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# The Speculative Influence of Academic Research on the Making of Communications Policy: Reflections, Recollections and Informal Perspectives

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# The Speculative Influence of Academic Research on the Making of Communications Policy: Reflections, Recollections and Informal Perspectives

## **Abstract**

This informal collection is designed to further a dialogue about the relationship between communications research and policy making. In particular it focuses on the impact of academic research on communications policy, and whether, and how, policy draws upon research (if at all). As quasi-editors (and commissioners of these essays) we have been highlighting various assumptions in the process. These assumptions mark every stage of the question (of the relevance of what academics do to what policy makers do). They mark an idealized mode of thinking about policy-making—an idealized mode sometimes articulated in legislation or judicial decision (or agency practice). The assumptions include the following:

- Good and democratic policy making should be based upon an informed deliberation, and include relevant research findings.
- Policy making involves problem solving, guided change and conflict resolution.
- Communications research should be (designed to be) an important input into policy making.
- Policy makers have an appetite for (or can be compelled to have an appetite) research
- There is room for “disinterested research” and possibly academic research has that quality
- Academic research has a kind of methodological purity or excellence or at least strives for that
- There is a disconnect between the demand and supply of policy relevant communications research.
- In part, this is a problem of access to research and data (although with the Internet, this has become more a “translation” and “communications” problem, i.e. researchers fail to communicate timely and for a broader audience).
- In part, the disconnect is a result of the difference between academic research and policymaking with regard to:
  1. Incentives (e.g. tenure/peer review vs political viability)
  2. Timetables (e.g. journal deadlines vs immediately)
  3. Format preferences (lengthy vs succinct)
  4. Agenda and relevance (old vs new challenges and technologies)
  5. Quality and validity standards (neutral vs political)
  6. Information about demand and supply
- In part, the problem is related with the ignorance and capacity of policy makers vis-à-vis using research.

What this effort hopes to do is to deepen and challenge these assumptions, as they relate to communications research and policy.

## **Disciplines**

Communication

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**The Speculative Influence of Academic  
Research on the Making of Communications Policy:  
Reflections, Recollections and Informal Perspectives**

Assembled by Monroe E. Price, Stefaan Verhulst and Libby Morgan  
Center for Global Communication Studies  
Annenberg School for Communication  
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## Table of Contents

<b>Introduction</b>	
Monroe Price and Stefaan Verhulst .....	2
<b>The Academic and the Policy Maker</b>	
Peng Hwa Ang .....	4
<b>Trying to Intervene: British Media Research and the Framing of Policy Debate</b>	
Georgina Born.....	7
<b>Policy Research in an Evidence-Averse Environment</b>	
Sandra Braman.....	12
<b>Research in Government Agency Decisions - Observations about the FCC</b>	
Daniel Brenner .....	28
<b>The Contribution of Research to Communications Policy</b>	
James Deane.....	31
<b>Academic Research and Its Limited Impact on Telecommunications Policy Making</b>	
Rob Frieden.....	35
<b>Harmonising European Media Policy: Supranational Regulatory Trends and National Responses</b>	
Beata Klimkiewicz.....	41
<b>Reflections on Academic Engagement in the Communications Policymaking Process</b>	
Phil Napoli .....	53
<b>Comparative Media Law Research and its Impact on Policy</b>	
Stefaan Verhulst and Monroe E. Price.....	56
<b>A Pilgrim’s Progress: The Development of PolicyArchive: An Online Bridge between the Research and Policy Communities</b>	
Tracy Westen .....	69
<b>The role of academic research in media policy-making: The case-study of Hong Kong</b>	
YAN Mei Ning .....	78
<b>Contributor Biographies</b> .....	85

## **Introduction**

By Monroe E. Price and Stefaan Verhulst

This informal collection is designed to further a dialogue about the relationship between communications research and policy making. In particular it focuses on the impact of academic research on communications policy, and whether, and how, policy draws upon research (if at all). As quasi-editors (and commissioners of these essays) we have been highlighting various assumptions in the process. These assumptions mark every stage of the question (of the relevance of what academics do to what policy makers do). They mark an idealized mode of thinking about policy-making—an idealized mode sometimes articulated in legislation or judicial decision (or agency practice). The assumptions include the following:

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  - Information about demand and supply
- In part, the problem is related with the ignorance and capacity of policy makers vis-à-vis using research.

What this effort hopes to do is to deepen and challenge these assumptions, as they relate to communications research and policy.

We were inspired, in part, to do this project by Professor Sandra Braman's edited volume *Communication Researchers and Policy-Makers* (Cambridge, MA: MIT Press, 2003), and by a February 24-25, 2008 "Necessary Knowledge" workshop on Collaborative Research &

## Introduction

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Advocacy for Media & Communications, organized by the Social Science Research Council and held at Annenberg.

The idea was to explore the edges of this question by having informal, almost personal, discussions and examinations of successful, failed or in between efforts to link academic (and other) research to communications policy. In this exercise, rather than using conventional frames for discussing the question of the relationship between research and policy, we would like to think through the complexities and idiosyncrasies of such efforts, to bring to the fore some of the discontinuities between the academic and policymaking communities. We're interested, too, in the differences between the academy (and different disciplines within the academy) on the one hand and consultant-supplied information on the other—if such a difference indeed exists.

This collection of essays was distributed at the February 2008 SSRC workshop. The thought, however, was that these essays might enrich the discussion and be a good start for a more ambitious project, possibly a book. This continuing effort will be conducted on an ongoing basis with Minna Aslama at the Social Science Research Council.

## **The Academic and the Policy Maker**

Peng Hwa Ang

I joined the Working Group on Internet Governance (WGIG) with very low expectations of how my inputs would be received. The reason is simple: this was a Group that was to deliver a report on a very sensitive (read “political”) area of the Internet. Where the urban legend said the Internet could not be regulated or controlled, this Group would say that there is a chokepoint in the hands of one government-appointed entity. I saw the recommendations as giving a selection of ammunition to the diplomats and their ilk to pick and choose. At the end of it all, however, I am pleased to say that my expectations have been more than met, and not just because they were set low. Perhaps because the subject matter is new. Perhaps because governments did lack expertise and so had no choice but to look to the Group for help. Perhaps because the report made sense. Whatever the “real” reasons, I found that diplomats and their ilk were prepared to and did indeed listen. I came away much more heartened about academic inputs into policies, which was why I was prepared to help form GigaNet.

### **When Is Academic Input Sought**

In presentations, I have tended to remark, half in jest but only half, that no one listens to academics. As indicated above, that is not quite the case. Sometimes academics do get listened to.

Common sense suggests that academic inputs would be sought where the subject matter under discussion is new and policy makers are uninformed. In fact, the first criterion is whether there is a culture of consultation beyond the circle of usual suspects of policymakers. In short, the political culture in question must be open to academic inputs.

In Singapore, until fairly recently, policy was formed almost entirely in-house by the Singapore government. To be fair, there was a lot of in-house expertise. The Singapore government has been offering scholarships to top students to attend top universities around the world. These “scholars,” as Singapore calls them, then return to serve the government on bonds of six to eight years. Often they rise quickly if they do good work and get noticed. Part of the process of getting noticed is developing creative responses to challenges to Singapore. This could concern traffic, education or defense. Or it could include the Internet. Academics are sometimes involved in policy formation but they are hired as consultants to do a study. Their inputs may or may not be used in the final policy decision.

Such a model of in-house policy formation may have been acceptable and usable in the past when there were well-worn paths to follow. But as Singapore moves to the fore on these issues, it has to blaze its own trail. There is therefore increasingly a move towards allowing various inputs on policy formation as opposed to merely inviting comments on the penultimate draft of the policy.

It was a similar situation in the WGIG, where at the very first meeting, there were insufficient electrical outlets for the 40 members’ laptops, and there was not even the wireless broadband that was now taken for granted.

Among the 40 members, fewer than a handful were academics working on policy. There were many more technical experts and others working on policy on behalf of governments and the private sector. This is not to say that academic inputs were not acknowledged as important –



they were. But other political forces were also at play so that representation of various parties was at least as important.

After that initial hump of acceptance, the reason for the use of academics is that the academy is supposedly blessed with a combination of expertise, neutrality, objectivity and, so legend goes, a degree of social consciousness. Expertise is a necessary condition for being heard during data collection and sometimes also during analysis. But as with intelligence, that is not enough. Also necessary is a major dose of social consciousness.

### **The Value of Academic Inputs**

Such consciousness is essential because the impact of a policy can cause sociological, cultural, political and economic change and upheaval. Policymakers therefore have to be cognizant of many factors beyond just the policy itself. And indeed I have always been impressed, and humbled, by the intelligence present in groups, especially international groups, that are convened to discuss and form policy.

Most policymakers tend to be trained in law or economics. Lawyers draw on the specialized skills and knowledge of the legal profession. Economists assume the consumer is autonomous and acts rationally; the goal is efficiency. Academic inputs can be helpful in bringing in diverse views.

In the WGIG, I happened to have a book on Internet law and policy that had been on my shelf for some time, held back by my administrative workload. I was able to quickly draft responses to a number of issues from materials in my book. I felt that for me and a few others in academia or working closely to academia, we were listened to closely.

Having said that, when it came to the final draft, the diplomats, and those familiar with working out text in the international arena, were in their element. The academic approach would have been too blunt and insufficiently politically nuanced to be palatable. In short, it would appear that it begins and ends with the political types.

### **Barriers in the Way of Academics**

Thus far, the picture I have painted is that of an “ideal-type” academic—one who is neutral, objective, able to accommodate varying views. But as with life, the very seeds of success for an academic—critical careful work—may also be the very source of failure.

Probably the first obstacle is that academics tend to fall into the nirvana fallacy<sup>1</sup> -- the idea that something will not work if it is imperfect relative to the model or framework proposed. In policy work, the nirvana fallacy ignores real-world constraints; anyone who falls here may not be able to get up.

I remember a group of academics in a rather internationally well-known university who were upset that my presentation had not shown them an ideal case model but instead had “merely” shown a framework that works. To be sure, sometimes such questions are good as they can challenge one’s assumptions. But too much of it—and no one has a weighing scale to say

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<sup>1</sup> Harold Demsetz, 1969. Information and Efficiency: Another Viewpoint, *12(1) Journal of Law & Economics*. 1-22 coined the term nirvana fallacy, which he defines thus: the nirvana fallacy "implicitly presents the relevant choice as between an ideal norm and an existing 'imperfect' institutional arrangement. This nirvana approach differs considerably from a comparative institution approach in which the relevant choice is between alternative real institutional arrangements."

how much is too much—and the recommendations along with the recommender are likely to be ignored.

This means that policy researchers must be open to seeing other viewpoints and frames of reference. Again, this goes against the academic legend of the lone researcher who, against the odds, proves that his theory is correct and the rest of the world is wrong. Tenure was given for this reason—so that the “strange” ideas may be protected through protecting the academic who dreamt them up in the first case.

I have to confess that I have been guilty of the nirvana fallacy myself. My work on self-regulation has been used in a couple of settings both internationally and in Singapore. One issue with self-regulation is that a self-selected group decides on the rules and then applies them to those who choose to sign up. Who is to say that the adjudicator of the rules may not be biased? Well, in the model I propose, the adjudicators should have an appeal body above them. These adjudicators and members of the appeal body would come from the members. But to avoid any perception of bias—say because of business rivalry—there should be a final appeal body made up of respected community leaders, for example, retired judges.

The first time I proposed this to an international body, I was offended when I was greeted with the phrase “gold-plating.” Yes, it would be necessary to pay an honorarium for them to be on standby to be the final arbiters. But in my model, this group was essential to the perception of the self-regulatory body as an association where members would be assured of a fair and impartial hearing. That association did not implement this final appeal committee.

Back in Singapore, the consumer association I have been involved with was embarking on several initiatives that would use this self-regulatory model, and the final appeal committee was implemented. To my surprise, in the several years of the system’s existence, this committee has been used less than a handful of times.

## **Conclusion**

No one should assume that one will change anything. It is impossible to predict how policy inputs might effect change. For example, I once made a casual remark in a discussion, but obviously carrying a tone of frustration, that in a project on media laws in ten countries, only Singapore required copyright clearance of the laws because the laws were copyrighted by the government-appointed printers. There was a high-ranking civil servant in that discussion that day; while I cannot be sure that what I said made the difference, soon after that the copyright of the statutes was removed.

In the discussion on the formation of the Internet Governance Forum (IGF), a meeting was convened in Malta and a panel of us discussed the shape of the IGF. Again, it is not possible to say that the panel had a singular impact but a number of ideas on key areas in the Forum have been adopted. For example, that the members of the IGF Advisory Council should meet several times a year for social lubrication: one becomes less disagreeable when one meets a person several times a year to discuss issues. Parallel sessions for small group discussions of issues have turned into surprisingly successful dynamic coalitions. While the plenary sessions are places to be seen and heard, these coalition meetings are in fact where the more substantive work is done.

In Singapore, where Internet rules have been more or less static, there has been recent momentum to examine the rules with a view to revise them. I urged a revision many years ago. Sometimes it takes years to get heard. And when that happens, it can be a pleasant surprise.

## **Trying to Intervene: British Media Research and the Framing of Policy Debate**

Georgina Born

In this informal paper I develop some themes drawn from my experience of attempting to use my academic research as a basis for intervening in media policy debates in the UK in the past decade. My research focuses on issues of public service broadcasting (PSB) and public culture and media generally, and includes in the last decade major studies of the BBC and Channel 4, the two main British public service broadcasters, the UK television industry, and digital television and convergence. I researched and wrote the first independent inside study of the BBC as an organization,<sup>1</sup> an ethnography based on two years' fieldwork mainly in BBC television in the late 1990s with updates to 2004, which is combined with wider historical and contemporary analysis of the industry and of media politics in the UK in this period.<sup>2</sup> On the basis of my research I have occasionally managed in the last decade to move into policy-related work and advisory and consultancy roles with government, the PSBs, and major cultural bodies, although with difficulty, as the following will show. The story is of the ambivalence of public and private bodies to academic involvement in policy, of the waning public profile and legitimacy of academic research, of the closure of channels previously available to academics for communicating policy-relevant findings in the press and political weeklies, and of a degradation of the quality of analysis and understanding in these outlets.

In Britain there are a number of key national bodies charged with policy development: primarily the government Department of Culture, Media and Sport (DCMS); the new (since 2003) telecommunications and media super-regulator, Ofcom; the BBC's new (since 2007) overseeing body, the BBC Trust; and two committees of Parliament – attached to the House of Commons and House of Lords – which engage in continuing reviews of the communications landscape. Already there is an interesting issue here, since in some eyes Ofcom has outgrown its proper regulatory role by becoming proactive and proposing major policy shifts. It is also striking that issues of media and communications have become 'sexy' as topics of public debate, given the high visibility and status of these industries, so that there are media pages in almost all of the quality newspapers and weeklies.

How does the British academic media and communications' community interface with these policy bodies and processes? Its main professional body is MeCCSA - the Media, Communications and Cultural Studies Association of the UK - which holds a meeting each year, and which contains several ideological currents. These include, inter alia and not necessarily mutually exclusively, a Marxist or post-Marxist wing, a libertarian wing, a neo-liberal tendency that works well and easily with the reigning political regime, and a public-interest oriented group (among which I count myself) keen to engage both constructively, on the basis of our research, and critically with current policies. As a result there is little working unanimity; MeCCSA is large, unwieldy, and acts primarily as an academic forum. Another local struggle in the UK is

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<sup>1</sup> The closest previous study, solely on the BBC news operation, is Phillip Schlesinger's work in the 1970s, *Putting Reality Together*, London: Constable, 1978.

<sup>2</sup> Georgina Born, *Uncertain Vision: Birt, Dyke, and the Reinvention of the BBC*, London: Vintage 2005.

internecine: there is a powerful group of distinguished media academics of the upper generation who oppose the attempt by myself and other colleagues to intervene in policy, arguing that this entails unacceptable compromises with the capitalist media and brings merely cosmetic gains. Our role, in their account, is to disdain from such interventions by undertaking only pure, critical research unsullied by contacts with industry and government. It is striking how, in the UK, there is a gendered dimension to this division, with most of the policy-engaged senior British media academics being women (Examples include Sonia Livingstone, Jean Seaton, Sylvia Harvey, and Maire Messenger Davies).

Underlying the situation for academic media scholars is a deeper shift in the past decade, one that affects academics' profile and capacity to influence policy and public debate. Both MeCCSA and individual academics are increasingly hampered by the declining authority of academia in general in public life in the UK – an extremely important and under-discussed issue. The role of public intellectual and policy advisor has been taken over by the increasing numbers of freelance consultants and think tanks, and these are the people/groups to whom government, executives and policy debates turn. They are hired by the project, and they tend to be tamer and to be attuned to what the policy bodies (and government and industry) want to hear.<sup>3</sup> What these hired hands do is bolster up and reproduce what Bourdieu identifies, with characteristic oxymoronic irony, as the ideological “consensus in dissensus, which constitutes the objective unity of the... field.”<sup>4</sup> The upshot is a strong, largely unchallenged ideological consensus in the UK among industry, government, influential policy bodies, media commentators and consultants – such that it makes sense to speak now of a two-headed media and political class. The consensus is broadly economically neo-liberal, while at the margins it is fine-tuned for public service ends, as befits a positive-regulation-oriented polity and in line with the historic PSB traditions of the UK.

This new consensual reality, its not-coincidental boundedness and drive to keep out independent and non-aligned arguments, is signaled by two further crucial developments. First, even the quality national broadsheets, including those broadly of the left (*The Guardian* and *The Independent*), have media sections staffed by editors whose ‘common sense’ falls within the neo-liberal consensus, and for whom there is comfort and kudos in speaking the same language as the industry – pro-market and pro-corporate, suspicious of public interventions and of any talk, however grounded or informed, of matters democratic or cultural. The result is that it is extremely difficult to gain space to write in the national press, even on evidence-based research of national importance. The space of debate is curtailed; it is peopled in part by canonized celebrity columnists, some of them substantial figures such as Timothy Garton Ash or Simon Jenkins, but with no claim to expertise on media issues. But mostly the quality of media coverage is superficial, collusive and unanalytical. Glaring symptoms of industry ill-health or malaise are overlooked; fashions in commentary pass for analysis, such as the discourse of ‘trust’ that has been brought to the epidemic of corruption and fraud afflicting British television in recent years, and which obscures the causes of this breakdown in the media ecology.

The second trend marking the determined framing of policy and the drive to keep alternative,

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<sup>3</sup> For an analogous account of the role of consultants within the BBC, see Born 2005, chapter 6.

