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Internet risks management and paradigm shifts in the regulation of the audiovisual industry

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Abstract
In all countries, audiovisual dissemination is subject to a regulatory framework that is stricter than that governing other media. The shift of much radio and television broadcasting to the internet necessarily involves questions about the paradigms we employ to think about audiovisual regulations. The context in which audiovisual regulations are now located is marked by the breakdown of a number of constants associated with modernity. In postmodernity, risk looks like a major component of the deliberative processes contributing to the production of law. In order to be legitimate, regulations have to be presented as designed to manage risk. Audiovisual regulation is thus portrayed as a risk management process. States and other public authorities legitimise regulations governing audiovisual broadcasting on the internet by invoking the risks posed by the default rules and norms of the cyberspace environment to the values that such authorities wish to protect. However, the very nature of the internet means that we cannot assume national regulations will indeed be complied with by all concerned. This forces us to design regulations in such a way that they generate sufficient perception of risk in all those targeted. This is a condition for regulatory effectiveness in cyberspace.

Keywords
Regulation, internet, risk management, audiovisual.

Resum
A tots els països, la difusió audiovisual està subjecta a un marc regulador més estricte que el que regeix altres mitjans. La transició a internet d'una gran part de la difusió radiofònica i televisiva implica, necessàriament, qüestionar-se respecte dels paradigmes que utilitzem per reflexionar sobre les regulacions audiovisuals. El context en què es troben actualment les regulacions audiovisuals està marcat per la ruptura d'un seguit de constants associades amb la modernitat. En la postmodernitat, el risc és vist com un component important dels processos de deliberació que contribueix a promulgar normatives. La reglamentació, per ser legítima, s'ha de dissenyar de manera que pugui gestionar el risc. La regulació audiovisual es descriu, per tant, com un procés de gestió de riscos. Els estats i altres autoritats públiques legitimen les normatives que regeixen la difusió audiovisual a internet, apel·lant als riscos que comporta la manca de reglamentació del ciberespai per als valors que les autoritats esmentades volen protegir. Tanmateix, la naturalesa mateixa d'internet impedeix assumir que tots els interessats acataran, de fet, les regulacions nacionals. Això ens obliga a dissenyar reglaments que assegurin que generen prou percepció de risc a tothom a qui s'adrecen. Aquesta és la condició indispensable per a l'efectivitat de les regulacions al ciberespai.

Paraules clau
Reglament, internet, gestió del risc, audiovisual.

A number of phenomena associated with the information society contribute to changing stakeholder and decision-maker ideas about the realities that have to be faced through state intervention. In a sector as strongly marked by change as the audiovisual world, it is important to examine transformations in reasons for rules and the conditions in which these are expressed and made effective.

Changes in the conditions in which information is produced and circulated have an impact on the ideas that provide the framework for thinking about regulations. These changes affect perceptions of and points of view on what justifies state intervention, what is within its scope and what seems to escape it. Melanie J. Mortensen points out that "Technological convergence, privatization and increased competition have led to new challenges for communications law in the last decade" (Mortensen 2003). She highlights the role of the changes that have occurred in the media environment and that have fuelled challenges to the foundations of regulations. In many respects, knowing the legal aspects of a phenomenon is knowing the reasons that lead to the adoption of rules; in other words, reasons that make it "rational" to adopt rules to provide a framework for a set of activities. The strong trend towards providing audiovisual media over the internet supposes a major shift in the founding paradigms of audiovisual regulations.

Changes in the way information is produced and circulated modify the ideas in terms of which we think about regulations. These changes appear in different ways in different legal systems but they always affect the perceptions and points of view concerning what justifies legal intervention, what is within the scope of such intervention, and what seems to escape it. For example, the field in which audiovisual regulations apply seems to be disintegrating. Newspapers, television shows, films, telephone calls, computer data, commercial services, purchases, banking and all other forms of information and communication can now be in a single format: digital bites. The internet is the embodiment of media environment convergence. The idea of convergence echoes the growing connections between the broadcasting, newspaper, telecommunications and computer industries.

Traditionally, radio and television regulation was based on postulates such as the public and scarce nature of radio waves, the intrusiveness of broadcasting media and the need to remedy the deficiencies of media that had been left unregulated (Hoffman-Riem 1996, Van Loon 2004, Trudel and Abran 1993-95). More recently, in particular in the world of telecommunications, there has been focus on universal access and we always hear about the need to regulate content considered offensive in light of the values prevailing in a given societal context (Botein, Adamski 2005).

