly change the 'ground rules' of political debate (Ot.prp.nr.58 1998-99). The fact that political advertisements were considered a means to *buy political influence* was later emphasised as particularly problematic, as it could lead to groups with resources gaining the upper hand in marketing their views, at the expense of less resourceful political parties (Ot.prp.nr.58 1998-99).

The ban is a negative intervention on freedom of speech, and a form of regulation that provides a clear cut external constraint on speech. Such restrictions are not unheard of elsewhere in Europe, where there are other examples of limiting market-driven freedom of expression and regulating media content to prevent harmful social effects. For instance, possible negative consequences of gender stereotypes in advertising (Svensson & Edström 2014) sexism in advertising assumed to contribute to gender-based violence (Llaguno in this volume) or restricting speech on the basis of harmful consequences of hate speech and possible silencing effects of unrestricted free speech (Brax in this volume).

The Nordic Countries have approached regulation of televised political advertising in different ways. Finland has one of the most liberal approaches to political campaigning in Europe, and opened up commercial TV channels for unrestricted political advertising in 1991 (Maier et al. 2011: 84; Moring 2006:198). Iceland allows political advertising on TV (Moring 2006:187), and make no mention of regulating political advertising in their Broadcasting Act (FJÖLMIÐILL 2011). Denmark has long held a position similar to the Norwegian, traditionally not allowing political advertising on TV, but at the same time the Danish legal position has been unclear (Moring 2006:189).

More recent revisions to the Danish Broadcasting Act as well as regulation on advertising indicate that Denmark is affirming its position, and embracing the ban – in less ambiguous terms (see Kulturstyrelsen 2013). Since the 1950s however, Denmark has allowed political parties to air self-produced videos in primetime on the public service broadcaster prior to elections (Hansen & Pedersen 2008:410). Sweden has moved in the opposite direction, moving from a "strictly regulated state" (Moring 2006:188) to relaxing the regulation of televised political advertising on commercial channels. This occurred as a side effect from switching from analogue to digital transmission, making demands of political neutrality void for some niche channels (Grusell & Nord 2010:96). In effect, the only broadcasters currently airing political advertisements are TV4 and its related sister channels. Swedish channels TV3 and Kanal 5 broadcast from Britain, and have to follow UK legislation which prohibits such advertisements. So far, political advertising on TV in the country has been deemed "very insignificant" by some scholars (Strömbäck 2007:84), and termed as having a "minor role" by others, with the assumption that it might become more important in time (Grusell & Nord 2010:96).

In America, by way of contrast, political advertisements are essential in any election campaign (Kaid 2006:37). From the political party's point of view advertising is typically intended to shift voter behaviour, evaluations or attitudes, as well as to inform voters about policies and politicians (ibid:45ff). Politicians need audiences for their messages, and broadcasters need advertising revenue. The use of advertisements in Norway does not mirror the American situation, which I elucidate below.

Attention through provocation, instrument for legal change and building brands

In a country with no televised political advertising, the televising of any political advertisements is an anomaly, almost assured to attract attention. Thus, the broadcasting of the advertisement can be a means to obtain so called "free media" through news coverage. The provocation is not necessarily a result of the actual content of the advertisement. Rather, it is the transgression of breaching the Broadcasting Act that provokes a response.

In a few instances, broadcasters have aired political advertising to provoke court cases with the intention of altering the Norwegian Broadcasting Act. In these cases, broadcasting the advertisement is the transgression necessary to provoke a sanction from the Norwegian Media Authority that can then be contested through the legal system.

By examining the argumentation of broadcasters in relation to the cases, it seems that the airing of political advertisements has served as an occasion to showcase and defend principles of free speech. Such ideals are held in high regard by journalists, but one should not underestimate this form of symbolic action as a tool to build brands and attract positive publicity for a company. Of course, there is also the question of the

economic interests of private broadcasters. Breaking the law on advertising in defence of free speech becomes a position in which one is both a little rebellious whilst still being just and virtuous – an attractive image for a private television company. The liberalistic Progress Party, which has been involved in some of the cases discussed below, has also cultivated an image of being a protest-party, which has served as a good match with the rebellious image of broadcaster TV 2.

Attention (through provocation)

On 14 April 1995 a labour union for academics bought all the airtime set aside for commercial breaks on TV2, to broadcast five different advertisements arguing for the increased salary of people with higher education (CO 1998). All the advertisements featured the same character: a bully, picking on people with scholarly education and praising his own life choices for not going into higher education. The Norwegian Consumer Council issued a statement, deeming the advertisement to be a breach of the Broadcasting Act. The Act prohibits the broadcast of "advertisements for religious or political messages on television" (Lovdata.no 2016). TV 2 disagreed with the conclusion that the advertisements were political, claiming that the verdict was in direct opposition to the principle of free speech (CO 1998). The case came before the Market Council, who at the time supervised the advertising regulations in the Broadcasting Act. The Market Council concluded *"with doubts"* that the advertisements were illegal. However, it also pointed out that the case itself had raised some difficult questions of principal that needed to be addressed in the future (CO 1998).