<sup>4</sup> Pierre Bourdieu, ‘Systems of education and systems of thought,’ *International Social Science Journal*, 19, 1967, p. 191.

even scholarly, voices out is the change in the last decade whereby huge fees are charged for major public policy events. Effectively, this represents the privatization of media policy debate in the UK – an extraordinary development under a Labour government. Thus, the two major annual TV industry events – one in Edinburgh, the other in Oxford – now cost academics approximately £1,000 (for three days) and £350 (for one day) to attend. To translate, given that my normal annual research budget from Cambridge University is between £500 and £800, if I do not have a specific research grant with funding for such events, half my annual budget could be spent attending just one one-day policy event. I am currently contesting this trend, in which even the most prestigious and influential Labour think tanks – such as the Institute for Public Policy Research – collude, and am fighting for media policy events to charge lower fees to academics and interested public bodies. But there are additional ways to keep academics out. Ofcom holds major policy conferences which are little publicized in advance, and to which it simply does not invite any but the most friendly academics (there are in fact just two non-economist media scholars in the UK who are invited to all of these events, and indeed help to program them).

In sum, these developments are part of wider changes to the effect that academics are no longer credited with the authority that they once were. This is no reflection of the declining potency of academic research. Rather, the commissioned, in some ways ‘tied,’ work of think tanks and columnists is now thought to be the sole source of acute social analysis and new ideas. Academics are seen as irrelevant, slow-footed, unexciting. This is a worrying turn, one that suggests that plummeting university salaries in recent decades have been paralleled by a sweeping *déclassement* of academics in the public mind.

The main successful organization intervening in media policy in the UK is an NGO called Voice of the Listener and Viewer (VLV), a public body with clout due in part to its considerable legitimacy as it is seen as genuinely publicly representative (it has a membership, now aging, which is committed to the historical values and institutions of PSB), but also in large part to the extraordinary talents and energy of its leader, Jocelyn Hay, who is consulted by government on most media policy matters and who gets a voice in many debates. Unfortunately Jocelyn is retiring soon, and some of the academic community in the UK (including Sonia Livingstone, myself and others) are now considering how – Trojan-Horse-like – to continue to support the VLV and make use of its valuable legitimacy. In the conditions I have sketched, this legitimacy will ebb away if it is seen to be too ‘academic.’ So that is an immediate, significant political challenge.

In addition, very valuable and effective NGOs and lobbying groups form at critical points in the media policy cycle to intervene, form alliances and so on. But our challenge in the UK is that these efforts are ad hoc and dissolve after the event, so a current task is to form a sustained ‘rapid response’ academic policy group with sufficient expertise and unanimity on key policy matters that we can intervene forcefully at critical moments – which, given digitization and convergence, are coming thick and fast. We are working on this and I think we will achieve it. One of the main supports for academic input on policy matters remains those British NGOs that act in part as a front for the trades unions in broadcasting and media. These organizations remain powerful because industry and government have no alternative but to meet and listen to them; the upshot is a welcome platform for diverse informed voices.

Further insights into the dynamics I have outlined can be gained by zooming in to my specific experiences with the BBC and Channel 4 in relation to my independent, often critical research. The BBC's dealings with me have been markedly (perhaps predictably) ambivalent. On the one hand, a number of senior figures – from BBC Governors, to heads of production departments, to news executives, to the current Director General – have sent me warm and grateful feedback, writing of the cogency of my analysis, and in one case of the 'shock of recognition.' Many of these people have been willing to stay in dialogue about the contemporary challenges facing the corporation. I was invited to participate in a key policy seminar on which my work bears, on impartiality in news. I have been able to follow up aspects of my earlier work, such as with senior news executives on the impact of digitization and the internet on BBC news operations. And I occasionally do BBC radio and TV myself, reviewing shows (such as the relaunched flagship current affairs strand, *Panorama*), and speaking on aspects of the BBC's history. On the other hand, there is a strong sense of being carefully managed, kept at arms length, even pleasantly buried. My book was never reviewed in any of the numerous on-air cultural and book review slots (and might well have been). I have never been approached by the BBC to take part in any serious policy discussions. I am aware that, despite passionate appreciation by some of those working in the BBC and in television, my book has not been allowed to surface within the BBC, nor within the industry. Some media journalist fans have puzzled over this, but this double tactic seems to me to be understandable, if regrettable. It reflects a policing of the boundaries of discourse on television and PSB in the UK.

A similar ambivalence is evident in the larger policy sphere. On the one hand, I was invited to give written and oral evidence to the House of Lords Select Committee addressing the future of the BBC during the recent ten-yearly review of its Royal Charter. I did so, and was informed that my contributions had been important (which was obvious since whole lines of questioning in the Committee meetings took off from my written evidence). On the other hand, I am regularly not invited to take part in Ofcom policy deliberations on the future of PSB in the UK. As I wrote this paper, an edited book for the new Ofcom review of PSB in the UK was being pulled together; as the foremost current academic expert on the BBC I offered an essay, but it was declined. Certain dominant New Labour think tanks also marginalize me in their work on broadcasting and media: for example the IPPR, and the Work Foundation – directed by Will Hutton, a leading New Labour writer also capable, however, of critical independence, who refused my attempts to make contact following my book's publication. My arguments are not fully in tune with the dominant consensus, and this seems to be sufficient to marginalize me.

With Channel 4 the story has in some ways been different. About five years ago I did some research on how C4 was getting into digital TV and the internet in what were then early days in the UK. My study turned out to be highly critical of what purports to be our second PSB, one that is ostensibly committed to experiment and innovation, diversity and minority provision. In short, I found that C4's strategizing for digital and the internet was limited to entirely commercial thinking, with no commitment to nor creative thought about the public service potentials of the new media.<sup>5</sup> It happened that a major policy initiative related to C4 was floated

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<sup>5</sup> See G. Born, 'Strategy, positioning and projection in digital television: Channel Four and the commercialisation of public service broadcasting in the UK', *Media, Culture and Society*, 25 (6), 773-799, 2003; and G. Born, *Uncertain Futures: Public Service Television and the Transition to Digital - A Comparative Analysis of the Digital TV*

by Ofcom at around the time I was publishing, so I found that I had a rare opportunity to publish a serious and substantial article in a national broadsheet, *The Daily Telegraph*. I wrote a thoroughly critical, questioning piece, highlighting C4's drift from its legal remit in the new digital conditions and its abandonment of its public service orientation. Soon after I was invited to lunch by C4's corporate relations executive, who assured me that C4 had just rediscovered its public service ethos! In fact no such shift could be discerned, but within a year the deputy chairman of the corporation suddenly began to speak in public of C4's determination to refind its public service principles – for which it would henceforth need considerable public subsidy. This remains today the state of play in policy terms for C4. I gained satisfaction from realizing the small but possibly crucial role I had played in turning C4 round. Once again, as in the BBC, there are friends and admirers of my work within C4, including senior channel bosses and creative executives, through whom I remain in touch and with whom I engage in dialogue. I am guardedly welcome to visit and interview people at C4, and recently gave the final keynote in the national conference marking C4's 25<sup>th</sup> birthday on the corporation's public service record, a lecture attended by some of the executives I had recently interviewed. But there is little doubt that, for all this, my participation in the policy battles and scenes that matter around C4 is quite marginal.

A final dimension of the struggle to intervene moves outwards to the international arena. Recently an international policy discussion list has been formed through the International Communications Association (ICA), with the purpose of sharing information and considering whether there are any supports or initiatives that could be developed through this global scholarly body. It is early days, but my own interest lies in the potential power of the ICA to discern and take up key 'universal' policy issues and, on that basis, add its lobbying weight to national struggles. For example, it might be possible to engage in an international dialogue between all those researching and/or committed to public service or public interest media, a critical area as we move forward with digitisation and convergence. Of course this is inescapably a value-laden activity; it necessitates straying on to the territory of trying to identify potentially (near) 'universal' policy concerns – and that is difficult and may even prove divisive. But the point about the ICA is that it is a large and powerful professional body, and therein lies its possible political strengths. Moreover identifying such values may be less onerous than it might be supposed. As well as the classic values of freedom of speech, of the press, and academic freedom, it may well be possible to create alliances on such additional common principles as support for human dignity, diversity of voice, and universal access. In turn, this might be translatable into statements that would support and add legitimacy to national policy interventions as well as engagements with international policy fora. I hope it is apparent how much our need is, at least in the UK, for additional legitimacy, visibility and force when dealing with crucial national policy debates. In this, given the conditions I have explored in this paper, the contribution of international agencies such as the ICA may become increasingly urgent and important in providing the backing for our efforts as individual scholars and indeed for our collective national academic activities.

## **Policy Research in an Evidence-Averse Environment**

Sandra Braman

It has been a characteristic of the modern state ever since the French Revolution to favor evidence-based policy-making. Indeed, the word "statistics" refers to the interplay between the development of research methods and the uses of those methods by governments. But the nature of the state, and of knowledge production, and of state-society relations, have all continued to evolve. Unfortunately -- but hopefully not necessarily -- the current expression of the informational state (Braman, 2006) in the United States is evidence-averse policy-making. Recent inversions of the legal system have brought about a loss of innocence regarding the relationship between policy-making and the facts and about the relative efficacy of governmental processes as described by their formal outlines. It is now clear that those who hope that the results of their research will be used to influence the conditions of our lives must deal not only with government (the formal laws, decision-making processes, organizations, and programs of geopolitically recognized governments), but also with governance (the formal and informal rules, practices, decision-making procedures, and institutions of private and public actors that have structural effects) and governmentality (the cultural habits and predispositions out of which modes of governance and government arise, and by which they are sustained).

By the early 21st century, more than 250 scholarly publications had documented difficulties faced by communication researchers in their efforts to engage with the formal processes of governmental decision-making. A 2003 collection presented 25 of the most important discussions of the relationship between communication researchers and policy-making in the U.S. context, along with an analysis of the entire then-existing literature.<sup>1</sup> Generalizable features of research-policy relations became clear: Research results do not in themselves determine policy choices, for value hierarchies, politics, and pragmatic considerations must also necessarily enter into decision-making. Research processes can be manipulated for political purposes such as slowing down or delaying decision-making altogether, legitimating a decision already made, or providing a surrogate for public opinion or consent on a contested issue. Few politicians have any training in data analysis and often misunderstand, either innocently or deliberately, the results of research. As a genre, scholarship is opaque and inaccessible to policy-makers. The institutional rhythm of academic life and research cycles do not line up with the timing of policy cycles. Scholarly reward systems give little due to involvement in policy-making, and so on.

A few lessons can be learned from the literature. The most important contributions of researchers may be ideas themselves. The thickness, richness, and stickiness of policy issues demand theoretical and conceptual innovations to achieve valid, reliable, and useful data. Researchers are often most successful when they are members of coalitions and policy networks rather than positioning themselves as "others" to decision-making. For accessibility, research results need to be translated into briefing documents, press kits, and other narrative forms for the lay public in addition to receiving scholarly presentation. The conditions under which research results obtain must also be made clear when findings are communicated.

In this area, however, knowledge is definitely in the details. Summary conclusions of the

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<sup>1</sup>Sandra Braman (Ed.), *Communication Researchers and Policy-Making* (Cambridge, MA: MIT Press.)



findings of *Communication Researchers and Policy-Making* only touch the surface of what can be learned by reading the case studies, application of diverse theoretical perspectives to the policy-research nexus, examination of how efforts to inform policy with research have varied across issue area, in-depth examinations of existing policy-oriented research in numerous specific issue areas, and the approximately 30 issue-oriented sets of bibliographic references in that work. What can usefully be done here, then, is to reflect upon what was not addressed in a volume focused on formal policy-making processes of geopolitically recognized states. These developments point to additional and sometimes quite other responses necessary for those who strive to inform communication policy-making with the results of research. Following a review of some of the policy trends that have created an evidence-averse environment, this essay concludes with a look at the implications of such trends for researchers, activists, and advocates concerned about the public interest in the shaping and implementation of communication policy.

### Policy Trends

Changes in the nature of the state and society-state relations affect the roles of research in political processes. The use of policy-making processes that are not open to either research or public inputs has grown. Researchers who produce results that support policies contrary to the George W. Bush Administration line have been muffled. The relative importance of various steps in complex policy-making processes has shifted. Globalization of the law moves a growing proportion of decision-making away from the state-level processes that were established with the participation of identifiable publics in mind. Changes in governance must also be taken into account. Government functions are increasingly privatized. There is systematic openness to industrial concentrations such as those found in the media industries that can in themselves develop regulatory-like functions. Contract law is being used to evade constitutional responsibilities. Policy innovations include the use of technologies not susceptible to policy scrutiny to achieve policy goals.

Some of the results of these developments are counter-intuitive to those concerned about the public interest in communication policy -- the greatest successes for civil society in this arena is not in achievement of a space for public interest advocates within Internet Corporation for Assigned Names and Numbers (ICANN) or World Summit on the Information Society (WSIS) processes, but the strengthening of stockholder rights in media corporations.

Often these issues are intertwined -- globalization exacerbates privatization, and vice versa. Taken together, these developments mean that governmentality is also of importance.

### Research-Insensitive Policy-Making Processes

There are numerous sources of policy-making in the United States that do not require evidence as support for the positions they take, and these have become increasingly important in recent years. Presidential fiat has been used in a particularly aggressive manner by George W. Bush, exercised through techniques that include the use of executive orders (unilateral announcements of policy by the president) (Relyea, 2003; Rosenberg, 2007) and signing statements (statements issued by the president after signing a piece of legislation explaining his or her understanding of the legislation and intentions regarding its implementation) (Magill, 2007). Attorneys general opinions guide interpretation and implementation of the law at both the federal and state levels, but their importance as sources of policy-making has become more evident, and more critically salient to free speech rights and other civil liberties, in the 21st century (see, e.g., Redman, 2007). And since the 1980s, the Office of Management and Budget

(OMB) -- in essence the government's office manager -- has put in a series of rules restricting the ways in which federal agencies can use research as inputs into decision-making (Cooper & West, 1988; Bressman, 2007).<sup>2</sup> Just one recent example of the impact of OMB interventions: No peer reviewers of research used as a decision-making input by a federal agency can have received funding from the federal government (whether that funding was for work pertinent to the issue at hand, and even in situations in which the number of researchers with deep knowledge pertinent to the research being reviewed is quite small). Peer reviewers can, however, include employees of corporations in the regulated industries that would be affected by resulting decisions.

### The Silencing of Politically Unwelcome Data

There is always the potential that politically unwelcome data will draw a strong response; the first books burned in Nazi Germany were those of sociologists reporting on poverty levels the government was trying to hide (Nowotny, 1983). Executive branch efforts to control communications about scientific findings under the George W. Bush Administration, however, have been so pervasive, extreme, and, many believe, damaging to society in the long run that the National Research Council (2007) issued a report carefully enunciating principles that should guide governmental treatment of research findings, and of scientists. There are those within government who are also concerned about how far these practices have gone (Shea, 2006); a report from the Office of the Inspector General of the Department of the Interior (2007), for example, condemned deliberate governmental manipulation of scientific data in order to evade responsibilities under the Endangered Species Act. There have been restrictions on speech both by government scientists and by those funded by government agencies (Stedeford, 2006-2007), through bureaucratic processes as well as through direct pressure (OMBWatch, 2007).

We are just beginning to see work conducting this type of analysis on research referred to by the Federal Communications Commission. The role of the media in alerting the public and policy-makers to this issue, however, vividly demonstrates the reflexive importance of communication policy as that which creates the context within which all other policy-making takes place. It was *The Washington Post* that documented Vice President Cheney's demands that scientists be brought into line with government agriculture policy in work on water shortages (Becker & Gellmann, 2007), and the Associated Press that provided the public with the information that United States Geological Service scientists are now required to have all of their data and their interpretations of data screened by the Interior Department before any form of public presentation, even if doing so results in reports that distort actual scientific findings (Heilprin, 2006).

### Globalization of the Law

Communication researchers have been paying attention to the development of global policy-making (e.g., ICANN) and to communications issues as they are dealt with by international organizations such as the International Telecommunications Union (ITU), the World Trade Organization (WTO), and the World Intellectual Property Organization (WIPO). However, the impact of globalization on law and policy extends further, into forms of policy transfer and coordination referred to as policy convergence (Bennett, 1991; Busch & Jorgens, 2005); harmonization is the outcome of such processes when they result in conformance of the

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<sup>2</sup> The best source for developments in the ways the OMB is affecting government use of research findings is the website of OMBWatch, at [www.ombwatch.org](http://www.ombwatch.org).

laws of multiple states with each other. These processes affect the jurisprudential foundations of the law -- the principles and arguments upon which law-making and -interpretation are based (Twining, 2000) -- so significantly that the early 21st century is considered equivalent in historical importance to the period during which the international system of geopolitically recognized states first formed several hundred years ago (Kirby, 2006). Since differences in jurisprudence both manifest and justify differences in the ways that democracy is theorized and implemented (Edelman, 2005), these developments are of enormous importance for the ways in which the public can participate in decision-making and in which evidence is used as a policy input.

A matrix of the processes through which policy convergence takes place, however, has numerous cells that are vacant of any research on communication laws and regulations (Braman, in press). There is some pertinent work, including work on the variety of techniques used to align media policies of transition societies with those of other nations (Price, 2002), and on legal harmonization as it appears in the course of health campaigns (Smith, et al., 2004; Taylor, 2004), antitrust law involving media and telecommunication oligopolies (Donovan, 2006), and treatment of consumer fraud (Rabkin, 2007). However, the overall paucity of research on the globalizing of media law and policy is problematic from the perspective of the protection of constitutional values.

Globalization of the law also significantly diminishes points of access for the insertion of research into decision-making. The processes that achieve harmonization of the law across states and other types of legal globalization are often political and cultural, rather than procedural in ways that include opportunities for the use of research results and public participation of other kinds. Even in international organizations that feature decision-making by consensus, those with concerns that differ from the interests of economic elites often fail to be heard because representatives cannot afford to be a part of the processes that shape the epistemic communities behind successful policy-making (Cogburn, 2004). Similarly, the growth in domestic civil society engagement with communication policy issues (Mueller, Page, & Kuerbis, 2004) does not always translate into desired results at the global level. Transnational activists and advocates are often isolated from domestic social movements and find themselves unable to bridge the local and the global, undermining the ability of transnational coalitions to achieve their goals (Tarrow, 2005). Theatrical or carnivalesque protests may express political frustrations, but don't often have traceable political impact (Chvasta, 2006). The processes by which international and global decision-making take place so differ from those found at national and subnational levels that non-governmental organizations (NGOs) can find it difficult to operate effectively (Steinhardt, 2005). Even when there is civil society participation in international or global meetings, it receives relatively little media coverage, in turn further limiting impact (Bennett, et al., 2004).