Other classic arguments focus on market malfunctions that regulation is intended to remedy. This justifies rules against concentration of ownership, rules promoting pluralism and diversity, including in terms of both content and sources of information so as to avoid one-sidedness, and rules that protect and promote minority cultures. There are also attempts to prevent a small number of entities from exercising control over the formation of public opinion, as well as measures designed to protect public broadcasting.

Other arguments place the accent on the need to maintain net neutrality (Lemley, Lessig 2001), in particular by seeking measures to prevent evils that seem to cause indisputable harm, such as child pornography, practices that violate privacy and dangers to children (Waltermann and Machill 2000). While the reasons for the regulations seem to retain a lot of legitimacy, the internet is an environment in which a multitude of decision-making centres have the ability to assess the respective weights that should be given to each of these reasons.

On the internet, it becomes difficult to maintain an approach that postulates a broadcaster with control over what is made available to users. Users can choose what they consume, when they will do so and under what conditions. Users now find it relatively easy to be programmers themselves by broadcasting and interacting with content online. Faced with these changes, we cannot help but consider the hypothesis of a radical paradigm shift: the ideas that form the very foundation of audiovisual regulations have undergone major mutations. Taking these changes into account and drawing the consequences is a condition for being able to maintain effective regulatory activity that can deliver the balances that are still pertinent.

Arguments related to technological developments and the resulting changes in uses and practices are among the most common justifications for new approaches to regulation. Indeed, some authors do not hesitate to assert that "communications policy inevitably will become a mere subset of internet policy" (Werbach 2002, 37). A broad set of rules and norms provides the framework within which the internet operates. As soon as we agree to see normativeness in a broader sense by not limiting ourselves to national legislation, we realize that cyberspace is regulated by many norms and rules of conduct ranging from the strictest to the most flexible. In cyberspace, active normativeness, namely, rules and norms that are actually applied, operates in a network and is imposed insofar as it generates enough risk to incite people to comply with it. Audiovisual regulations applied to the internet form part of this diverse normativeness.

The postmodern context

Information technologies amplify the characteristic changes in today's law. The dynamics of globalization tend to affect states' capacity to exercise complete control over many phenomena. As information society has become reality, states can no longer claim to control flows of information in environments that apparently have undetermined limits and are deployed in networks.

The passage from modern to postmodern law makes it possible to grasp the changes that result from developments in the socio-technological context and, above all, the impact they may have on law, its role, its form and the conditions in which it operates. Marie-Andrée Bertrand writes:

> Authors who have devoted much of their work to analysing advanced societies and their culture consider that ours resembles no other, and especially that it is clearly different from the preceding one. We have come out of a first "modernity" and entered into what some call advanced modernity (high modernity, late modernity) or hypermodernity or second modernity. Others speak instead of postmodernity (Bertrand 1995, 10).

From this perspective, Chevallier does not hesitate to speak of a crisis in state architecture Chevallier 2003, 21). The state model inherited from modernity is in trouble in postmodern societies. The state's role is being re-assessed, and the crisis of the welfare state seems emblematic of this trend. According to Jacques Chevallier, this crisis developed at the level of ideas: beginning in the 1970s, there was an erosion of the system of ideas on which the state had built its legitimacy. The theme of government inefficiency involves a number of challenges to a model that is increasingly portrayed as interventionist, upsetting market mechanisms and limiting initiative. According to Chevallier, "the impossibility for states to control the circulation of these information flows cannot avoid undermining not only their traditional principles of organization, based on hierarchy and centralization, but also the very foundations of their institution" (Chevallier 2003, 31).

Manuel Castells points out that the territorial system is being replaced by a world organization based on flows of goods, information and capital that ignores borders (Sciences Humaines 2011, 76). It is likely that the changes that are occurring in law do not result exclusively from developments in communications technology, but there does seem to be a strong correlation between technological transformations and changes to governments and law.

The state is now facing growing competition from other norm-producing entities. Economic stakeholders and non-governmental organizations (NGOs) acting locally and in transnational networks in accordance with supra-national systems are playing ever-increasing roles in the deliberation processes that lead to the establishment of rules and regulations.