In the year 2000, the Norwegian Nurses Organisation produced and commissioned air-time for a political advertisement on TV2. The ad shows how a dramatic surgical procedure on a small child comes to a full stop because the nurse is missing. She has taken up a job as an air stewardess. The final shot of the ad shows the text "50.000 Kr more per year would solve the crisis at Norwegian hospitals". Television viewers did not see this part of the ad, however, because it was hidden behind a big black block commonly seen projected over adult movies when broadcast on Norwegian TV-screens – a so called censor box. The text on the box read: "Censored by TV2 in compliance with Norwegian law. See the rest at www.TV2.no".

The Norwegian Media Authority discussed this ad, and concluded that it was unlawful, but that no sanctions were needed due to the fact that the box hid the textual argument, and the name and logo of the sender, the Norwegian Nurses Organisation (MA 2000). One could very well imagine that the case would have had a different outcome without the box. The use of the censor box can be read as an argument in the ongoing debate. By stating that the ad cannot legally be shown on television, but can be watched legally on the Internet, TV2 poked fun at the strict divide between the two technologies, while implicitly asking whether political statements are so dangerous that they should be censored.

In October of 2009 a small political organisation campaigning against the planned building of a new route of power lines in the Hardanger area, broadcast an ad on TV 2. The Media Authority issued a statement saying that this advertisement clearly could be labelled political (MT 2010), but that they did not wish to issue a sanction. Referring to the ECHR case of *VgT Verein gegen Tierfabriken v Switzerland* (ECHR 2001), the Media Authority claimed that the source organisation was small and with limited funds, but nonetheless with a message of (potentially) great societal interest (MT 2010).

Protest and instrument for legal change

The National Election of 1997 featured the first party political advertisement in Norway in modern times. The party in question was the Progress Party. The ad featured a ballot box in a dimly lit room. Nondescript characters take turns dropping money into the box, whilst the narrator explains: The Labour Party receives support from the Labour Union, the Conservative party receives support from the Trade Organisation. Finally, someone drops a ballot into the box. The narrator exclaims: The Progress Party receives support from the Norwegian people.

The Norwegian Consumer Council commanded TV 2 to stop broadcasting the ad. TV 2 complied, but the channel and the political party did not agree to the fact that airing the ad was unlawful, and subsequently sent a complaint. The outcome was that the Market Council rendered the decision of the Consumer Council void (CO 1998). However, in the aftermath of the case the relevant legislation was elaborated. A white paper-proposition subsequently stated that political advertising was permitted in radio broadcasting, but not on television (Kjeldsen 2003:4).

In 1998, the Progress Party broadcast another commercial on TV 2. It took the shape of a Christmas card, wishing all supporters of the party a merry Christmas, and thanking them for their support. This advertisement was apparently not considered by the Media Authority, as there is no mention of it in official papers, nor in other government white papers.

TV 2 aired another Progress Party advertisement in 2003, with the party leader in the lead role. TV2 were fined by the Norwegian Media Authority, and appealed to the Market Council (as they had in 1998) – this time to no avail (MC 2003). In the same period, TV-Vest (owned by a regional newspaper) broadcast three different advertisements for the Pensioners Party. TV-Vest appealed the case both to Oslo District Court (ODC 2004), and later to the Norwegian Supreme Court (NSC 2004). TV-Vest lost both cases, but appealed to the European Court of Human Rights (ECHR 2008). The court ruled that there had been a breach of Article 10 of the European Convention on Human Rights concerning freedom of expression – and ruled in favour of TV-Vest and the Pensioners Party. This can be considered a clear example of a court acting to strike down laws to comply with free speech principles (Kenyon in this volume) but the verdict was disputed in Norway. The Minister of Culture claimed that it only had

relevance to small political parties and their right to freedom of expression. TV-Vest on the other hand, argued that the verdict was valid for all types of political advertising for all political parties. As a compromise The Free Channel was created, where all political parties could air their ads without having to pay for air time (Gjestad 2009).

In 2009, TV-Vest interpreted the ECHR verdict as a free pass for political advertising and re-broadcast the 2003 advertisements from the Pensioners Party. They then proceeded to broadcast an advertisement from the Conservative Party on two separate dates, showing the ad 13 times each day (Goa 2009). Nine other local TV channels indicated that they intended to broadcast the same advertisement for the Conservative Party (Henriksen 2009). The Norwegian Media Authority issued warnings to all 15 of the local broadcasters that did broadcast the advertisement (Mauno 2009).

Principles & Branding

According to the Broadcasting Act, a message is not an advertisement in the strict sense if there is no form of payment being made from one party to the other (Lovdata.no 2016: § 1-1 g). Thus, TVNorge (TVN) could offer free advertising time to thirteen different political parties in the election of 2009. The Minister for Culture did not protest against this action (Hagen 2009). However, not all political parties chose to use their offered time. The Christian Peoples Party stated that they had no wish to broadcast an advertisement, as they did not want to partake in any acts of civil disobedience (Bjørkeng & Henriksen 2009). The Labour party accepted, but attempted to give their free air time to the idealistic organisation Norwegian People's Aid (Kampanje.com 2009a). TVN did not accept this (Kampanje.com 2009b), and the air time offered to the Labour party ended up being unused. Ultimately, seven political parties accepted the offer.