### Privatization of Governmental Functions

Privatization of government functions makes it possible to avoid legal and regulatory requirements regarding public participation, including those procedures that make it possible to insert research results into decision-making. Privatization can occur through the explicit release of formerly government activities into the private sector as well as the achievement of regulatory-like qualities by corporations and corporate alliances with powerful global reach. The growing dominance of private law -- as opposed to privatization of what had been a matter of public law -- is discussed in the next sub-section.

The privatization of government functions is evident across states (Rose, Chaison, & de la Garza, 2000), often resulting in concentration of the privatized functions despite claims that the process would lead to competition (Guedhami & Pittman, 2006). In telecommunications, privatization has led to improved efficiency -- but only because of regulatory interventions, not the market itself, and only in terms of corporate profit rather than the achievement of social policy goals (Bortoletti, et al., 2002). Alliances among firms in the audiovisual sector, for example, are proving to be so powerful that they are effectively taking over the national cultural policy role (Feigenbaum, 2002). Globalization of the communications infrastructure and of content flows are vivid examples of the policy impact of privatization. With satellite systems, both access to data collected (Florini & Dehqanzada, 2003) and the management system itself (Thussu, 2002) have been privatized. The internet is managed by an organization that is currently a public-private partnership linked to the U.S. government (ICANN) (Mueller, 1999), but which is likely to become purely private within the immediately foreseeable future (Kesan & Shah, 2001).

The range of techniques being used to privatize the law go even further. Patents remove processes from regulatory purview (Thomas, 2006). It is the private sector that develops standards used to implement public law, whether those are technical standards (Burk, 2005) or those used in accounting (Cunningham, 2005). Use of audio and videoconferencing technologies to take depositions and testimony from one country directly to court in another can serve as a means of shopping for rules of evidence and procedure even when the jurisdictional locus has been established (Davies, 2007). Globalization of the delivery of legal services opens up spaces for private sector actors (Dezalay & Garth, 1996), and the same can be said for cognate services such as accounting (Dilevko & Gottlieb, 2002). Use of arbitration rather than the courts for conflict resolution also removes decision-making from public scrutiny and research input (Ware, 1999).

Private sector power can also, however, be turned to the service of public interest values. Citron (2007) argues that doing so may be absolutely necessary in areas such as the protection of personal data, and the same argument has been made regarding online hate speech (Bailey, 2004). The success of the United Church of Christ in achieving standing for the community in Federal Communications Commission (FCC) decision-making is an example of such activity, in which private sector entities in effect act as private "attorneys general" by engaging parties on behalf of the public interest (Shapiro, 2006). A variety of techniques can be used to accomplish this, including torts (Rustad, 2001-2002), contracts (Bailey, 2004), and persuasion such as that seen in successful efforts to expand access to documentaries under the leadership of Pat Aufderheide at the Center for Social Media ([www.centerforsocialmedia.org](http://www.centerforsocialmedia.org)).

### Private Law

Privatization of course increases the importance of the roles of private law relative to those of public law. Private law -- those areas of the law that are open to ordering by private parties, generally by contract, rather than the state -- offers not only a means of facilitating transactions, but also of compensating for harms and serving the public function of regulating conduct (Wai, 2005). Private law has been particularly important in recent decades for the media because, as a result of digitization, there have been so many legal issues for which there were previously no law at either the national or international levels. As a result, law firms such as Debevoise and Plimpton have had a great deal of global influence because the development of contractual arrangements on behalf of their private clients has established legal principles that

then serve precedential roles for public law (see, e.g., Bruce, Cunard, & Director, 1986).

Some organizations in the private sector exercise such control globally that they are effectively developing private regulatory systems that sometimes supplement and sometimes supplant those of national governments; in the case of Walmart, for example, such power is exercised via control over the organizations involved in each stage of the supply chain (Backer, 2007). Such law-like activity is so extensive and influential that some believe private entities performing sovereign functions should be offered the same immunity to which states are entitled (Wen, 2003).

One of the most important ways in which contract law affects communication policy is through the flow-down contract system put in place by ICANN, which has effectively created a parallel legal environment with the capacity to touch all aspects of Internet structure and use (Mueller, 1999). Individuals experience this system through their End User Licensing Agreements (EULAs) to which agreement is required for Internet access. These agreements radically change the conditions under which communication takes place without or in contravention of public policy-making. Such contracts not only undermine constitutional protections for free speech, but they also grant property rights in content communicated to the corporations and organizations through which Internet access is achieved in complete contravention of common carriage principles (Braman & Lynch, 2003).

#### Material Policy Tools

One of the most striking policy innovations of the last decades of the 20th century was the embedding of controls with regulatory effect in objects themselves, what Kitchin and Dodge (2006) describe as "mundane governance." Technical approaches to preventing copyright infringement have been around since the 1970s, when non-reproducing ink began to be used for newsletters and signals from videotapes were distorted in a manner to ensure that re-recorded material would not play back appropriately (Ganley, 2002), and innovation in the development of digital resource management (DRM) techniques continues today (Fisher, 2006).

Just as happens in encryption wars, so the use of "technological protection measures" (TPMs) generates repetitive cycles of innovations for the claimed purpose of protecting property rights, and of innovations by hackers to develop work-arounds. The costliness of such efforts has led the European Union and other governments to consider laws banning both. Meanwhile, though there is evidence that such policies do not achieve their goals (von Lohmann, 2004), some argue that de facto reliance upon such techniques suggests that thinking about best practices and model laws may be more effective than any effort to reverse this legal trend (Gasser, 2006). Problems with TPMs include not only property rights wars, but also damage to equipment, secrecy regarding how access to content is being controlled (Denicola, 2004), prevention of many legal uses of content (Rothchild, 2005), facilitation of surveillance for other purposes (Hoofnagle, 2004), and the generation of co-ownership between content producers/distributors and those who produce the software and hardware involved in restricting access (Field, 2001). In this area, communication issues are on the leading edge, but the use of such policy tools in other areas is already being proposed; California, for example, is discussing a proposal to require homes to have radio-sensitive thermostats so that power companies can control energy use (Barringer, 2008).

The types of technical decision-making and standard-setting processes involved in the development and use of TPMs do not include requirements for either public participation or social science evidence in the course of decision-making (Davidson, Morris, & Courtney, 2002).

Going beyond specific policy-driven tools such as those of DRM, it is now widely acknowledged that technical decision-making -- the design and architecture of technologies and networks -- should be treated as social policy (Benoliel, 2004; Yu, 2004). We know that manipulation of technical design can be used to escape scrutiny by policy-makers (and competitors) (Mansell, 1996), and that technical protocols that successfully accomplish one task may exacerbate other problems (Pau, 2002). There are many more calls for policy analysis of technical decision-making (e.g., Galloway, 2004; Langlois, 2005), however, than there are actual analyses or recommendations for ways of ensuring that the results of research by those in the social sciences and humanities are taken into account.

### Civil Society

Among those who do research on or are involved as advocates or activists in global media policy-making, the focus has been on civil society as represented by issue-oriented NGOs. Twenty-first century meetings of the World Summit on the Information Society (WSIS) process provide examples of both practice and research of this type (see, e.g., Calabrese, 2004; Raboy, 2004). However, the greatest success in terms of a strengthened legal presence for members of civil society at the global level has been in the very different arena of investors' rights (Van Harten, 2005). Trade union enthusiasm for International Framework Agreements that adapt and extend representation for the global environment provides additional testimony to the growing legal strength of those members of civil society whose primary goal is capital accumulation rather than maximizing the public interest (Fairbrother & Hammer, 2005). For those concerned about media policy, this may be an even more important dimension of civil society activity, given the global nature of media consolidation (McChesney, 1999).

### Researcher Responses

The literature on communication researcher interactions with formal government processes explored in *Communication Researchers and Policy-Making* suggests both institutional and individual responses to barriers to success. On the institutional side, it is clear that systematic and enduring relationships with the staffers of those in Congress, submissions to agencies such as the FCC when there are opportunities for public comment, and encouragement of universities to give credit to policy-related work during tenure and promotion processes are all goals to pursue. For individuals, the development of systematic and focused research programs and expansion of the skill set to include various forms of communication as public intellectuals are recommended.

The experience of those who have gone before also identifies some things that should not be done. Sustaining research industries that pursue the same research topic over and over with essentially unvarying results does not in itself add to the persuasiveness of policy arguments that refer to such data. Nor does engaging in research that is invalid and conceptually weak.<sup>3</sup> The tiresome and circular quibbling about qualitative vs. quantitative research methods so important to politics within many academic institutions distracts from the real political issues at hand, and confuses public and policy-making audiences.

Incorporating the trends discussed in this essay into the analysis suggests additional recommendations for researchers, activists, and advocates concerned about protecting the public

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<sup>3</sup> Both of these problems characterize the continuing research on media localism, where new studies do not change the findings of the already-large literature on the subject, and where much of the work that is done is invalid because it does not link content localism with decision-making localism (Braman, 2007).

interest in communication policy. These of course begin with the need to fill in research gaps, such as those that have been identified elsewhere regarding the ways in which media law is being globalized. Other approaches that may be of value include connecting diverse types of data on a problem into a single coherent story, attending to shareholders as policy-makers, incorporating policy precession into both research and political activity, and working with education as a policy venue.

### Triangulating Research into Coherent Stories

Schön and Rein (1994) point out that any given policy problem has multiple levels, each one of which should receive a different type of policy analysis. In their formulation these begin with cost-benefit and other narrowly and quantitatively evaluative examinations of diverse options for resolving a particular problem, and move out through appreciation of conflicts among stakeholders, trends in stakeholder discourses, and the framing of those discourses themselves. To these we can add conflicts among various policy-making processes themselves, including those that are emerging rather than traditional (Braman, 2004). There are at least two practical implications of this view. First, the persuasive value of research will be greater if multiple research studies, each focusing on a different level of the policy problem but focused on the same issue, are linked together so that research findings can be presented as a coherent story. And second, efforts by activists and advocates who wish to promote actionable attention to such research findings similarly need to be operating at each level.

### Recognizing Stockholders as Policy-Makers

Deepening our knowledge of the processes by which structural decision-making for the media is becoming globalized and privatized can suggest new research questions and activist targets. Those concerned about media concentration, for example, have been focusing efforts on Congress and the FCC, but to my knowledge little effort has been spent learning about, studying, and communicating with stockholders of the firms involved. Stockholder interventions have affected policies of corporations in other industries successfully.

### The Importance of Policy Precession

"Policy precession" is the recognition that the effects of the implementation of diverse laws and regulations interact with each other so fundamentally that analysis of any one must necessarily include attention to others that are related to be comprehensive -- and for action based on that analysis to be effective. One historical story from the media reform movement exemplifies what happens when policy precession is not taken into account.

During the fall of 2003, the media reform movement claimed a success when a rider to a budget bill dealing with military matters (and thus not the subject of much public discussion) that would have raised the cap on the percentage of the national audience one broadcaster could serve was altered by a few percentage points -- just far enough to get Democratic buy-in on the bill as a whole -- in response to public demand. There was, however, a second rider in that bill: legislation that expanded the Federal Bureau of Investigation's (FBI) ability to request financial information from any entity on anyone of interest without even the requirement of any judicial scrutiny of the grounds claimed to justify such surveillance that remained in the USA PATRIOT Act. This extraordinary expansion of FBI surveillance powers included a gag on those entities from whom information was requested. Direct relationships between this watershed moment in the history of U.S. surveillance and media content diversity have become clear by 2008, when

surveillance practices are being used to discern who has read particular news items online and presented particular political positions anonymously. Yet that rider was accepted by those in the media reform movement because all attention was on the media concentration question.

At least one leader of the media reform movement responded to a question regarding the fact that the bill claimed to be such a success included this extraordinary change in our privacy environment by saying that it was "not their issue." Of course it is. Fragmentation of the policy environment in this way by those who seek change offers great opportunities to those who prefer the status quo, or to engage in change in the opposite direction, who understand much more fully than do media activists and advocates the interrelationships among diverse policy matters.

### Education as a Policy Venue

A primary venue for working with governmentality as the source from which policy-relevant perception and understanding drives is the education system. The Recording Industry Association of America and Microsoft are already deep into targeting primary school children with educational materials presenting their views of copyright. It is time to provide primary school materials that present the alternative perspective as well.

The focus in media law and policy in higher education is on those students in journalism, mass communication, and media studies courses. However, few legislators and policy-makers involved in communication policy issues receive degrees in any of these areas. A study of the educational backgrounds of the 180+ members of Congress involved in the Internet Caucus in 2003 found only one person who had graduated from communication. Matters related to communication law and policy, however, are actually found across disciplines that also include political science, sociology, urban studies, information science, and even, now -- because of accreditation requirements -- computer science. Researchers interested in communication policy and the public interest would do well to engage with colleagues across campus to provide curricular support for this much wider audience of students who, in turn, shape the political environment of the future.

In the 1980s many journalism departments began requiring some training in research methods, often under rubrics such as "precision journalism," based on the sound argument that journalists need to be able to evaluate the quality of the research upon which they are reporting so that they are not held captive by misrepresentations. Given the evidence-aversion of the current political environment, general education in research methods, the same argument should now be used to apply across all students in higher education as a significant part of the effort to return the requirement of evidence-based policy-making to the center of expectations and practices. Research methods courses are most often taught from a disciplinary perspective, so those engaged in policy analysis in communication are urged to also include the teaching of research methods to undergraduates -- using research of pertinence to current policy issues -- as part of their policy-oriented program of work.

Finally, those who teach communication law and policy at the higher education level almost unanimously report that they are unable to keep up with the technological developments that underlie and often cause policy issues. Nor does anyone yet report use of a sustainable approach to teaching the relationships between technological innovation and the law. There is a deep need for the creation of curriculum development and course materials to widen the community of scholars, activists, and advocates sufficiently grounded in knowledge of both technology and the law to be able to cope with contemporary and future issues.



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## **Research in Government Agency Decisions - Observations about the FCC**

Daniel Brenner

The FCC is considered by Congress and courts to be an “expert” agency and is tasked with a wide range of decisions that rely on expertise in engineering, economics and statutory construction. This presumed expertise allows courts to grant “deference” to the agency’s decisions. In appeals of FCC decisions, the adage that applies is, “Tie goes to the FCC.”

On engineering matters, this often makes the most sense. The FCC’s engineers can use field or predicted measurements to decide, for example, if two radio stations will interfere or two satellites are too close to each other. And, unless the judge’s law clerk or the judge has the avidity or expertise to look into the results, it’s unlikely that the FCC’s decision would be disturbed on appeal.

Similarly, on some but not all interpretive technical policy issues, the FCC judgment won’t be disturbed. In recent years, courts have deferred to such matters as what rate to charge a cable company when it attaches to a utility pole to provide high speed data service, how to define cable modem service, or whether to prohibit integrated security in set-top boxes to promote a retail market for cable boxes.

Where economics are involved, the FCC has been granted less deference. Ownership limits set by the FCC have been tossed out, with a series of Goldilocks-like decisions that decree some limits too high, some too low. These include how many subscribers a single cable operator can control (court said too low); how many program networks that a cable operator carries it can also own (too low); whether a broadcaster can also own a newspaper (pending); or limits to the number of stations one broadcaster can control (too high).

Ownership cases affect communitarian values like control and viewpoint diversity (e.g., ownership) that competition laws may not fully measure. Otherwise the field would be (and maybe should be) completely occupied by competition law enforced by the FTC and the Justice Department. In this sense they resemble the morality issues faced by the FCC for indecent broadcasts and violent programming. With these matters, the five voting Commissioners are called on to make policy judgments that don’t lend themselves to answers in the same way that an engineer can reliably declare. So is the FCC really an “expert” on questions left to it? And can research help bridge the gap that in reality exists between the five appointed Commissioners, with their subjective viewpoints, assigned to make policy decisions?

The history of agency rulemaking is one that invites studies by interested parties and by the agency itself. It’s worth considering the differences between party-supplied research and that which the agency commissions. Parties will only submit studies that support their viewpoints, of course, and they will not be subject to peer review as such. Instead, the study design – and this applies to technical as well as economic studies – is integral to adducing for the commenting party the evidence it wants to be relied on by the FCC.

So when, for example, Consumers Union wants to demonstrate rising cable prices, it will find a time period of steepest prices and present that data. It might not want to adjust for inflation over that period. It may not want to weight prices based on what customers actually subscribed to, i.e., what share of customers took the package of services represented by steep curve. It may want to exclude how many people actually paid the rate-card rate as opposed to a promotional rate. And it will not want to consider the value, per dollar spent: for example, the



number of hours viewed or the quality of programming (original vs. reruns, high budget vs. low budget).

On the other hand, if the cellular industry association wants to show that cell phone rates have declined, they would modify the raw year-to-year data by just the sort of adjustments that Consumers Union would want to ignore in presenting the case for high cable rates. It would adjust for inflation. It would show that the cost per minute declined. It would emphasize how the total number of minutes had increased.

The foregoing examples simply are variants on the old saw that statistics lie. But cast as “studies” by commenters, they take on the weight that a decision-maker chooses to make of them. The “soaring cable rate” story has been a consistent one invoked by the current FCC chairman; whether in competition reports or public speeches, he has not made the adjustments that industry would seek as elemental fairness in telling the whole story. It is worth noting that in making the case against cable, the chairman has compared cable rates to wireless rates – where adjustments *are* made – to show how the two industries’ pricing behavior has diverged.

Even more elemental in considering data studies is the source of the data being analyzed. How do commenters or the FCC get the data from which to draw broad trends where the study doesn’t involve, say, a field test of equipment that it itself conducts? The FCC can rely on U.S. Household Census data where it is available (and one guesses is itself subject to claims about reliability). It can collect data from industry itself. It can look to filings at other agencies, such as the Securities Exchange Commission, where the accuracy of the reported information is backed by the risk of criminal liability. Or it can look to neutral third party sources that collect the data for purposes unrelated to establishing government policy.

One would think such data collected by commercial services would be a safe place to go. But the FCC’s recent “70/70” meltdown shows that is not always the case. There the FCC was attempting to see if a statutory threshold had been reached: are 70 percent of households that have cable available to them actually subscribing? If this threshold was reached, the 1984 Cable Act said the FCC could consider additional regulation of the industry in regard to leased access obligations (although some thought the FCC Chairman would use the finding for broader program regulation like a la carte). Cable subscribership climbed from 1984 through the early 1990s; in 1994 DirecTV launched and the next 14 years have seen competitive inroads to cable by that company, Dish TV (the other major Digital Broadcast Services company), and more recently the video services of Verizon and AT&T. Cable penetration, which had never reached more than the mid-to-high 60 percent of homes, has been on the decline. The FCC’s own surveys found this.