There is a set of systems that have the capacity to produce norms. First, state laws are major sources. However, this is compatible with the emergence of law that is developed, negotiated and conceived in different networks that portray themselves as having a vocation to provide frameworks for activities that national state laws do not seem able to completely regulate. Technology and the constraints and opportunities that it presents are also sources of norms (Trudel 2000, 187; Trudel 2001, 221-268).

Institutions have difficulty imposing normative models on individuals who refer first and foremost to their own experience. The end of "master narratives" ("grands récits") means that there are fewer and fewer frameworks of reference that can provide ethical guides based on broadly held beliefs. From this perspective, risk is a notion that might be able to crystallize the discourses explaining perceptions and conceptions underlying demands and justifications for legal intervention in the changing audiovisual world.

Regulation to manage risk

In postmodernity, risk seems like a major component of the reconfiguration of the deliberative processes associated with the production of law. Indeed, the notion of risk has been a major topic in research in the human sciences over the last decade (Jackson, Allum and Gaskell 2004). Diverging and converging perceptions concerning risks, their existence and their scope contribute to constructing arguments that legitimize legislation and regulations. Anticipation, management and distribution of risks are among the leading concerns of legal systems. Ulrich Beck explains that:

> Modern society has become a risk society […] because the fact of discussing the risks that society produces itself, anticipating them and managing them has gradually become one of society's leading concerns (Beck 2006).

If Beck is right, it follows that legislation in general and audiovisual regulations in particular can be seen in the light of risks that tend to justify or legitimate them. Pieret says that risk seems central in the decision-making process with regard to a future that is largely open and free from beliefs, traditions and destiny. "It represents the intermediary period between security and destruction, in which perceptions of threats determine our thoughts and action" (Pieret). This leads Ewald and Kessler to point out that there is a "requirement that modern policy be thought about in terms of optimal risk distribution" (Ewald and Kessler 2000, 55). Thus, thinking about audiovisual legislation and regulations in the postmodern context requires thinking in terms of risk management. It is as if audiovisual regulation has become a process through which risks resulting from technological normativeness and various emerging internet trends are detected, debated and assessed. State regulation thus consists in making it risky to engage in behaviour and practices that are judged problematic, given the objectives of national legislation.

To regulate activities occurring on the internet is to intervene in the framework of a risk management process (Trudel 2010 243-265). Law is one of the risk management mechanisms in modern societies. Decision-makers take into account societal risks, in other words, the risks facing all a given population. Like other technologies, the internet generates risks for persons and communities.

On the internet, like elsewhere, there are necessarily default regulations, those that have not been decided upon by state authorities but nonetheless have a normative effect on what is available and what is indeed consumed. In fact, a set of rules and norms interact in cyberspace and they generate, each in their own way, risks that stakeholders in the network have to manage. These risks can be perceived at the level of national and territorial communities, as well as at an individual level.

Audiovisual regulations can therefore be analysed as a process by which technological and societal risks are managed by legislators and regulatory authorities. The entities subject to the regulation have to manage the risks resulting from the regulatory measures established by states, just as they have to take into account the risks that are imposed on them by other norms and rules active on the internet.

Risk as a foundation of regulation

First, regulation is motivated by the concern to limit perceived risk resulting from a situation or form of behaviour. States take action to limit, manage, distribute and, ideally, eliminate risks. Risk is what motivates most state intervention with respect to activities occurring on the internet. For example, a number of states have committed themselves to establishing measures to fight against certain crimes by subscribing to the *Convention on Cybercrime*. State decision-makers may consider that the activities of audiovisual companies on the internet generate risks that have to be managed by establishing regulatory mechanisms.

By default, regulatory activities that occur on the internet result from technical normativeness, namely, those prevailing by default insofar as they prescribe the *modus operandi* of techno-

logical environments. Regulation also results from the practices of stakeholders who, through their actions or requirements, impose risks on others. The laws that apply to stakeholders create risks for them that they have to try to manage as best they can in the network space. Each of rules generates opportunities for some and risks for others.