In 2013, TVN CEO Harald Strømme stated through various channels (Strømme 2012:22) that he was ready to fight for the principles of free speech by selling and broadcasting political advertising on his channel in that year's upcoming election. Bravado aside, no advertisements were aired. Strømme has refrained from commenting on the matter, both to the media as well as to the author of this chapter.

In 2015, Strømme and TVN once again pressed the issue, albeit with a different angle. During the local election of 2015, TVN aired a series of advertisements featuring both local and national politicians. In the advertisements, politicians are facing the camera and attempting to give a message about the importance of voting, whilst being interrupted by comedians that are featured on the channel. The punchline: "If you want to be informed, you should watch an entirely different channel" (Jerijervi 2015).

As in 2013, no *actual* political advertisements aired on television. Does this indicate an acceptance of the status quo? Not necessarily. In terms of Norwegian media use, traditional TV is declining, and the importance of online news and social media as major news sources are on the rise (Bjørnstad & Tornes 2014). The importance of

traditional TV, while still substantial and important, is diminishing. Advertisers spend less money on TV, and more online, indicating a lessening relevance. Meanwhile, political advertising has flourished on the Internet, in terms of moving images on YouTube and subsequently on Facebook. Both videos and other advertising distributed through social media have increased in use and popularity among political parties in Norway the recent years.

Beyond television

To answer the question of what use it is to broadcast illegal political advertisements, this chapter has suggested three main functions. Moreover, the declining interest in broadcast advertising and the increased popularity of Internet political advertising points to a general lesson from the Norwegian case that can be extrapolated to the rest of the Nordic region: Even if medium-specific regulation is strictly enforced, it is easily bypassed in a media milieu of convergence and fragmentation. As media habits and use changes, the importance of television is lessening in favour of other channels – for example, a political party can legally place an ad on Norway's largest web-TV provider VG-TV. Social network sites such as Facebook are beyond simple government control. These other channels offer the possibility of reaching more specific audiences than traditional TV, and some allow for micro targeting of campaigns. It could be that political parties are finding other channels more attractive. In Sweden, where regulation has been relaxed, TV advertisements have not gained in significance, while political parties place videos on social media to a high degree. Norway has seen the strictest enforcement of a ban on political advertising on TV. However, it has also seen more controversial innovations in political communication. Paid messages from a political party imitating journalistic content in both look and editorial placement, pose new challenges to democracy that the advertising ban was supposed to avoid. Early studies indicate that such advertisements may erode trust in journalism, which threatens to undermine journalism's societal role and function for democracy at large (Knudsen & Iversen under review). It is uncertain whether the ban has forced political parties into being more innovative in other channels, pursuing venues such as native advertising. What is more certain is that media policy and regulation is not keeping up with the practice of advertisers and political parties. Whether deciding to continue regulation or deciding to promote the negative free speech of freedom from state intervention, countries in the Nordic region should consider what to do, if anything, about these new forms of political advertising. The Norwegian ban on political advertising stands as a lesson on the difficulties of making effective policy measures in a climate which has been in rapid change since the onset of digitisation.

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Appendix: Overview over case selection, 1995-2015

Year	Case	No. of films	Source motivation	Broadcaster motivation
1995	Academics/TV 2	5	Attention for smaller cause	Unknown/ad revenue
1997	FRP/TV 2	1	Attention & provocation	Principles & PR
1998	FRP/TV 2	1	Attention	Principles & PR
2000	NNO/TV 2	1	Attention for smaller cause	Principles & PR
2003	FRP/TV 2	1	Attention & provocation	Principles & PR
2003	PP/TVVest	3	Attention for smaller political party	Legal change
2009	TVNorge free airtime	9	Reaching audiences	Principles & PR
2009	Free Channel	10	Reaching audiences	Unknown/compliance with given task
2011	BH!/TV 2	1	Attention for smaller cause	Principles & PR /Legal change
2013	TVNorge press release	–	–	Principles & PR
2015	TVNorge mock ads	7	Attention	Principles & PR

FRP = The Progress Party. BH! = Bevar Hardanger!. NNO = Norwegian Nurses Association. PP = Pensioners Party.

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NORDICOM's activities are based on broad and extensive network of contacts and collaboration with members of the research community, media companies, politicians, regulators, teachers, librarians, and so forth, around the world. The activities at Nordicom are characterized by three main working areas.

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  In yearbooks, newsletters and survey articles the Clearinghouse has an ambition to broaden and contextualize knowledge about children, young people and media literacy. The Clearinghouse seeks to bring together and make available insights concerning children's and young people's relations with mass media from a variety of perspectives.

Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression focuses on challenges from the market to free speech and how free speech can be protected, promoted and developed when lines between journalism and advertising are blurred. With contributions from 20 scholars in law, media studies and philosophy, it explores an issue deserving greater attention, market pressures on freedom of expression. The role of commercial constraints on speech, restrictions and control of media content and the responsibility of state institutions in protecting free speech are some of the topics scrutinized from a democratic free speech perspective.

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