Nevertheless, Warren Publishing does its own survey of cable systems which it has used to produce its annual “Cable TV Factbook” for decades. Participation in the survey is entirely voluntary, however, and cable system operators can submit incomplete responses. For instance, while a cable operator may be willing to report the number of subscribers it has in a particular system, it may not want to report the number of households passed, fearing that such disclosure would provide competitive data useful to DBS or, now, the telcos.

It turned out that this is what happened: Warren reported a more complete set of cable subscribers and an incomplete number of households passed. The resulting quotient – a conceivably accurate numerator and a decidedly underreported denominator – swelled cable’s penetration to above 70 percent. Because a “study” based on this “third-party” data proved useful to reach the 70/70 conclusion, it was emphasized in the draft report circulated by the Media Bureau at the Chairman’s behest. Worse, the FCC’s own survey of cable penetration –

which pegged the number in the mid-50 percentile – was excluded from the draft report and shared with other FCC Commissioners only the night before the agency was to consider the 70/70 report. In his defense the Chairman pointed out that the cable industry itself had cited Warren data in the past when it suited it, so fair was fair. Nevertheless, the Warren publishing company disavowed the use of its data for public policy purposes, indicating that the Factbook provides value beyond its limited ability to estimate whether the 70/70 threshold was passed.

Sometimes the FCC will seek academics or research think tanks to prepare studies. Ten such studies were commissioned as part of the FCC's broadcast ownership review. Four independent economists were asked to comment on the record developed by interested parties in the FCC's a la carte study. The FCC used to conduct more of its own studies – the Office of Plans and Policy could be counted on for several papers each year – but that work ended several years ago as the Office was renamed and assigned a different function.

To generalize, it is often true that studies will be promoted that tend to support the policy inclinations of the Chairman, under whose direction, after all, every draft decision is made. On some issues, where the Chairman couldn't care less about the outcome, or doesn't want to be tagged politically as having nudged the process in a particular direction, studies can be helpful as a justification for the outcome. Or, in that rarer instance, they can form the basis for informed decision-making where the expertise in designing, executing, and interpreting the study can come into play.

## **The Contribution of Research to Communications Policy**

James Deane

This reflection, drawn largely from personal experience, will focus principally on the contribution of research to media and communication within the context of developing countries. It will look mainly at how research informs (or not) development policy relevant to debates around media and communication.

It is made from the perspective of a practitioner, of someone who has been involved in and sometimes directed media and communication for development organizations over 25 years. Over that time, it has become a constant source of puzzlement that so little connection has existed between media and communication research and media and communication *practice*. Later in this reflection, I'll focus on why this disconnect is common, but first some observations about the links – or lack of them - between media and communication research and development *policy*.

Media and communication does not feature highly or well in development policy, at least outside of the United States. Media and communication issues are among the most politically charged, and often politically driven, areas of government policy, particularly in developing countries. Media and communication issues, at least beyond an often one dimensional support to the role of a free media, is relatively marginal in most development policy and agencies. Few donor agencies (and arguably a decreasing number) have specialist staff tracking media and communication trends, or have policies that prioritize support to media and communication capacity building in a substantial way (as with most points in this essay, there are exceptions to this). There are very few - some would argue no – major specialist international research centers aimed at informing development policy related to media and communications.

Where research does influence policy related to media and communication, it tends to be from non media and communication experts. Examples might be provided by Amartya Sen or by Paul Collier, who highlights research studies in his book *The Bottom Billion*, the critical role of the media in providing checks and balances in society as a critical component of economic success. Even very specific research related to media tends to have most policy influence when not produced by media and communication scholars or researchers – an example would be James Putzel and Joost van der Zwan's 2006 study, *Why templates for media development do not work in crisis states: defining and understanding media development in post-war and crisis states*. When such research is produced, there are few opportunities for development policymakers, researchers and practitioners to come together to discuss, critique and work out the most effective action on them.

There are, in addition, very many research studies produced by mainstream development research institutions that highlight the role of media, but they rarely drill down into how and why media are important and provide insight into how policymakers can respond. Many drivers of change studies, for example, do this, as does much research on citizenship, power analyses, research into neo-patrimonialism, some horizon scanning exercises, quality of governance

assessments and many others. This is research that mentions or highlights the role of media and communication, but rarely explains it.

Explicit media and communication research (i.e. that produced by media and communication researchers) rarely seems to be highlighted in development policy. This in many respects is curious given the main policy preoccupations of development policy. To provide but one example, the Paris Declaration on Aid Effectiveness, agreed in 2005 by more than 100 donors, multilateral agencies, developing country governments and international development banks, places a major stress on issues relevant to media and communication. In particular, the Declaration stresses (within the context of providing greater budget support in aid), the importance of governments being accountable to their citizens, and the importance of a country's ownership of their own development strategies. The media is a critical component of any strategy to inform the former, and public debate facilitated by media is critical to the latter. Little media and communication research is framed in terms that are relevant to such mainstream development policy debates.

So much for a very brief reflection on disconnects between media and communication research and development policy – what of the disconnect with practice?

A disconnect between research and practice is not necessarily the same thing as one between research and policy, but it is relevant. Many media and communication practitioner organizations have significant policy influence and explicit policy advocacy or information programs. Sometimes through formal process, more often informally, they influence governments, development agencies, and donors. In the case of development agencies, and particularly donors, who have very limited (and arguably diminishing) capacities of their own to understand and respond to media and communication issues as they affect development, policy is often heavily reliant on external consultants and practitioner organizations.

There are three obvious potential reasons for this, all of which are valid.

The first is that media and communication practitioner organizations are either insufficiently curious about, or do not have the time or capacity to search out, research that affects their work. This may be born from a sense that these organizations find themselves close to rapidly changing media and development realities and trends and feel they have a better, more rooted and more current understanding of the environments and issues that need to inform their work than research can provide. To the extent this is true, this would be a problem with research per se, rather than what the research covers.

The second may be that media and communication research simply does not tend to cover issues that are relevant to media and communication practice or policy, or at least does not produce research that is sufficiently relevant, timely or useful to media and communication organizations working to implement practical solutions and policy responses. This may be partly an issue of the research itself, and partly an issue of how it is articulated and communicated. The experience of this author is that when media and communication organizations need research done on media

and communication issues, they tend to end up doing it themselves, and only very rarely draw on compellingly useful and timely research that can inform their work.<sup>1</sup>

A third reason is that the mechanisms to bridge the research and policy divide and research and practice divide are very limited. Traditionally, very few practitioners or policymakers have gone to media and communication research conferences; very few practitioner organizations have traditionally even subscribed to and let alone ingested media and communication journals. When they have gone to conferences, practitioners and I suspect policymakers come away with very little that is directly useful to their work.

This has lead most media and communication practitioners, and I suspect some others close to policy, with a mixture of embarrassment, irritation and frustration. Embarrassment because they know their work and sector needs to be grounded in a more rigorous research and evidence base, irritated that so little media and communication research asks the questions they need answered, and ultimately frustrated that there are not better communication mechanisms between researchers and practitioners and policymakers (a reality that they need to take significant responsibility for).

This situation is changing, for several reasons. It is changing partly because this apparent chasm does not exist for very good reasons. There are a growing number of research institutions and individuals who are focused on issues of media and communication in development (witness several new Masters programs in this field in the last two years), and while research agendas should not be driven simply by the needs of practitioners, most researchers at all levels want to be relevant. The gap between research and practice, and at least to some degree between research and policy, is more down to the paucity of systemic communication mechanisms and contacts between the fields, rather than a determined reluctance to engage with issues that preoccupy each other. Increasingly, academic research organizations encourage the increasing numbers of students working in this field to take up internships or focus their research on issues faced by practitioner organizations.

There are at least four other more practical reasons why this is changing.

Governance programs within development strategies have been moving up development agendas very rapidly in recent years, and issues of media and communication have been growing with them (not as rapidly, and certainly not as strategically as most organizations would prefer, but growing nonetheless). Media and communication in development remains an extraordinarily neglected and marginal area of research into development policy, but the demand and need for research is at least beginning to grow. Demand tends to drive research.

The second is the extraordinarily rapid changes in media and communication in most countries, including in most developing countries, and their consequences for development. Because real research into the consequences for society, for democracy and for development is so scarce, the development sector has very little idea of what, if any, relevance these changes have to their work. The very rapidly changing information and communication realities, needs and aspirations

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<sup>1</sup> There are of course many exceptions to this.

of people living in poverty are illuminated by extraordinarily little research outside of the commercial sector (where such research data is carried out, for example, by mobile phone and other technology users keen to expand their markets to the bottom of the pyramid, and by large scale media houses – much of such data is of course proprietary). This is an important reason why the BBC World Service Trust (which the author works for) has invested as much as possible in its research capacity: without good research, it cannot develop programs that respond to clearly defined needs<sup>2</sup>. That research is insufficiently available elsewhere. The growing importance of the media and communication sector in development is likely to lead to a reassessment by development agencies of a research agenda around this.

The third, and linked to this, is the demand by development agencies and policymakers for evidence of impact and relevance of media and communication for development. This is of course another key reason that media and communication organizations are investing much more heavily in research where they can. The growing professionalization of the sector is another factor.

Fourth, many media and communication practitioners are acutely aware that the theoretical frameworks that underpin their work are often not as robust as they need to be. As with all the reflections in this essay, there are many exceptions to the point made, but I suspect that, if asked, very few practitioner organizations would say they are satisfied with the theoretical articulations they use in their work. Better structured debate that brings together theory and practice and policy, as well as research and practice and policy, is badly needed.

There is a greater need for practitioner and policy organizations to engage in and contribute to research debates, and an onus on them to be clearer about what research questions they do need answered. Journals in this area are increasingly and not decreasingly relevant and not a great deal would need to change to (re)connect research and practice.

There are important disconnects here that exist, it seems to this writer, for not very good reasons. There is much that could be achieved quite easily to repair it, potentially with very positive effects for research, development policy and practice.

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<sup>2</sup> The BBC World Service Trust has created over three years a network of 45 researchers (a Research and Learning Group), most of them nationals of the countries in which they work. A critical reason for doing this is to enable it to carry out more effective needs assessments and capture impact of the programs it implements.

## **Academic Research and Its Limited Impact on Telecommunications Policy Making**

Rob Frieden

In an ideal world, uncontaminated by partisanship and political agendas, academic researchers have much needed qualifications and skills that can contribute to rational decision making by the Federal Communications Commission (“FCC”). By law the FCC has to combine its in-house expertise with a transparent and complete collection of evidence when establishing rules, regulations and policies. Sadly the FCC’s “Notice and Comment” proceedings rarely include filings from academic researchers lacking financial sponsorship from a stakeholder with the resources and incentives to steer the Commission to a preferred outcome. Absent a financial incentive, both tenured and tenure track professors eschew policy advocacy, largely because such efforts have little influence on the FCC and also generate limited recognition as academic contributions.

This essay will consider whether and how academic researchers might achieve a greater impact even when the FCC displays an inherent bias toward results-driven decision making. With increasing regularity the FCC generates and seeks empirical data that supports preferred or preordained policies. For example the Commission established a low bit rate threshold to support the conclusion that robust high speed broadband competition exists in the United States. The Commission also sought to demonstrate that ala carte access to cable television programming would foist higher costs on consumers, but later reversed its position possibly because of reassessment of the political liabilities from its initial findings.

Additionally stakeholders happily support the Commission’s agenda by sponsoring academic and consultant research and by submitting advocacy documents masquerading as rigorous in-house, academic or third party research. The essay concludes with recommendations that the FCC seek out and sponsor peer-reviewed academic research as it has done recently in assessing the impact of concentrated media ownership.<sup>1</sup>

### **I. The Need for, and Lack of, Peer-Reviewed Academic Research**

The FCC must engage in rational decision making, based on a complete evidentiary record. When the Commission acts arbitrarily, capriciously or abuses its discretion,<sup>2</sup> reviewing courts should reverse the regulatory decision and require a better work product.<sup>3</sup> Courts readily defer to regulatory agency expertise and interpretation of statutory requirements.<sup>4</sup> But at the risk

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<sup>1</sup> See Federal Communications Commission, Media Bureau, Peer Review; available at: [http://www.fcc.gov/mb/peer\\_review/peerreview.html](http://www.fcc.gov/mb/peer_review/peerreview.html).

<sup>2</sup> See 5 U.S.C. § 706(2)(A).

<sup>3</sup> “[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). “If the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision-making, the reviewing court may supplement the record or remand the case to the agency for further proceedings. It may not simply affirm.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1198-99 (10<sup>th</sup> Cir. 2001)(determining that the FCC failed to provide adequate justifications to prove rational decision making in calculating subsidy mechanism for promoting universal service in high cost area), *citing Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10<sup>th</sup> Cir.1994).

<sup>4</sup> *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)(establishing a standard for

of engaging in judicial activism, courts will not defer and will overturn agency decisions that do not adequately reflect empirical evidence and decision making informed by a complete evidentiary record.<sup>5</sup>

The FCC has achieved a mixed record in having its decision making pass muster with appellate courts. In far too many instances a reviewing court refrained from its inclination to defer to the FCC's expertise, because the Commission did not adequately support its conclusions. Too often the FCC seeks a policy outcome, often deregulatory in nature, based on a political agenda, or because a particular political or economic philosophy supports the outcome. Sadly theory and philosophy appear to drive too many policies, regulations and rules.

It should come as no surprise that despite being established as an independent and expert regulatory agency, the FCC cannot operate outside of politics. The President appoints Commissioners based in part on their political party affiliation. Congress authorizes the FCC's budget and regularly holds "oversight hearings" where individual Senators and Representatives may regulate "by lifted eyebrow" in support or opposition to an FCC initiative. However, the political sensitivity of the FCC appears to have increased recently because of two relatively new developments:

- 1) As the scope, reach and influence of the Internet has grown so too has the number of advocacy groups, particularly ones affiliated with or financially supported by stakeholders; and
- 2) Faced with the need to generate a comprehensive evidentiary record, the FCC increasingly relies on sponsored research not subject to peer review.

Technological and marketplace convergence supports the growing importance of the Internet as a primary medium for delivering previously separate types of content. Incumbents and market entrants alike seek limited regulation, and the majority of FCC Commissioners from both parties agree. But at some point, government oversight might provide necessary guards against anticompetitive conduct, or practices that harm consumers and the public interest. Deregulatory advocates predictably seek to dissuade the FCC from identifying instances of market failure, or other reasons for government regulation. Advocates for regulatory safeguards seek to persuade the Commission of the need for light handed oversight.

To bolster advocacy and to contribute to a perception of public support, stakeholders have unprecedented options for securing additional filings in an FCC notice and comment rulemaking. Countless new advocacy groups purport to represent the public interest, even as they typically do not fully disclose their affiliations and financial sponsorship. The terms

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assessing the reasonableness of a regulatory agency's interpretation and implementation of a statute, including ambiguously worded ones).

<sup>5</sup> See, e.g., *Digital Broadcast Content Protection*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 23550 (2003 *rev'd and vacated* American Library Ass'n v FCC, 406 F.3d 689 (D.C. Cir. 2005)(FCC exceeded statutory authority when it required that equipment on consumer premises to process "broadcast flag" digital rights management instructions); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005)(reversing as inadequately justified liberalized numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets); *Fox Television Stations, Inc. v. Federal Communications Commission*, 489 F.3d 444 (2nd Cir June 4, 2007)(finding that the FCC failed to articulate a reasoned basis for its new policy regarding "fleeting expletives" and that the new policy constituted arbitrary and capricious decision making); *pet. for cert. pending* (07-582, Nov. 1, 2007).



“astroturf organization”<sup>6</sup> refers to an enterprise that purports to operate as a “grass roots” representative of the public even though its funding largely comes from companies with a major financial stake in the outcome of an FCC rulemaking.

An ever increasing number of foundations, institutes, centers and organizations offer assistance to the FCC in the Commission’s generation of an evidentiary record. However, most of the work product represented as empirical research and attached to advocacy filings suffers from the taint of financial support from organizations with obscure or undisclosed affiliations with specific stakeholders. Put more bluntly, much of the research filed with the FCC would not pass muster with rigorous peer review, not only because of the financial strings attached to the product, but also because the research seeks to endorse a preordained outcome. The FCC receives reams of “research” documents, but little if any of it reflects research as opposed to rationales for specific policy recommendations.

## II. Case Studies in Results-Driven FCC and Sponsored Research

### A. Broadband High Speed Internet Access Statistics

The FCC has received justly deserved criticism for the way in which it has compiled statistics of broadband market penetration and the inferences it has derived from the collected data. For example, the Commission uses zip codes as the geographical measure of broadband penetration and considers the entire zip code served if one user exists, regardless of circumstances and prices paid. This measure overstates the degree of real competition for broadband services, particularly in light of the Commission’s own data showing cable modem and DSL carriers having a 96 percent national market share.<sup>7</sup> The Commission also considers broadband to constitute any service that operates at 200 kilobits per second broadband or higher in only one direction.<sup>8</sup>

The FCC’s statistics provide the basis for the Commission, stakeholders and outside researchers to conclude that a vibrant and robustly competitive broadband market exists.<sup>9</sup> Had the Commission used a higher bitrate standard and a more granular measure of penetration the

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<sup>6</sup> “One of the underhanded tactics increasingly being used by telecom companies is ‘Astroturf lobbying’ -- creating front groups that try to mimic true grassroots, but that are all about corporate money, not citizen power.” Common Cause, *Wolves in Sheep’s Clothing: Telecom Industry Front Groups and Astroturf* (Aug. 10, 2006); available at:

<http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1499059>.

<sup>7</sup> Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2006* (Jan. 2007); available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.doc).

Cable modems served 55.2% of the residential lines while asymmetric DSL connections accounted for 40.1% . The remaining 4.7% were served by symmetric DSL lines, or traditional wireline connections, fiber connections to the end user premises, and other types of technology including satellite, terrestrial fixed or mobile wireless (on a licensed or unlicensed basis), and electric power line.

<sup>8</sup> “We use the term ‘high-speed’ to describe services that provide the subscriber with transmissions at a speed in excess of 200 kilobits per second (kbps) in at least one direction. ‘Advanced services,’ which provide the subscriber with transmission speeds in excess of 200 kbps in each direction, are a subset of high-speed services.” Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2006*, 1, n. 1, available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf).