In the audiovisual world based on use of radio waves, the relative scarcity of available frequencies was generally used to justify state regulation. In short, it was argued that the risk if there being insufficient broadcasting channels was a threat to the right to expression of those who would not have the privilege of being attributed a broadcasting frequency. The risks that could result from the impact of audiovisual media have also been among the major foundations of state regulation of radio and television. With the growing trend towards broadcasting radio and television shows on the internet, it is becoming difficult to postulate the scarcity of communications channels since the internet seems infinite. Barriers to entry seem to have been lowered: with very few resources, it is now possible to broadcast shows all across the network. The infiniteness of the network may therefore reduce the risk that seems to legitimize state regulatory initiatives.

The normativeness resulting from the prevailing technological context now makes it possible to broadcast radio and television shows over the internet. These changes reveal the *modus operandi* of regulation in a networked environment such as the internet. Technical normativeness, the norms that apply by default, can generate risks for the values that are the reasons why there are audiovisual regulations in a given social environment. Such technological normativeness generates risks that have to be identified and managed by establishing state rules that create constraints stakeholders cannot ignore unless they are ready to face the risk of sanctions resulting from non-compliance. Risks perceived by stakeholders are a condition for the effectiveness of regulations in networks.

The promotion of values that seem inherent to human dignity, such as the protection of privacy and freedom of expression, and also the fight against hatred, racism and abuse of vulnerable individuals, takes the form of risks in response to which it seems imperative to act, including on the internet. More problematic, risks that the shift to the internet can create for balances that ensure the production of national works seem in some cases to be sufficiently strong to justify efforts to regulate a network that lends itself poorly to uncoordinated state intervention. This sheds light on the conditions in which regulation on the internet can be considered effective: it has to generate a sufficient perception of risk for the stakeholders who are targeted. This is the condition for its effectiveness.

Risk as a factor for effectiveness

State criminal and civil laws establish a large percentage of the rules governing cybernauts practices. For most users, responsibility with respect to state legislation is treated as a set of risks to be managed. People and companies have to ensure their practices comply with the legal provisions that are likely to be applied and entail their liability. Such stakeholders will try to control the risks resulting from their activities by taking precautions to protect themselves against the adverse effects of the enforcement of national legislation. When rules are stated in legal texts, players tend to adjust their practices so as to limit the risk they can be found to have violated them.

In order to implement their policies, states cannot limit themselves to establishing regulatory measures without asking questions about whether these measures will increase or limit the risk that shouldered by those cybernauts to whom the legislation applies. For internet users, like other players in the network, state laws are seen as risks to be managed. State laws and other normativeness – such as the norms resulting from technology – create more or less risk. This dynamic is necessarily the context in which audiovisual regulations operate.

Legal risk results from stakeholders' assessments of the concrete possibility that national legislation and other rules will indeed be enforced with respect to their activities. Stakeholders within the network will necessarily have to manage the risks they face owing to technical normativeness, other players' practices and the state laws that may apply to their activities. This explains why some legal rules do indeed apply to situations on the internet while other rules, which are theoretically applicable, remain unapplied. The notion of legal risk also makes it possible to explain why, even though the internet is a worldwide network, no one feels compelled to comply with all the national legislation that could in theory be applied. There are phenomena that impede rules established by states and various internet stakeholders, and that prevent them from being applied at the network's extremities. Despite the network's global nature, there can still be major differences between assessments and values in the many cultural milieus in which rules apply (Goldsmith and Wu 2006). Such phenomena prevent the application of rules that are taken out of the context of the situation or cultural substrate in which they apply (Trudel 2010 243-265).

On the internet, the scope and effective tenor of regulations governing activities occurring in the network result from the risk management decisions of all stakeholders. The main risks on the internet result from the configuration of virtual spaces enabled by the internet, in which it is possible to interact. These environments are constructed through technology and what one can and cannot do in them depends largely on their configuration. The behaviour of users and enterprises active in the network also generates risk. Regulation itself, whether it results from legislation or other normative sources, is, in practice, perceived by stakeholders as a risk to be managed.

Stakeholders pass on to their partners the requirements and risks they have to manage. Seen in this way, the regulation of internet environments is essentially an ongoing taking into account and management of risks perceived by various stakeholders. The notion of risk is useful for explaining the impediment

phenomenon in the effective enforcement of national legislation on the internet.

It can be difficult to effectively enforce rules set by governmental authorities acting within a given territory because the internet tends to ignore territorial borders. There is almost always a possibility that an individual will succeed in operating a site that violates national legislation. This phenomenon leads some to think that it is impossible to regulate activities on the internet. However, when we look at this more closely, we find that, in practice, stakeholders who seek to earn money in a country find it risky to operate an internet site that breaks that country's law.