<sup>9</sup> See, e.g., Greg Sidak, A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet, 2 J. COMP. L. & ECON., No. 3, 349-474 (2006)(using FCC statistics and claiming dial up telephone service constitutes a competitive alternative to broadband services to conclude that a robustly competitive Internet access marketplace exists).

statistical compilation would look less sanguine. The Organization for Economic Cooperation and Development (“OECD”) has compiled broadband market penetration statistics that show the United States lagging many nations, despite using only a slightly higher 256 kilobits per second baseline standard for broadband.<sup>10</sup>

Remarkably the mere presence of conflicting statistics triggered official United States government opposition. Both the National Telecommunications and Information Administration and the State Department challenged the OECD staff compilation as flawed.<sup>11</sup>

### **B. Ala Carte Access to Cable Television Programming**

The FCC has developed an inconsistent record on whether and how individual channel access to cable television programming would save consumers money in lieu of the current operator packaging of programming tiers containing many channels. The Commission initially concluded that ala carte program access would not save consumers money based on its research and most of the sponsored research it reviewed.<sup>12</sup> The Report estimated that the impact on retail rates of pure or mandatory ala carte sales would benefit only those consumers who would purchase fewer than 9 programming networks. Because most consumers watch 17 or more channels, the Report concluded that most consumers likely would incur an increase in their monthly bills if they used a likely ala carte pricing model. The Media Bureau concluded that a 17 channel ala carte purchase would trigger a monthly rate increase of between 14% and 30%.

The Report also included several policy recommendations that the Congress and Commission should consider to enhance consumer choice, foster competition and provide consumers with the tools to prevent objectionable programming from entering their home. These recommendations include promotion of multichannel video programming delivery (“MVPD”) competition which would generate downward pressure on rates as has occurred with aggressive marketing by direct broadcast satellite operators. The Media Bureau suggested that policymakers consider creating incentives for operators to provide consumers with more control and access to programming such as that provided by Pay Per View and Video on Demand services. The Media Bureau also suggested that rapid deployment of broadband networks would create additional content access options for consumers such as a per game or subscription model access to Major League baseball game coverage via the Internet. The Media Bureau also noted that many retransmission consent negotiations between content providers and cable systems may bundle less desired channels in exchange for a lower carriage rate for more desired programming. Such bundling may crowd out more desirable programming and possibly raise both public interest and antitrust concerns.

In a stunning reversal of its previous research and analysis the FCC now asserts that ala carte access to cable television programs could save many consumers money and would not result in a reduction of television viewership. The Commission’s a Further Report on the

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<sup>10</sup> See Organization for Economic Cooperation and Development, OECD Broadband Portal; Broadband Subscribers per 100 Inhabitants by Technology (June, 2007); available at: <http://www.oecd.org/dataoecd/21/35/39574709.xls>.

<sup>11</sup> The State Department made the issue something of a diplomatic affront to the U.S. See [http://www.ntia.doc.gov/ntiahome/press/2007/State\\_OECD\\_042407.pdf](http://www.ntia.doc.gov/ntiahome/press/2007/State_OECD_042407.pdf). NTIA offered explanations why scope of broadband access in places such as government offices and coffee shops mean that the OECD ranking underestimates market penetration. See [http://www.ntia.doc.gov/ntiahome/press/2007/ICTLeader\\_042407.html](http://www.ntia.doc.gov/ntiahome/press/2007/ICTLeader_042407.html).

<sup>12</sup> Federal Communications Commission, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public*, (Nov. 18, 2004); available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-254432A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf).

Packaging and Sale of Video Programming Services to the Public<sup>13</sup> reexamined the conclusions and underlying assumptions of the earlier Media Bureau report on a la carte submitted to Congress in November 2004. The Commission reported mistakes in previous calculations of per channel cable television costs failed to net out the cost of broadcast stations and accordingly overstated costs by as much as 50 percent.

The Commission also abrogated its previous finding that ala carte would cause consumers to watch nearly 25 percent less television, or over two fewer hours of television per day. The Further Report stated no reason to believe that viewers would watch less video programming than they do today simply because they could choose the channels they find most interesting. The Further Report states that “many consumers could be better under an a la carte model.”<sup>14</sup>

The Commission revisited the issue of ala carte pricing at the behest of several Representatives and Senators. In light of a complete reversal in its findings, the Commission either has engaged in shoddy research and review of sponsored research, or it has responded to a shift in the political winds and has changed its interpretation to situate the Commission in favor of the now politically advantageous position of supporting ala carte program access.

### **III. Institutional and Practical Constraints on Academic Research**

Most policy advocacy lacks independent, peer reviewed contributions for several reasons. First, with rare exception the FCC lacks the finances or inclination to sponsor such independent research. It appears that the Commission must first suffer an embarrassing judicial rebuke before seeking such untainted research. For example, after a stinging remand from the Third Circuit Court of Appeal in *Prometheus v. FCC*,<sup>15</sup> on the failure to generate a record supporting relaxed media ownership restrictions, the FCC adopted a Further Notice of Proposed Rulemaking that specifically commissioned peer reviewed studies. In this rare instance the Commission implicitly recognized that sponsored research might not provide sufficient analysis of such issues as how people get news and information; the degree of competition within and between types of media; marketplace changes since the Commission last reviewed its ownership rules; the Commission’s promotion of local ownership; minority participation in today’s media environment; the availability of independent and diverse programming in today’s media environment; and the impact of ownership on the production of children’s and family-friendly programming. Absent a stinging judicial rebuke the FCC does not financially sponsor or encourage independent academic research.

The lack of academic research in the policy making process also occurs because academics prefer traditional peer-reviewed forums for their work. Untenured academics need to acquire a record of publications in peer reviewed journals. Even tenured academics have concerns whether their policy-oriented research might generate controversy and adversely impact prospects for securing research grants. The path of least resistance favors targeting research in academic journals instead of seeking to influence regulatory agencies’ policies.

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<sup>13</sup> Federal Communications Commission, Further Report on the Packaging and Sale of Video Programming Services to the Public (Feb. 9, 2006); available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-263740A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf)

<sup>14</sup> *Id.* at ¶3.

<sup>15</sup> *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (2004); *cert. denied*, 125 S. Ct. 2902 (2005).

#### **IV. Conclusions and Recommendations**

Both tenured and untenured academics need to perceive policy-oriented research as a reputation enhancer and a worthwhile endeavor. Promotion and tenure committees should recognize that policy research constitutes a blend of national service and rigorous research, despite the likelihood that peer review may not take place.

For its part the FCC should seek out and sponsor academic research, not just when it is politically advantageous or necessary as a result of a court remand. Of course this requires the Commission to have an open mind on policy issues that could trigger many different outcomes. The FCC needs to quit driving policy research on the basis of politics, economic and regulatory philosophy or a preconceived notion of what the agency should decide. The need to create a complete evidentiary record requires the FCC to have an open and inquiring mind.

## **Harmonising European Media Policy: Supranational Regulatory Trends and National Responses**

(a draft for a media policy paper)

**Beata Klimkiewicz**

*The development of media systems and landscapes is undergoing a profound change. New technologies and media services such as digital television, satellite radio, mobile content applications, video on demand, new internet services fundamentally change media environments and media use. New modes of social interactions with the media re-design everyday social activities and change character of social institutions.<sup>1</sup> Globalisation of media markets intensifies the pressure for media ownership concentration and new forms of alliances cutting across traditionally divided media sectors. Transnational media networks develop new relations between different actors of media systems, such as platform providers and content makers. The COPE paradigm (Create Once – Publish Everywhere) encourages content and distribution schemes that can be multiplied in numerous localised versions, thus reducing ‘untranslatable’ cultural specificity.*

Both globalisation and convergence change the logic of media policy making and challenge traditional regulatory models. Conceptualisation of problems to be dealt by regulators, the processes by which regulatory decisions are made, as well as operationalisation of regulatory rationales are, both at the European and national levels, in a state of flux. The complexity and interpretational richness of such media policy issues as - global media market competition, cultural diversity, interactions with the media, democratic participation and the role of the media in a larger society - are liable to ambiguity and constant redefinition.

At the same time, continuous integration of media regulatory functions of the nation state into the European Union, as well as adaptation and incorporation of European decisions and strategies into domestic policy discourse and practice, have had significant implications for the legal and regulatory systems concerning the media. The historical enlargement integrating the countries of Eastern and Central Europe within the EU political, economic and legal structures has implied far-reaching institutional change at the EU macro-level, but also transformed Eastern and Central European media regulatory regimes (especially in terms of removal of limits on foreign ownership, promotion of European and independent works, control of state aid provided to PSB and telecommunication sector, etc.). A constant adoption of EU media policy and CoE’s standards affected various facets of media systems sharing specific features resulting from post-communist reform.

### THREE APPROACHES TO EUROPEAN MEDIA POLICY-MAKING

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<sup>1</sup> Schulz, W.: (2004) “Reconstructing mediatization as an analytical concept”, [in] *European Journal of Communication*, Vol. 19(1).

European dimension of current media policy process is well reflected in the scholarly literature offering numerous approaches in order to explain parameters of media policy thinking, language and practice, especially within a strong context of governance at the pan-European level:

Table 1 Three approaches to European media policy making

NETWORKED/MULTI-LEVEL	ASSYMETRY/ POSITIVE-NEGATIVE HARMONISATION	BARGAINING
*fragmentation and decentralisation of media policy-making	*media policy-making in favor of pro-market deregulatory solutions	*European public actors in more favorable position
*interdependence of actors and institutions.	*regulatory weakness of actors promoting ‘positive’ integration and ‘positive’ information rights (e.g. CoE, EP)	*loss of autonomy in a system of joint decision-making compensated by gains in autonomy vis-à-vis external actors

The model of *networked media policy making* refers to a structure of policy formation and decision-making, in which pan-European institutions, states, societal organizations and interest groups are vertically and horizontally disaggregated but linked together by co-operative exchange (as in corporatism).<sup>2</sup> The logic of policy making emphasizes the bringing together unique configurations of actors around specific projects oriented towards institutional solutions rather than dedicated programs.<sup>3</sup> A *multi-level* approach assumes, that decision-making power and policy attunement is distributed over various territorial levels (regional, national, pan-European) and over various functional arenas (e.g. competition, audiovisual policy, human rights). European media policy is thus formed by a relatively large number of legally independent but functionally interdependent actors and institutions (such as states, EU institutions – EC, EP in particular, CoE, media industry consortia, various interest groups), while policy-making process might be reflected in “*the intermeshing of overlapping networks operating simultaneously in multiple functional arenas and at multiple geographic scales.*”<sup>4</sup> Overlapping of EU and Coe activities would be especially relevant in this context. Both – networked and multi-level - approaches naturally share some assumptions on the major properties of the European media policy making, in particular fragmentation and decentralisation of power, and the interdependence of actors and institutions.

The *asymmetry approach* stresses unbalance between media business interests, journalists and media users interests at the European level. This asymmetry of EU policy making has made pro-market deregulatory ‘negative integration’ far easier to achieve than market-correcting regulatory and ‘positive integration.’ Fritz Scharpf argues that ‘negative integration’ refers to the removal of

<sup>2</sup> Ansell, Ch. (2000) „The Networked Polity: Regional Development in Western Europe”, [in] *Governance* Vol 13 (3), p. 303 – 333; Borzel, T. (1997) *Policy Networks: A New Paradigm for European Governance? EUI Working Papers* RSC No. 97/19. Florence: European University Institute.

<sup>3</sup> Grande, E. (2001) *Institutions and Interests: Interest Groups in the European System of Multi-Level Governance*, Working Paper No. 1/2001.

<sup>4</sup> Ansell, Ch. (2000), p. 322.

barriers – like tariffs – or other obstacles to free and undistorted competition. ‘Positive integration’ on the other hand concerns reconstitution of an economic system of regulation through market-correcting measures.<sup>5</sup> Scharpf emphasises structural asymmetry of EU governance (with an overwhelming role of ‘negative integration’) and asserts that *aquis communautaire* have done little to increase the institutional capacity for ‘positive integration’ and problem solving.<sup>6</sup> This regulatory asymmetry has been repeatedly echoed by other scholars when analysing EU or European media policies. With regard to the public service broadcasting, concern for media pluralism and cultural policy, Alison Harcourt has stressed the essentially market-making, ‘deregulatory’ nature of EU media policies.<sup>7</sup> Similarly, Venturelli has underlined absence of legislative clarification on positive information rights as political rights and a dominance of negative free-speech rights justifying deregulatory and liberalising policies in the media sphere, which contrast with mechanisms for supporting media production (European quota).<sup>8</sup> Dennis McQuail and Jan van Cuilenburg see normative grounds for deregulatory asymmetry in a new communications policy paradigm mainly driven by an economic and technological logic. This media policy shift legitimises retreat from regulation where it interferes with market development or technological objectives and it gives more priority to economic and technological over social-cultural and political welfare when priorities have to be set.<sup>9</sup>

In the *bargaining approach*, joint media policy-making may change the distribution of power between public European institutions and private actors in favor of the former. Edgar Grande argues, that European public actors (EU institutions, CoE) can purposefully use various ‘internal’ ties and commitments generated by joint decision-making to strengthen their bargaining position vis-à-vis ‘external’ e.g. private actors.<sup>10</sup> In the case of AVMS Directive drafting, European Commission has compensated its loss of autonomy in relation to integrated system of joint decision-making (the Council, EP, Member States) by gains in autonomy vis-à-vis interest groups (e.g. media industry), especially in terms of European quota, protection of minors and human dignity. The Commission has been able to influence the promotion of European quota and the once highly contentious issue has successfully transformed in a process of media policy making into a widely accepted instrument.

## EUROPEAN MEDIA POLICY TRENDS

New developments changing media landscapes, influence the logic of media policy making and redefine regulatory models, traditionally locked in functional, sectoral, institutional and national boundaries. These new policy trends may be characterised by:

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<sup>5</sup> Scharpf, F. (1999) *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, p. 45.

<sup>6</sup> Ibid. p. 157.

<sup>7</sup> Harcourt, A. (2005) Manchester: University of Manchester Press.

<sup>8</sup> Venturelli, S. (1998) *Liberalizing the European Media: Politics, Regulation and the Public Sphere*, Oxford: Clarendon Press.

<sup>9</sup> Van Cuilenburg, J. and McQuail, D. (2003) ‘Media Policy Paradigm Shifts: Towards a New Communications Policy Paradigm’, *European Journal of Communication*, 18 (2), s. 181-207.

<sup>10</sup> Grande, E. (2001), p. 19.

1. DIFFERENT STANDARDS OF RATIONALITY - Problematisation of issues within the process of media policy making not only stems from different (conflicting) interests seeking for diverse solutions within a framework of the same rationales, but it is grounded in different standards of rationality, proposing divergent choices, each of which may be perfectly rationale given the different logic and way of reality conceptualisation.<sup>11</sup> Herein, the goals and objectives to be pursued in European media policy may differ, when used by distinct institutions (e.g. EP and EC). Moreover; the values and criteria by which goals are defined or recognized, may have a dissimilar weight when promoted by different actors.
2. INSTITUTIONAL INTERDEPENDENCE – Organisational framework for European media policy formation and implementation is characterised by a high degree of institutional interdependence. A dense network of institutional ties generates interactions, which may have both negative (administrative competition, policy deadlock) and positive outcomes (policy diffusion, policy learning, parametric adjustment).<sup>12</sup>
3. FUNCTIONAL CONVERGENCE – Functional convergence is largely determined by changing technological environment: the various content and communication services as well as the different distribution services regulated by different sectoral policy applied in past, are more increasingly dealt with in a common ‘information society and media’ umbrella framework. This functional convergence and institutional interdependence generate a high demand for policy coordination.
4. MORE STRATEGIC OPTIONS – Different standards of rationality, greater diversity of interests, increasing number of actors and advocacy coalitions imply more strategic options and offer new strategic games such as the shifting of problems between the different levels.<sup>13</sup>
5. AMBIGUITY OF LANGUAGE – The complexity of contexts within which media policy issues are formulated, demands interpretational richness and constant redefinition. Such concepts as - PSB, media literacy, media market, media pluralism - are liable to ambiguity and thus, also cause different ways of understanding and interpretation.
6. COMPLEMENTARY MEASURES - Policy measures and means of policy implementation (mainly embodied in law, regulation, self-regulation or market practices) are increasingly designed in a complementary manner. Different actors and institutions share responsibilities for implementation of these measures.
7. INCREASING SELF-REGULATION

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<sup>11</sup> Staniszkis, J. (2004), *Władza globalizacji*, Warszawa: Wydawnictwo Naukowe „Scholar”, p. 19.

<sup>12</sup> Grande, E. (2001), p. 10.

<sup>13</sup> See: Sabatier, P.A. (1998) „The advocacy coalition framework: revisions and relevance for Europe,” [in] *Journal of European Public Policy*, Vol 5 (2), p. 98 – 130; Richardson, J. (1996) „Policy-Making in the EU: Interests, Ideas and Garbage Can of Primeval Soup” [in] J. Richardson (ed.) *European Union: Power and Policy-Making*, London: Routledge, p. 3 - 23.



8. CHALLENGE FOR DEMOCRATIC LEGITIMACY - The high complexity and constant redefinition and accommodation of European media policy to technological and economic changes causes a lack of transparency in a negotiating process and limits civic participation and democratic control. This challenge for a democratic legitimacy is rooted in a tension between participation-limiting policy-making and trust-demanding social systems.

## 1. MEDIA POLICY RATIONALES

Freedom of expression and the media remains the grounding principle for media policy formation, both at the European and national levels. It is a fundamental right, respect for which affects the exercise of most other rights. Freedom of expression is guaranteed in a vast number of international legal documents and national constitutions including

- UN Universal Declaration of Human Rights (1948) - Article 19,
- CoE's European Convention on Human Rights (1950) - Article 10,
- UN International Covenant on Civil and Political Rights (1966) – Article 19,
- Charter of Fundamental Rights of the European Union (2000) – Article 11,
- EU's Treaty establishing a Constitution for Europe (2004) – Article II-1

At the European level freedom of expression is guaranteed as one of basic principles of genuine democracy and a necessary instrument for development of human rights protection. Different national arrangements, allowing in exceptional cases some restrictions on freedom of expression and freedom of the media, reflect diverse historical, cultural and legal traditions. Yet, the European Court of Human Rights has constantly attempted to harmonise these national approaches through the application of common criteria and tests (e.g. 'triple test' – an eventual restriction must be prescribed by law, it must pursue a legitimate aim and must be necessary in a democratic society). Over the past decades, and especially since 1990, a substantial body of case-law has been established by the European Court, with regard to Article 10 ECHR.<sup>14</sup> Thus, media laws and regulatory regimes, as well as rules on journalistic freedom and independence have been developed and applied within this framework of Article 10.

Even though the Article 10 itself has the character of an 'abstention right' prohibiting state interference, it also implies an obligation for public authorities to ensure and stimulate freedom of expression and freedom of the media.<sup>15</sup> In other words, Article 10 prevents interventions by states in the field of freedom of expression and freedom of the media, while at the same time the article encourages and even requires a positive action approach to guarantee citizen's right to be fully and impartially informed from diverse and independent sources. Several resolutions and recommendations adopted by the Parliamentary Assembly and by the Committee of Ministers of CoE, as well as European Parliament resolutions do stress the importance of the active implementation of Article 10 ECHR for the appropriate functioning of free and autonomous media and for citizen's access to plurality of information sources. These activities clearly

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<sup>14</sup> Voorhoof, D. (1998) „Guaranteeing the Freedom and Independence of the Media” [in] *Media and democracy*, Strasbourg: Council of Europe Publishing, p. 35 – 57.

<sup>15</sup> *Ibid.*, p. 42

demonstrate the influence of Article 10 as a regulatory rationale and a sound basis for media policy making at the European level.

9/11 terrorist attacks in US brought numerous attempts to impose new restrictions on freedom of expression in many countries. These efforts have intensified in Europe especially after bombings in Madrid and London, while limitations to freedom of expression have been increasingly justified by the necessity of public security. Growing inter-religious and inter-ethnic tensions (e.g. the 2005 riots in France and the controversy with the Danish cartoons of prophet Mohammad) invoked the intention of politicians for further regulation confining freedom of expression and freedom of the media.

The questions and challenges to be addressed by chapters included in the Section 1:

- **POSITIVE OR NEGATIVE RIGHT?**  
Is freedom of expression increasingly interpreted and understood as a positive or negative right? What are the regulatory implications for guaranteeing (positive) citizen's right to be fully and impartially informed?
- **FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA**  
What are the conceptual differences between freedom of the expression and freedom of the media? What are the regulatory consequences of such a distinction?  
  
**FREEDOM OF EXPRESSION AND THE NEW PARADIGM SHIFT**  
Does the media policy paradigm shift favor 'positive' or negative' interpretation of freedom of speech and freedom of the media?  
  
**IMPACT OF EUROPEAN HARMONISATION ON THE NATIONAL LEVEL**  
What impact has had the harmonisation of European policy standards on freedom of expression and freedom of the media at the national level?
- **FREEDOM OF EXPRESSION IN TIMES OF CRISIS**  
Have new limitations on free speech worked in favor of increasing a safety of citizens and as a remedy mitigating inter-religious and inter-ethnic tensions, racism, xenophobia?
- **IMPACT OF NEW LIMITATIONS CONCERNING FREEDOM OF EXPRESSION ON JOURNALISTIC WORK**  
What has been the effect of new limitations to freedom of expression (defamation laws, hate speech laws, anti-discrimination laws, political correctness, etc.) on the work of journalists?
- **IMPACT OF NEW REGULATORY DEVELOPMENTS ON FREEDOM OF EXPRESSION**  
What is the impact of new regulatory developments (such as draft AVMS Directive) on freedom of expression and freedom of the media? Some experts emphasise that in a

multi-channel, internet and digital communication environment there is no need to impose distinctive and special regulatory measures for the internet. It is argued, that free communication through the internet is the strongest safeguard of freedom of expression and the media, especially in countries where other media sectors are under government control.

## 2. CONTENT AND SERVICE-RELATED REGULATION

The “Television without Frontiers Directive” (TVWF) remains the principal regulatory instrument concerning media and audiovisual policy at the EU level. The Directive 89/552/EEC was adopted in 1989 and revised in 1997, primarily with a view to clarify certain of its articles which had proved problematic, in particular those relating to state jurisdiction and child protection. TVWF Directive sets minimum standards across the EU for rules which Member States (MS) impose on television broadcasting. The Directive supports Europe’s audiovisual industry through removing national barriers to cross-border broadcasting and promoting investments in European and independently produced programmes. In addition, specific rules deal with public access to major events, proportion of European works and contents produced by independent producers (quotas), protection of minors and dignity, right of reply, film rights and advertising, sponsorship and teleshopping.

The new, more far-reaching modernization of the TVWF was launched in 2002. After three years of intensive discussions, a draft proposal for a new Audiovisual Media Services Directive was issued on December 13<sup>th</sup> 2005. The main objective of the Draft Proposal was to mitigate differences in regulatory treatment between the various forms of distribution of identical or similar media content (including ‘traditional broadcasting, video on demand, mobile content applications, content hosting services, news and information services, new media advertising). The Directive (passed in 2007) has created a distinction between linear and non-linear audiovisual media services, based on push vs. pull criteria. The main rationale behind this distinction was ‘harmonisation’ of regulatory differences through simplifying some rules applicable to ‘traditional’ television broadcasting and introducing part of the rules applicable to non-linear services as well.

A special status of Public Service Broadcasters in European media landscapes has not been addressed by the draft AVMS Directive. The Protocol on the system of public broadcasting appended to the EC Treaty by the Treaty of Amsterdam links PSB with the democratic, social and cultural needs of each society and with the requirement to protect media pluralism. It allows the Member States to finance PSB on these grounds, but Protocol interpretations meet many difficulties in a light of PSB commercialisation and EU state aid policy. Complaints which have been brought since the beginning of 90s by private broadcasters of an unfair competitive regime giving privileges to PSB, provide a compelling evidence of the growing tension between the wish to permit PSB to realise fully their mission and the general rules of European competition and state aid policy. The pro-competitive course of action aiming at reduction of state aid, requires to justify any support for PSB by market failure.

Therefore one of the most salient questions brought by the debate on changing regulatory model (from regulation of TV broadcasting to regulation of audiovisual media services) is an urgent

need of redefinition of PSB concept in transnational European context and a new digital environment (as Public Service Media or Public Media Services, not Public Service Broadcasting). Unlike the case of AVMS Directive aiming at an adoption of EU measures by Member States, the concept of PSB - as protected through the Amsterdam Protocol – has offered multiple ways of realisation in the national context. New developments modifying the role, remit and the very existence of PSB in the Information Society, open also questions of harmonising/recognising the modes of public service provision at the supra-national European level: do different national models converge to one similar direction (e.g. commercialisation of financing, programming structures resembling private competitors offer, changes in corporate management, thematic diversification, etc.)?

The European Convention on Transfrontier Television was opened for signature by the Committee of Ministers of the Council of Europe in 1989. It entered into force in 1993. The main objective of the Convention was to strengthen the free exchange of information and ideas by encouraging the transfrontier circulation of television programme services on the basis of a number of commonly agreed basic standards. A Protocol to amend the Convention was adopted in 1998. The main objectives of the amendment was to ensure its realignment with the revised TVWF Directive. The review of the Convention currently being undertaken is potentially more far-reaching and has been prompted, in part, by TVWF Directive modernization, as well as by new technological capabilities and their implications for freedom of expression and freedom of the media.

Questions and challenges to be addressed by chapters included in the Section 2:

- LIMITS ON INNOVATION?  
The broadband industry argues that new audiovisual content services, made possible through innovation in digital technology and the internet, should be given time to evolve and develop rather than being shackled by ‘premature’ and ‘unnecessary’ regulatory intervention by the EU.
- CONCENTRATION AND THE INTERNET (the topic overlaps with media pluralism issue):  
Some media economists argue, that the Internet, despite its public origins and pluralistic tendencies, is likely to be absorbed into corporate structures and governed by a commercial logic. High quality multimedia content is expensive to produce in the first place and yet, once commissioned and created, relatively cheap to edit and trivially cheap to reproduce. High fixed costs and low marginal costs are the natural creators of monopolies, therefore there is a need for non-linear services regulation.<sup>16</sup>
- UNJUSTIFIABLE BURDEN FOR ‘SMALL’ AND ‘NON-PROFIT’ NON-LINEAR SERVICE PROVIDERS?

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<sup>16</sup> Graham, A. and Davies, G. (1997) *Broadcasting, Society and Policy in the Multimedia Age*, Luton: John Libbey.

Some experts also point out that small and non-profit non-linear service providers are especially vulnerable to introduction of new regulatory requirements as they might lack an infrastructure, resources or abilities to implement new regulatory requirements and to monitor them. This might then result in more likely alliances with large multi-media networks having capacities for accommodation of additional regulatory demands.

- NATIONAL REGULATORY BODIES

An important question addresses the competence of national super-regulatory bodies, such as British Ofcom. Are these convergent regulators a better option in terms of independence, accountability and performance than separate regulators or does it not matter? Do they have an optimal potential for harmonising the European media regulation with national mechanisms and vice versa? Some researchers argue that public service broadcasting should certainly not be regulated by these authorities as super-regulatory management bodies have no formal representation from the nation, regions, communities of interests. They were designed to promote a more commercial media and communication environment with less positive content regulation.

- REDEFINITION OF PSB REMIT IJN TRANSNATIONAL AND CONVERGENCE ENVIRONMENT (the topic overlaps with media pluralism issue)

The position of PSB in Europe has been increasingly challenged by private broadcasters, state aid rules, political actors and new technological settings. Some parties argue that the remit, content provision and mode of operation of PSB should be redefined so that PSB have guarantees for a development of new media services, but also will be encouraged to transform more fundamentally atuning itself to changing social, political, economic and technological conditions.

### 3. STRUCTURAL REGUALTION: MEDIA PLURALISM, CONCENTRATION, DIVERSITY OF CONTENT AND SERVICES

There is a widespread agreement that media pluralism refers to a significant phenomenon which can hardly be omitted in contemporary media policy debates, but at the same time, there is a consensus that it is difficult to deal with media pluralism in a coherent and pragmatic way, namely because of divergent definitions, absent operationalisation and lacking common grounds in terms of using media pluralism as a normative and regulatory rationale.

Despite its weak legislative powers, European Parliament has more frequently initiated Community media policy than have the Commission or the Council.<sup>17</sup> In particular, the Parliament has pressed for an action to pursue policies protecting media pluralism. In 1992, at the request of the European Parliament, the European Commission published a Green Paper: *Pluralism and Media Concentration in the Internal Market*. Its main purpose was to assess the need for Community action on the question of concentration in the media (television, radio, press) and to evaluate different approaches of involved parties. The results of the consultation process reaffirmed divergent standpoints of involved bodies. A second round of consultations

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<sup>17</sup> Verhulst, S. and Goldberg, D. (1998), "European Media Policy: Complexity and Comprehensiveness", [in] L. d'Haenens and F. Saeys (ed.) *Media Dynamics and Regulatory Concern in the Digital Age*. Berlin: Quintessenz Verlags GmbH, p. 17-49.

resulted in a circulation of a discussion paper prepared by DG Internal Market, proposing a possible 1996 draft directive on media pluralism. Even with significant modifications and flexibility, the initiative was rejected. Although the battle for media pluralism has been seen as “the biggest failure of the EP” in the field of media policy,<sup>18</sup> the issue remained EP’s media policy agenda (the most instructive in this case is the 2004 *Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information*).

Publication of the EP’s 2004 resolution and drafting of AVMS Directive provided a new opportunity for re-dressing the concern for media pluralism. The Commission’s Staff Working Paper on *Strengthening Competitiveness of the EU Publishing Sector* stressed, that media policy should support sustainable competitiveness, bringing together the economic, environmental and social (high rates of employment) objectives of the European Union, in order “to enhance pluralism and culture at the European level.”<sup>19</sup> On January 16, 2007 the Commission published a staff working document *Media Pluralism in the Member States of the European Union*, indicating further steps in a policy process regarding this matter.<sup>20</sup> The document sustains a familiar argument against submitting a Community initiative on pluralism at present, but it emphasises a necessity to closely monitor the situation. The monitoring process is to involve an independent study on media pluralism indicators (2007) and Communication from the Commission concerning these indicators (2008). Thus, ‘concrete’ indicators of assessing media pluralism present a crucial methodological category used for developing a more sophisticated risk-based monitoring mechanism, including such areas as:

- policies and legal instruments that support pluralism in MS,
- the range of media available to citizens in different MS,
- supply side indicators on the economics of the media.<sup>21</sup>

The idea to monitor conditions of media pluralism in the EU Member States integrates the Commission decision-making with European Parliament’s and Council of Europe’s priorities concerning policy on media pluralism. It is not likely to bring a significant qualitative change in current EU media policy-making, but will present a potential base (the Commission may or may not use) for more substantial policy change depending on a critical mass of information needed for an initiation of new solutions.

*The Council of Europe has played a crucial role in setting up common standards on media pluralism, principally through a vast number of resolutions and recommendations adopted by the Parliamentary Assembly and by the Committee of Ministers, as well as reports prepared by its advisory bodies and committees of experts. The range of current Council of Europe’s concerns regarding media pluralism can be best illustrated by recommendations on media*

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<sup>18</sup> Sarikakis, K. (2004) *Powers in Media Policy: The Challenge of the European Parliament*, Oxford: Peter Lang, p. 132.

<sup>19</sup> Commission of the European Communities (2005) *Commission Staff Working Paper: Strengthening the Competitiveness of the EU Publishing Sector, The Role of Media Policy*, SEC (2005) 1287, Brussels 7.10.2005, p. 30.

<sup>20</sup> Commission of the European Communities (2007) *Commission Staff Working Document: Media Pluralism in the Member States of the European Union*, SEC (2007) 32, Brussels, 16 January.

<sup>21</sup> *Ibid.* p. 17–18.

*transparency (1994), independence of public broadcasting (1996), media pluralism (1999) and digital broadcasting (2003). In this context mention should be made of three CoE's reports – Media Diversity in Europe (2002), Transnational Media Concentrations in Europe (2004) and The assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets (2006).*

New technological developments and implementation difficulties urged the Council of Europe to revise instruments proposed in the already existing recommendations. On 31 January 2007 the Committee of Ministers of CoE adopted three new documents referring to media pluralism: Recommendation Rec (2007) 2 on Media Pluralism and Diversity of Media Content, Recommendation Rec (2007) 3 on the Remit of Public Service Media in the Information Society and the Declaration on Protecting the Role of the Media in Democracy in the Context of Media Concentration. The Recommendation Rec (2007) 2 on Media Pluralism and Diversity of Media Content links requirements concerning freedom of expression with media pluralism: demands of the Article 10 of ECHR can be fully satisfied only if citizens are given the possibility to form their own opinion from diverse sources of information.

Questions and challenges to be addressed by chapters included in the Section 3 :

- LINK BETWEEN MEDIA CONCENTRATION AND CONTENT DIVERSITY?  
Some media analysts argue that the empirical research does not provide an evidence for a direct link between concentration of media ownership and content diversity. Therefore media specific anti-concentration regulation seems unnecessary at the EU level.
- TRANSNATIONAL MEDIA OPERATIONS  
There is a growing tension between transnational media operations, cross-border nature of media alliances and the variety of models for regulating media markets developed by the Member States. According to some institutions (e.g. European Parliament) these tensions justify common regulatory measures and the minimum conditions to be introduced and respected for the purpose of protecting media pluralism at the EU level.
- NEED FOR THE SUPPORT OF DIVERSE FORMS OF MEDIA OWNERSHIP?  
An important argument has also been raised by the FCC analyst Douglas Galbi (2002): there is a historical evidence that advertising has grown about the same rate as the overall economy. Thus, if policy seeks information industries to serve as an engine for creating new economic opportunities and jobs, policy should seek to develop media not supported by advertising and encourage diverse forms of ownership. This would be an argument in favor of common regulatory measures on media pluralism and harmonisation at the supra-national level.
- COMPETITIVENESS OF EUROPEAN MEDIA INDUSTRIES IN A GLOBAL SCALE  
An important argument for removing media- and MS-specific anti-concentration rules concerns competitiveness of European media industries in a global scale. Strongly divergent national approaches could create obstacles for the free provision of media

services in the EU. Thus, no additional regulatory measures protecting media pluralism are needed.

- CONTENT QUALITY AND DIVERSITY

Competition improves efficiency and increases choice, but it does not necessarily guarantee quality, diversity or impartiality. Some researchers (Collins and Muroi, 1996) stress that an intervention is needed to remedy information asymmetry and the imperfect nexus between ‘buyers’ and ‘sellers’ of broadcasting. This would obviously support an idea of specific media pluralism regulation at the EU level harmonizing different national approaches.



## **Reflections on Academic Engagement in the Communications Policymaking Process**

Philip M. Napoli

My reflections on this topic are drawn from my vantage point as a tenured faculty member in a graduate school of business (but with academic training in communications), as well as from my position as the Director of the Donald McGannon Communication Research Center, a policy-oriented research center that was launched in 1986 by Everett Parker, one of the founders of the contemporary media reform/media justice movement via his role in the historic *Office of Communication of the United Church of Christ v. FCC* case in the 1960s.

A key component of the McGannon Center's mission is to serve as a research resource for the public interest, advocacy, and policymaking communities. In pursuit of this mission, the Center has, over the past five years, engaged in research partnerships with a wide range of public interest and advocacy organizations, including the Office of Communication of the United Church of Christ, the Benton Foundation, the Center for Creative Voices in Media, the Minority Media and Telecommunications Council, the Center for American Progress, and the Consumer Federation of America. In some of these partnerships, the McGannon Center has received funding from these organizations to engage in particular research projects. In others, the McGannon Center has provided funding or data to these organizations to help them engage in research activities. And in others, the Center has shared the labor and expense associated with conducting research projects.

In addition, on behalf of the McGannon Center I have had the opportunity to participate directly in the policymaking process via providing testimony before the Federal Communications Commission and Congress, via submitting formal research-based comments in FCC proceedings, and via serving as an external peer reviewer of FCC research. These activities, and the conversations and relationships that have developed surrounding them, have certainly significantly shaped my current set of perceptions about the academic research-policymaking relationship.

And of course in conducting this kind of work I have also had the opportunity to engage with a wide range of scholars and administrators (within my own university as well as other universities) on the topic of the linking of research and policy. These conversations are particularly important in terms of what they have, at times, revealed about the academic community's stance on the academic research-policymaking relationship.

From this standpoint, rather than reflect on one particular experience, I will try to identify some commonalities across these experiences that perhaps can contribute toward the development of some generalizable insights about the current state of affairs in terms of scholars' involvement in policy research and policy advocacy, and what issues need to become points of focus moving forward.