In May 2000, the American Yahoo! company was ordered by French courts to block sites defending Nazism since such content is prohibited in France and other European countries.[1] Of course, it proved impossible to force the company, which is based in California where such discourse is not prohibited, to obey the French court,[2] but the French subsidiary of Yahoo! finally decided to comply with French law (Kelly 2004, 257-264). The most likely hypothesis explaining such behaviour is that the American company considered it too risky to continue ignoring the prohibitions of French law. A risk management approach would therefore have led the American company to comply with French regulations. Even if, in theory, French law does not apply to an American entity, French legislation has shown that it can create enough risk for a company to comply in practice… especially if it hopes to continue attracting French internet clients.

There is another example of states' capacity to create risk through the indirect regulation of an activity on the internet. In 2006, the United States passed a law limiting the possibility of using credit cards issued by American banks to pay online casinos (Marconi, Davis and McQuad 2009, 602-603). Rather than intervening directly against online casinos, the legislation increases the risk of those doing business on the internet, sometimes from areas outside of the scope of American legislation. The legislation forces companies to find other forms of payment for transactions with people in the United States. This is an example of national legislation that does not prohibit the operation of casinos on the internet but makes them riskier to operate when Americans are involved.

Internet stakeholders see technical constraints and possibilities, as well as legislation that could apply to their activities, as risks to be managed. The regulation operating in cyberspace is essentially the result of stakeholder and regulator risk management strategies. Such regulation can result from all stakeholders, including states. Viewed in this way, the question of regulating the internet and the activities that occur on it looks essentially like a set of rules and mechanisms coming from states and other sources, and increasing or decreasing the risks of users and other stakeholders. In such a network, regulators and stakeholders are in a position to increase or decrease risk for themselves and for others. Technology produces situations that increase or decrease risks. The same goes for legislation.

Conclusion

Regulation of audiovisual content on the internet takes the form of active normativeness resulting from risk management decisions made by regulators and web stakeholders. On the internet, states, users, companies and other players manage risks. Through their decisions and behaviour, all producers of rules and norms both create risks and are also subject to the risks resulting from applicable rules and norms. They pass on both kinds of risk to their partners and to those with whom they have signed contracts.

In the postmodern world, characteristic of the digital revolution, state intervention is seen differently than in classical approaches. The givens that used to provide the foundation for state intervention have shifted. Classical justifications seem to have been replaced by foundations taking different forms.

Audiovisual regulation on the internet results from technical configurations, the practices of players on the network, and rules legislated by states. It is part of a normative network with multiple sources rather than a set of hierarchical state norms. The degree to which regulations are compulsory results from the risks that stakeholders associate with being found to have violated them. Stakeholders find themselves obliged to cope with the multiple risks that are imposed on them by these rules and norms.

This process shows that the effectiveness of regulating audiovisual companies on the internet depends on its ability to generate a sufficient level of risk. Legislation and the regulatory processes that implement it have to mesh with consistent strategies in order to generate sufficient risk for players who could be inclined to adopt practices incompatible with the requirements of public policy regarding audiovisual services and programming.

Risk analysis makes it possible to assess the stakes of regulating internet broadcasting and to calibrate the implementation mechanisms. In order to accurately describe audiovisual regulation in cyberspace, we have to identify the risks that result from the internet's technical configurations, user practices and the objectives of public audiovisual policy. Identifying these risks makes it possible to determine those that can be accepted and those that have to be managed through regulations which, in turn, should generate enough risk for players for them to find it rational to comply.

Given the importance of risk perception by those targeted, the legitimacy of regulations becomes crucial to the effectiveness of state intervention. Indeed, if it is not seen as legitimate, regulatory intervention is difficult to apply and its violation is saluted rather than disparaged. The ability to regulate audiovisual content is therefore becoming increasingly dependent on promoting the legitimacy of the values regulations are designed to protect.

Notes

1. *UEJF et Licra v. Yahoo! Inc. et Yahoo France*, Ordonnance de référé, 22 May 2000, online, JURISCOM.NET. <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>. [Consulted on June 29, 2011]
2. *Yahoo! Inc.* v. *La Ligue Contre Le Racisme et l'Antisémitisme*, 433 F.3d 1199, 1202 (9th Cir. 2006).

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