First, while I have only been directly involved in policy-oriented research for about a decade, I'm troubled by the extent to which the research process seems to have become increasingly politicized. This may be a naïve statement. Perhaps it has always been this way and it is just that, after a decade of engaging in this process (and becoming more deeply engaged over time) I'm learning more about how the process works, and also becoming a bit cynical. But the process of "dueling studies" that surrounds every policy issue, and the extent to which we as

academics very quickly (and sometimes unfairly) get lumped into being a member of one “side” or the other has become increasingly frustrating.

The research environment surrounding communications policymaking seems to me to be increasingly treacherous for those of us in academia who truly want to inject our work directly into the process, rather than simply publishing it in academic journals and hoping that the appropriate trickle down effect takes place. Recent issues such as the accusations of suppressed localism research by the FCC, the controversy surrounding the selection of researchers to conduct the Commission’s most recent round of ownership studies, and the denials of access to broadband data, as well as to data and other documents related to the media ownership proceeding, all point to a policymaking environment in which the role and function of research is seen very differently than it is seen in academia.

As a researcher involved in the policymaking process – whether one is working directly with advocates, directly with policymakers, or directly with industry stakeholders, the process is often (no surprise here) heavily results-driven. These various parties often (though not always) are seeking a specific result from any study they commission. And, in particular, as the nature of the research demanded moves increasingly toward highly quantitative work that draws primarily on sophisticated econometrics, the range of statistical and methodological approaches that can be taken toward a particular research question expands, which leaves lots of room for debate, critique, reanalysis, and reinterpretation surrounding what the legitimate, actionable findings of any one study are. Personally, I’ve found myself growing a little weary of this whole exercise. The process is starting to feel like a bit of pointless tail-chasing, as inevitably each “side” ends up with studies, or interpretations of studies, that support their policy positions. As a result of this recent bout of disillusionment, I have found myself as of late conducting research that is more legal than social scientific in its orientation. Advocacy is part and parcel of legal research, and as such is allowing me to have greater clarity of purpose than is possible when doing social scientific research in partnership with, or for, members of, the policymaking or advocacy communities. I hope after this little break I’ll feel ready to get back on the horse of social scientific policy research.

In light of these particular reflections, it probably stands to reason that the most satisfying experiences that I have had in terms of conducting policy research for distribution and consumption beyond academia have been those instances in which I have been asked to conduct research for foundations. This is a more indirect mechanism for influencing the policy process – engaging in policy research that informs grant-makers, who in turn use what they have learned from your research to inform their grant-making strategies. This is inevitably a more gratifying experience, in large part because the grant-makers more often are in the position of genuinely wanting to learn something new, rather than needing a particular position supported.

On the academic side, perhaps one of the most exasperating things I have run across is the somewhat clichéd arrogance for which the academic community has become known for. Specifically, I have been frustrated by conversations with scholars who view efforts to engage directly in the policy questions under consideration by policymakers as essentially a surrender to the incorrect or misguided perceptions of the policymaking community. From this perspective, efforts to conduct policy research that directly addresses questions being asked by policymakers are fundamentally flawed due to the fact that such research accepts the terms of debate and framework for analysis adopted by the policymakers. Such approaches allow others to set the research agenda for us, when, as academics, we should always be setting the agenda. From this perspective, if we as scholars don’t like the size and shape of the playing field, the end result is

that we take our ball and go home. Personally, I don't always feel confident that I always have all the answers in terms of how particular policy issues should be framed or addressed. More importantly, I don't think we're dealing with an either/or proposition here. I think it is possible to engage with the policy process in ways that are accepting of the established terms of debate while also engaging in work geared toward shaping or altering the terms of the debate. These are essentially two different tracks that involve engagement in the policy process at two very different points in the gestation period for any policy issue. But to engage in one of these activities to the neglect of the other is to me a reflection of both arrogance and naiveté that the academic community needs less of. And, most important, it causes us to marginalize ourselves from important stages in the process.

I in fact left an academic position in a communications school for an academic position in a business school in large part because there seemed to be a more established culture of engagement with the non-academic community in the business school environment. A related reason for my shift in institutional affiliation was that, early in my career, I quickly got the sense that policy professionals had a very specific set of pre-conceived notions about what a policy scholar trained in communications was likely to bring to the table. More importantly, I had also gotten a sense that policymakers didn't particularly value what it was they thought that a policy scholar trained in communications was likely to bring to the table. For this reason, I thought a business school affiliation would, in fact, represent a more effective platform for me to inject my work into the policymaking process. Fortunately, I think the past ten years have seen a dramatic improvement in the extent to which communications scholars are looked upon as legitimate and important contributors to the policy process. And I hope that, in my own work, I have made some modest contribution to this transition.

Going forward, I think one of the key things our field needs to focus on goes beyond increasing the supply of policy-relevant research (i.e., motivating more scholars to engage with the policy process) or improving the mechanisms for communicating such research to policymakers (I think a lot of improvement has taken place on this front in recent years). Rather, the field also needs to begin devoting energy and resources to increasing the *demand* for this research. To me, the demand issue represents the kind of macro-level strategic challenge that really hasn't been addressed yet. Specifically, it seems that the better integration of communications research into communications policy can't be achieved without better populating the policymaking sector with individuals with training in, and appreciation for, communications research. Going back 30 years, the FCC's appreciation for economic research was, to a large degree, a function of the influx of staff members trained in economics. To do the same for communications scholarship, we need to better steer undergraduate, master's, and even Ph.D. students toward careers in policymaking and policy advocacy. This would help to create a market for the type of research that many of us feel should be better represented in the communications policymaking process.

## **Comparative Media Law Research and its Impact on Policy**

Stefaan G. Verhulst and Monroe E. Price

### ***Introduction***

In this essay, we assume—perhaps too broadly—that research is useful for policy formations and ask, rather, why engage in *comparative* research. And because of our own work, we focus on comparative research concerning media law and policy. Comparisons can lead to fresh, exciting insights and a deeper understanding of issues that are of central concern in different countries. They can identify gaps in knowledge and policies and may point to possible directions that could be followed, directions that previously may have been unknown to observers or, in the case of media law, legal reformers. Comparisons may also help to sharpen the focus of analysis of the subject under study by suggesting new perspectives.<sup>1</sup> Comparative media law research can give us a better understanding of how one country, or even medium, borrows from the traditions and conventions of another (such as the links between film and broadcasting, the PSB models within Europe, free speech notions in Latin American countries); how intellectual property migrates across various media over time; and where best practices exist in the world for the regulation of new communications technologies.<sup>2</sup> Moreover, comparative research can give us an improved knowledge as to whether specific media patterns and structures are causally conditioned by social, political, economic, historical and geographic circumstances. Without a conscious effort, however, comparisons can be mangled, inadequate, often a disservice.

Partly because of the growing internationalisation and the concomitant export and import of social, cultural, and economic manifestations across national borders, and partly because of political, economic, social and technological transitions, the demand for comparative research has grown. It is increasingly evident that contemporary communications structures and patterns can only be understood from a comparative perspective. Only by examining relationships across media forms, across national and regional boundaries, across cultures, institutions and environments and over time,<sup>3</sup> can a full picture of the processes of change and globalisation be created. Hence the growth of the use of comparative research and the increased need, as well as demand, for comparisons.

Yet, despite the benefits and the growing demand, little informed discourse exists on the opportunities of comparative media law and on the potential methodological challenges of the preparation of such work.<sup>4</sup> This reluctance and narrowness of scope may be explained not only by a lack of knowledge or understanding of different cultures and languages, but also by insufficient awareness of the research traditions and processes operating in different national contexts. This is certainly the case in the field of comparative media law and policy, which combines the research traditions of comparative social research in general, with comparative

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1. See Linda Hantrais, *Comparative Research Methods*, Soc. Res. Update, 1996
  2. Most examples used within this paper are based upon the work conducted at the Programme in Comparative Media Law and Policy. For more information see <http://pcmlp.socleg.ox.ac.uk/>
  3. The vocabulary for distinguishing between the different kinds of comparative research may prove to be redundant and not very precise in many cases. Concepts such as cross-national, cross-cultural, cross-institutional, cross-societal etc. are used both as synonymous with comparative research in general and as denoting specific kinds of comparisons.
  4. See, e.g., Else Oyen, *Comparative Methodology: Theory and Practice in International Social Research*. London: Sage, 1990 and Stefaan Verhulst and Monroe Price, *A Methodological Perspective on the Use of Comparative Media Law*. In: Monroe Price and Stefaan Verhulst, *Broadcasting Reform in India. Media Law from a Global Perspective*, OUP, 1998

law in particular. The purpose of this paper is to analyse the needs, possibilities, limitations and pitfalls of comparison, and to probe problems of definition, methodology and presentation.

### ***Growing Demand for Comparative Research***

One way of thinking of the issue is environmental. What kind of context is ideal for comparative media law and policy research? One could look at the loci where this kind of work is done, or where it is attempted to be done. A principal characteristic is to have some sort of institutional commitment and something like a critical mass. Communities of scholars are built with a comparative bias. Efforts have been made at the University of Westminster, in the UK, at the School of Business at Columbia University. We both have been engaged in trying to establish such centers (Programme in Comparative Media Law & Policy at Oxford University, 1996, and the Center for Media and Communications Studies at Central European University, 2004). Currently, one of us directs a Center for Global Communication Studies at the Annenberg School for Communication and the other continues to nourish comparativism from a perch at the Markle Foundation. MIT is another prominent university to have created a center dedicated to comparative media research: offering a two-year course of study, the Comparative Media Studies Department allows students to study for a master's degree.

A somewhat unconventional example is offered by the Learning Initiatives on Reforms for Network Economies (LIRNE.NET), an international collaboration between four universities: the Center for Tele-Information (CTI), Technical University of Denmark; the Economics of Infrastructures Section, Delft University of Technology, Netherlands; Media@LSE, the media and communications programme at the London School of Economics; and the LINK Centre at the University of Witwatersrand in Johannesburg. This network, which is one of the key partners in the World Dialogue on Regulation ([www.regulateonline.org](http://www.regulateonline.org)), has produced a number of comparative and cross-country analyses, primarily in the field of telecoms regulation. A similar, yet broader, kind of network is ORBICOM, the Network of UNESCO Chairs in Communications, which has conducted some comparative analyses.<sup>5</sup> The Hans Bredow Institute in Hamburg is an example of an interdisciplinary institute with comparative ambitions but rooted in a German legal context. It also is an example of a research entity funded, in the first instance, by public service broadcasters, but then branching out. One important recent entrant, Ofcom, the British regulator, has emphasized evidence-based policy making and the need to look comparatively to understand regulatory possibilities.

Each of these units takes a different approach to comparative research. Seen together, however, they mark the growing importance of the field. Their emergence, and more generally the growth of comparative research, has its roots in a variety of forces.

Globalisation, the end of the Cold War, the rise of Asian economies and the growing geopolitical importance of the Middle East are just some tendencies that have led to a general call for broadening of the usual scope of research to include more comparative studies. The increased transnational flow of people and information has clearly challenged the universality of Western theoretical models and concepts,<sup>6</sup> and has forced scholars to look beyond their borders and disciplines. Moreover, amidst a growing homogeneity and uniformity, the

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5. <http://pcmlp.socleg.ox.ac.uk/>, [www.lirne.net](http://www.lirne.net), <http://www.orbicom.uqam.ca>, <http://web.mit.edu/cms/index.html>.

6. For a detailed description of this unease with so-called Western parochialism within media studies see: James Curran and Myung-Jin Park, *De-Westernizing Media Studies*. London: Routledge, 2000

emphasis of research has shifted from seeking uniformity among variety to studying the preservation of enclaves of uniqueness. Anthony Giddens has, for instance, observed that "globalisation today is only partly westernisation. Globalisation is becoming increasingly decentered."<sup>7</sup> Indeed, while some cultural differences are diminishing as a result of globalisation, others are becoming more salient. Only comparative research succeeds in capturing this richness of variety across nations, institutions and cultures.

The need for more comparative media law research clearly fits within this broader framework of globalisation. In many cases, however, comparative media law has emerged in response to a more complicated mix of forces. Technological transformations, political transitions, and institutional and market re-structuring are among the most important pressures. In addition, advanced telecommunications and the world-wide expansion of media markets create an urgent need to understand our emerging "global media culture," the cross-fertilisation of national and international cultural traditions, and the new styles and genres developing in this context. The world is engaged in a vast re-mapping of the relationship of governments, corporations and societies to the images, messages and information that course within and across traditional boundaries. States, governments, public international agencies, multinational corporations, human rights organisations and billions of individuals are all involved in this process. All is under construction, yielding, as it were, a thorough shaking and remodelling of media and communications systems. The result, at the moment, is a teeming experiment in reconstruction and reaction of media laws and policies. The various players are seeking a vocabulary of change and a set of laws and institutions that provide legitimacy, continued power, or the opportunity to profit from the technological prospects for change. Only with a comparative and interdisciplinary grasp of the massive changes taking place can there be a more sophisticated and nuanced understanding of the impact of media changes on democratic values and economic development.

Among the various forces driving comparative media law, technological change is, clearly, one of the most important. The introduction of a new medium is often met with both utopian visions of a more perfect society and apocalyptic anxieties about the collapse of an old order. In much the same way, the emergence of new media forces us to rethink relationships and regulatory assumptions regarding previous communication technologies. It challenges the application and value of older models of regulation to a newer environment. To understand the true complexity of technological convergence we must improve our understanding of the interrelationships among many different technologies and media environments. We must therefore compare and think across media. A fully comparative insight of the meaning of convergence and technological change across nations, its importance for regulators over time, and the different perspectives with which to assess its impact are clearly among the most important threshold issues to address, before it is possible to consider specific regulatory responses at for instance a pan-European level.<sup>8</sup>

Moreover, the massive transformations in the media sector, brought about by technological convergence, economic liberalisation and globalisation of manufacturing processes, have resulted in major changes to media ownership patterns throughout the world. Media ownership that was once bounded by the geographical limitations of the nation-state has become transnational. Transparency of media ownership structures and guarantees of pluralism are challenges for every government and institution. The need for global mapping

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7. Anthony Giddens The Reith Lecture Series: New World without an End, The Observer, April 11

8. For a discussion of the need for comparison of the approaches to convergence see Stefaan Verhulst and Chris Marsden, *Convergence in European Digital TV Regulation*. London: Blackstone, 1999.

of media ownership and control patterns has become a major motivator behind comparative media research.<sup>9</sup>

These transformations, however, are more than changing the way media are controlled and analysed; they are also changing the regulatory mechanisms for the communications sector altogether. Self-regulation has, for instance, been suggested as a panacea for many of the current problems on the Internet. It illustrates the move away from traditional command-and-control regulation toward more and newer responsive regulatory systems. Clearly, to analyse self-regulation on the Internet the scope of study has to be transnational and comparative. Moreover, in order to examine, for instance, codes of conduct as effective responsive mechanisms to content concerns on the Internet, the units of analysis have to be the major transnational Internet Content and Service Providers (e.g., MSN, Yahoo, Google). Cross-institutional and cross-instrument research is therefore a new and important field of comparative media law research.

In addition to these technological and institutional transitions, a growing demand for comparative data exists in transitional societies that are (re-)considering the balance between state regulatory prerogatives and the freedom of media outlets. The post-Cold War period has not only opened previously inaccessible countries for a comparative media law perspective, but has demonstrated that the shaping of media laws and administrative agencies involved in implementing them are key determinants in the emergence of stable democracies. Much, in addition, has been learned during this period about styles of preparing laws, needs of groups involved in improving the process and entities dedicated to establishing a media sphere that includes independent newspapers, television and radio stations.<sup>10</sup> In some societies, there has been the challenge of inventing a media law where none existed before. In others, where a government or regime has been discredited and where control of the press was characteristic of its excesses, revision of the media law is often necessary. In a third group of societies, often in the post-Soviet transition, there are difficulties in providing technical assistance in implementing media laws and revising flaws in a first generation of legislative reforms. Problems exist because of the lack of reliable information about regulatory models, legal and societal changes within a given state, challenges of new technologies and changes in the international scheme of trading and regulation with respect to the media. Often, groups participating in the process of media law improvement (as a step toward enhancing the role of the press in a democratic society) do not have an adequate sense of the Western or neighbouring models available and how they might be interpreted and adjusted. Hence, more cross-national media law studies than ever before are being carried out and the demand for comparisons across countries is immense.

Finally, the demand for comparative media law research is also dispersed over time. It may be most intense while a statute is being drafted or debated, or a new technology is being introduced, but it is equally valuable during implementation, even though the requirement for discourse and alternatives may not be so evident. To be responsive, media law research must be able to react to these rhythms of demand.

### ***Comparative Media Law Research***

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9. See Monroe Price, *Media and Sovereignty: The Global Information Revolution and Its Challenge to State Power*, MIT Press, 2002.
  10. See Monroe Price and Peter Krug, *Media Law Enabling Environment*. Washington: USAID, 2000. See also Peter Krug and Monroe Price, "A Module for Media Intervention: Content Regulation in Post-Conflict Zones," *Cardozo Law School, Public Law Research Paper No. 58*.

Comparisons are an integral part of most sciences. Many scholars would therefore argue that the very nature of their method is comparative and that thinking in comparative terms is inherent to their research. In truth, no phenomenon can be isolated and studied without comparing it to other phenomena. This is certainly (or especially) the case for law as well as for media related issues: the two major strands that make up comparative media law. The question may therefore be posed whether comparative media law research presents a different set of theoretical, methodological and epistemological challenges, or whether this kind of analysis must be treated just as another variant of the (comparative) problems already embedded in traditional law and/or media research.

One could take the view that conducting comparative research across countries is no different from conducting any other kind of media and/or legal research. Another approach is to pursue comparisons without considering whether the research adds to the complexity of interpreting the results of the study. Our view is that it is necessary to be aware of the many problems of doing comparative research in a world of complex interdependencies. Without becoming paralysed in the face of these complexities, it is important to go ahead, opting for compromise and trying to use existing tools for new insights.<sup>11</sup> To advance our knowledge about comparative media law research it is necessary to consider some distinctive characteristics of comparative studies.

Not all comparative studies are alike. Several distinctions within comparative research can and should be made. One can, for instance, distinguish two broad types of research in comparative media law research. Exponents of *micro-comparison* analyse the laws belonging to the same legal family, within a single jurisdiction. Researchers pledged to *macro-comparison*, on the other hand, investigate laws in different jurisdictions in order to gain insight into alien institutions and thought processes.<sup>12</sup> For some legal scholars, concerned mainly with legal technicalities, micro-comparison holds the greater attraction, whereas macro-comparison is the realm of the political scientist or legal philosopher, who sees law as a social science and is interested in its role in government and the organisation of the community. Micro-comparison appears to demand no particular preparation. A specialist in one national system considers himself or herself qualified to study those of various other countries of the same general family. His main need is access to bibliographical material. But even this mechanical approach avoids certain built in problems we deal with later. With macro-comparison, no comparison is possible without identifying and thoroughly mastering the fundamentals of the legal and social systems as they differ from place to place. The scholar must, as it were, subvert his own background and seek to reason according to new criteria.

Within comparative media law, both types of investigation are often employed. In analysing regulatory responses to the changing media,<sup>13</sup> for instance, both micro- and macro-comparisons can be used. Micro-comparison then takes priority when a range of regulatory challenges and problems, such as data protection, competition, content control and others are examined within a specific nation and described by a country expert. Macro-comparison

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11. See Else Oyen, *The Imperfection of Comparisons*. In : Else Oyen (ed.), *Comparative Methodology. Theory and Practice in International Social Research*. London: Sage, 1990, pp. 1- 18

12. One may however argue that a micro-comparison always implies a macro as well and vice versa.

13. See Stefaan Verhulst, David Goldberg and Tony Prosser. *Regulating the Changing Media. A comparative study*. Oxford: Clarendon Press, 1999



follows when the research project managers compare the selected jurisdictions and their detailed descriptions.<sup>14</sup>

Many similar distinctions,<sup>15</sup> for example between heterogeneous and homogenous comparative research, can be made. One particularly useful distinction is between vertical and horizontal comparison.<sup>16</sup> Vertical comparison concerns social and legal contexts showing different levels of economic and technological development, such as Internet penetration or take-up of digital television. Horizontal comparison is concerned with contexts sharing a relatively similar level of economic and technological development, but largely differing in their development, their production organisation, their political and legal regime and/or other relevant characteristics.

Again, many comparative media law research projects may combine both approaches. For example, the European Commission launched a research project in 1997 called ESIS (for European Survey of Information Society<sup>17</sup>), with the objective of comparing European data concerning new regulatory developments in the field of telecommunications and Information Society as well as presenting a mapping of the actors offering Information Society infrastructure, services and applications. The project was extended to Central and Eastern European countries and the Mediterranean countries in 1999. These two regions were compared from a vertical perspective and within the regions it was obvious that, for example, Albania and Poland differed from each other substantially in a macro way. Tunisia and Morocco, however, were compared from a more horizontal and micro-comparative perspective. Clearly, as is described below, different types of problems arise with regard to both kinds of comparison.

Another way of considering comparative media law research as a distinctive method is to look at the paradigm field in which it operates. At least four conflicting models and poles underpin most comparative media law projects:

### **Uniformity and Diversity Paradigm**

Because of globalisation and the creation of free markets, it is predicted that media laws and policies will present a considerable measure of similarity and uniformity, at least with respect to communications infrastructure and economic regulation. Yet, owing to the endurance of

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14. For examples of macro research, see:

Chris Dent, "Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers," *Media & Arts Law Review*, Vol. 9, No. 2, pp. 89-112, 2004.

Chesterman, Michael, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America," 45 *Am. J. Comp. L.* 109 (1997)

Klik, Peter, "Mass Media and Offers to the Public: An Economic Analysis of Dutch Civil Law and American Common Law," 36 *Am. J. Comp. L.* 236 (1988).

For an example that includes both macro and micro-research, see Kati Suominen, "Access to Information in Latin America and the Caribbean," *Comparative Media Law Journal*, 2, 2003, p. 29.

15. Kohn identifies for instance four kinds of comparative research on the basis of the different intent of the studies. Countries can be (1) the object of the study – the interest of the researcher lies primarily in the countries studied, (2) the context of the study – the interest is mainly vested in testing the generality of research results concerning social phenomena in the countries compared, (3) the units of analysis – where the interest is chiefly to investigate how social phenomena are systematically related to characteristics of the countries researched, and (4) trans-national – namely studies that treat nations as components of a larger international system. See Melvin Kohn, *Cross-National Research in Sociology*. Newbury Park: Sage, 1989.

16. See Vincenzo Ferrari, *Socio-Legal Concepts and their Comparison*. In: Else Oyen, *Comparative Methodology: Theory and Practice in International Social Research*. London: Sage, 1990. p. 67

17. See <http://www.eu-esis.org/esis2pres/esis2pres.htm>

social traditions or cultural preferences that are still quite different in many parts of the world, there is and will be much less harmony between the rules dealing with content. Moreover, diversities of media law within one country may also exist on an ethnic, religious or federalist basis. Even within national borders, differences still exist, for instance, among the *Länder* of Germany towards media regulation.

Searching for uniformity and unearthing and explaining diversity lie at the heart of comparative media law research. Comparative media law considers the benefits and burdens of uniformity and plumbs the contexts demanding diversity and tries to establish a terminology that enables comparison. Comparative research has moved from justification for uniformity to studying the uniqueness and variety among homogeneity.<sup>18</sup>

### **Rhetoric and Reality**

One interesting challenge of comparative research is to face the "grass is greener on the other side" syndrome, or in some cases, "dark side of the moon" comparisons. Indeed, comparisons are often used by vested interests (e.g., incumbent operators) to prove, for reasons of political or rhetorical expediency, the effectiveness or harmfulness of a specific foreign policy. Comparative data, in particular, is sometimes utilized in a deliberately muddled way to advance a particular agenda. One key task of comparative media law research, as with all methodologies, is to put legal and policy practices within their appropriate contexts to create a better understanding of reality rather than ammunition for exchanges of heated rhetoric.

### **Metaphors and Models**

During the process of comparative thinking about the global restructuring of the media and when conceptualising regulatory responses, two specific techniques are often applied: the methods of model and metaphor.<sup>19</sup> First, comparing the experience of others, proponents of one system or another invoke what they deem to be a "model" for imitation, such as looking at the BBC for public broadcasting or the "newspaper model" for regulation. The second technique for conceptualisation involves the use of metaphors to simplify the task of articulating the path of change, such as the metaphors of the "information superhighway," "cyberspace" or "killer applications." Metaphors and models are useful and common tools within comparative research and analysis. They can help guide researchers and policy makers through uncharted territory.<sup>20</sup> But there are limitations. Metaphors can be poetic devices that wrap complex ideas in appealing words; they can be used to persuade even when acceptance is not wholly warranted. Both metaphors and models can be shortcuts that avoid more complex reasoning.<sup>21</sup>

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18. See Bernd Holznapel, "New challenges: Convergence of markets, divergence of the laws? - Questions regarding the future communications regulation," *Int'l Jnl of communications law and policy*, Web-Doc 5-2-1999. Available at [http://www.ijclp.org/2\\_1999/ijclp\\_webdoc\\_5\\_2\\_1999.html](http://www.ijclp.org/2_1999/ijclp_webdoc_5_2_1999.html)

Eko, Lyombe. "Many Spiders, One World Wide Web: Towards a Typology of Internet Regulation." *Communication Law and Policy* 6.3 (2001): 445-84.

19. See Monroe Price, Chapter 2. *Media and Sovereignty*. MIT Press, 2002

21. For discussions of the uses of metaphors and models, see:

Stefaan Verhulst and Monroe Price, "In Search of the Self: Charting the Course of Self-Regulation on the Internet in a Global Environment," *Cardozo Law School, Public Law Working Paper No. 015*

Verhulst and Price, "Privatization and Self-Regulation as Tropes of Global Media Restructuring," *Cardozo Law School, Public Law Working Paper No. 010*

Price, Monroe E., "Market for Loyalties and the Uses of Comparative Media Law," *5 Cardozo J. Int'l & Comp. L.* 445 (1997).

20. It has also been claimed that in the case of the Internet for instance any metaphor will fail because of its uniqueness. For a further analysis of the role of metaphors see Raymond Gozzi, Jr., *The Power of Metaphor in the Age of Electronic Media*. New Jersey: Hampton Press, 1999.

### **Transfer and Exclusion**

Comparative media law research provides the evidence for the use of models and metaphors in policy or law transfer debates. The basic thrust of current theories of policy and law transfer<sup>22</sup> is the idea that law and policy diffusion is a process explained by imitation, copying and adaptation on the part of policy-makers. Comparative media law and policy plays a crucial role within this process of identifying "success policies" and best practices that can then be exported to other countries via a process of learning, interpretation and even translation. Lesson drawing<sup>23</sup>, as a process of interpretation and translation, is a major goal of comparative media law. In some exceptional cases, comparative media law has also been used for "forced" policy and law transfer, by conditioning on the adoption of certain media policies financial assistance or other incentives and even to determine exclusion from membership to specific international authorities, such as the Council of Europe.<sup>24</sup>

### **Functions and Aims of Comparative Media Law**

From the above, it may be obvious that comparative media law research serves multiple aims and functions. In general and at a more epistemological level, one could define comparative research as an "ecole de verite," a methodology that seeks to supply comparative solutions and a better international understanding. More concretely, at least four key uses for comparative media law research can be identified: further study of historical and cultural components, commercial application, legislative assistance, and international law and harmonisation.

### **Historical and cultural relativism**

We may view comparative media law from the standpoint of its value to the historical and cultural study of legal and policy decision-making in the field of communications (including the political economy of policymaking). Ideas regarding the place of law in society, the nature of the law itself and its relationship with new communications technologies become appreciably clearer when comparative law is joined to historical research. Indeed, to some extent, historical background may aid in forecasting the future of certain national systems and the applicability of existing law to new tendencies. A closely related consideration prompts many Western jurists, political scientists, and sociologists to acquaint themselves with non-Western methods of reasoning. For example, comparative studies can reveal that sources and conceptions of free speech and its role vary widely. The notions of a rule of law and of rights of the individual - fundamental to Western civilisation - are not wholly recognised by societies that, faithful to the principle of conciliation and concerned primarily with harmony within the group, do not favour excessive Western-style individualism or the modern Western ideal of legal supremacy. These differences may be used as a justification for authoritarian rule, but they also may reflect important variances in structuring the relationship of the

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22. For an overview of the policy transfer literature see David Dolowitz and David Marsh, "Who Learns from Whom: a review of the policy transfer literature," In *Policy Studies* XLIV, 1996, pp. 343-357. The law transfer process has been described in James A. Gardner, "Legal Imperialism: American Lawyers and Foreign Aid in Latin America," 14, 1980

23. See for instance Bennet, Colin and Michael Howlett, "The lessons of learning: Reconciling theories of policy learning and policy change," *Policy Sciences*, 25, 1992, pp. 275-294.

24. For a good discussion of policy transfer within the new EU accession states, see Alison Harcourt, "The Regulation of Media Markets in selected EU Accession States in Central and Eastern Europe," *European Law Journal*, Volume 9 Issue 3 Page 316, 2003.

individual and society. Comparative law may enable an improved understanding from a viewpoint of historical and cultural relativism.<sup>25</sup>

### Commercial uses

Comparative media law may be used for essentially practical ends. Industry leaders, for instance, need to know what benefits they can expect, what risks they may run, and generally how they should invest capital or run businesses abroad. This practical aspect has encouraged the growth of comparative law in the United States, where the essential aim of law school has been usually to turn out practitioners; and one need hardly mention the strong link in Germany between big industry and the various institutes of comparative law. Sometimes it is said that studies with such a focus should not be considered a part of comparative media law, but practical considerations certainly have helped to finance and promote the development of comparative legal studies in general.<sup>26</sup>

### Aid to legislators

The re-mapping of communications structures because of all kinds of transitions (from planned economies to free markets, from analogue to digital, from war to peace) requires an ongoing reform of legal systems. When considering new regulatory frameworks, policy-makers and legislators quite often have a desire to identify foreign models that already have been tested, instead of framing a new, revolutionary system. Seeking foreign inspiration for a number of legal rules or institutions is a well-known phenomenon; sometimes so all-embracing that one speaks of “reception” or “transfer.” The study of comparative media law is therefore used by legislators to identify “transferable models” and has found a special place among scholars in those countries where such a reception or transfer has occurred.<sup>27</sup>

### Use in international law

Globalisation of communications and the growth of the Internet have led to calls for more international and regional efforts to harmonise the regulatory framework of specific transactions. Those engaging in cross-border communications, for instance, do not know with certainty which national law will regulate their content, since the answer depends to a large extent on a generally undecided factor, namely, which national court will be called upon to decide the questions of competence. The sole lasting remedy appears to be the development of a more harmonised international system. The development of the TV without Frontiers Directive in 1989 (reviewed in 1997 and recently) was a regional answer to a similar call from transnational satellite broadcasters. Harmonisation can succeed only through the medium of comparative law. Regional authorities are highly dependent on comparative material in order to identify policy issues and monitor, for instance, the implementation of existing multilateral agreements or to highlight the need for action in certain areas. An important function,

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25. See Richard Ross, “Communications Revolutions and Legal Culture: An Elusive Relationship,” *Law and Social Inquiry*, Vol. 27, No. 3, pp. 637-684, 2002.

Wei Li et al (2001), “The Political Economy of Privatisation and Competition: Cross-Country Evidence from the Telecommunications Sector,” Discussion paper No. 2585. London: Centre for Economic Policy Research. Available at <http://www.cepr.org/pubs/new-dps/dplist.asp?dpno=2825>.

26. For an example of comparative legal research with business applicability see Urs Gasser, “iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media - A Case Study,” Berkman Center for Internet & Society at Harvard Law School Research, Publication No. 2004-07.

27. See Christina Spyrelli, “Regulating the regulators? An assessment of institutional structures and procedural rules of national regulatory authorities,” *Int'l Jnl of Communications Law and Policy*, IJCLP Web-Doc 1-8-2004. Available at [http://www.digital-law.net/IJCLP/8\\_2004/ijclp\\_webdoc\\_1\\_8\\_2004.htm](http://www.digital-law.net/IJCLP/8_2004/ijclp_webdoc_1_8_2004.htm)

therefore, of comparative law research is its significant role in the preparation of projects for the international unification of law.<sup>28</sup>

### ***Methodological Problems***

Despite growing demand and multiple benefits, comparative media law studies are still at the pioneering stage<sup>29</sup> and are both difficult and risky. It is therefore necessary to examine the limitations and potential pitfalls of such studies. Comparative research in general poses certain well-known problems (e.g., accessing comparable data<sup>30</sup> and comparing concepts and research parameters).<sup>31</sup> Additionally, when comparing different jurisdictions and legal systems, researchers may be subject to further pitfalls: (1) Clashing linguistic and terminological perspectives; (2) cultural differences between legal systems; (3) potential arbitrariness in the selection of objects of study; (4) difficulties in achieving “comparability” in comparison; (5) the desire to see a common legal pattern in legal systems (the theory of a general pattern of development), (6) the tendency to impose one's own (native) legal conceptions and expectations on the systems being compared, and (7) dangers of exclusion/ignorance of extralegal rules.<sup>32</sup>

As for comparative media law specifically, one might observe three additional sources of limitations:<sup>33</sup> (1) Inadequate availability of statutory and secondary material for those engaged in comparative research; (2) the quick “expiration” of information due to the rapid and constant change of communications law (a process itself driven by rapid technological change); and (3) the possibility that information, even if available and correct, may not be easily summarised, compressed, or reduced to elements that are comparable. These are questions of organisation, terminology and presentation. Each of these potential difficulties is worth discussing briefly.

### **Limitations on Availability of Statutory and other Regulatory Sources**

Despite researchers’ expertise and experience in the field, the absence of ready, comprehensive and up-to-date material remains a definite limitation on the capacity to undertake meaningful comparative media law and policy research. This shortcoming restricts the way advocates and legislators can use comparative research in their process of reform. But, even if the statutes and decisions are available, formal language and legal terminology within statutory or regulatory material are potentially misleading as the exclusive source of

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28. The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law. The method used in the past and still often practiced today is to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law. See Cowhey, Peter F, 1990, “The International Telecommunications Regime: The Political Roots of Regimes for High Technology,” *International Organization*, 44: 2, 1990, pp. 169-99.
30. For some notable contributions comparing media laws, see Eric Barendt, *Broadcasting Law: A Comparative Study*. Oxford: OUP, 1993 and Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries*, 1996
31. See Margaret Stacey, *Comparability in Social Research*. London: Heinemann, 1969
32. See Linda Hantrais & Steen Mangen, *Cross-National Research Methods in the Social Sciences*. Pinter Publishers, 1996.
33. See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*. Oxford: OUP, 1989
34. See Stefaan Verhulst and Monroe Price, *A Methodological Perspective on the Use of Comparative Media Law*. In: Monroe Price and Stefaan Verhulst, *Broadcasting Reform in India. Media Law from a Global Perspective*. OUP, 1998

law.<sup>34</sup> Words alone do not convey the manner in which concepts are variously carried out and enforced. In some societies, a formal prohibition may be quite strict, but the practice may be quite lenient. A similar divergence may exist when interpreting constitutional principles, such as freedom of speech.

### **The Speed of Change of Regulation and Law within the Communications Sector**

A second potential difficulty has to do with the pace of change. Comparative research usually provides only a snapshot of regulatory formations when a motion picture is required. While this is a problem of research generally, and certainly of research that depicts the way in which the world is organised as of a certain date, it is particularly true in the area of telecommunications and broadcasting, where technological innovation often outstrips legal developments. Thus the need to keep up-to-date with fast-moving technological change often muddies the waters for would-be comparatists. In particular, convergence, a favourite doctrine of regulation analysts, suggests that existing categories for regulation are being confounded.<sup>35</sup>

### **Limitations Based on Selection, Comparability and Simplification**

The comparability of regulatory regimes depends on a number of factors, some constant, many transient. Some commentators<sup>36</sup> list the following determinative factors: the cultural, political and economic components of a society, the particular relationships that exist between the state and its citizens, a society's value system and its particular conception of the individual. Other general factors include the homogeneity of the society in question and its geographical situation, language and religion. It is indeed difficult to find countries that have achieved a similar stage of development in those areas.

Even more difficult than the problem of selection is the problem of simplification and definition: almost all forms of comparison require the articulation of similarities so that resemblance and differences can be noted. Therefore, a related problem to be addressed in any comparative study is one of context. In terms of media law and policy, for example, it is important to understand the reasons why a comparison is being made, reasons that may not have to do with the law itself, but with the objectives of law. Often the goal of a broadcast regulatory structure is to increase the diversity of voices or to enhance the right of a citizen to receive or impart information. A restriction on foreign ownership may have an impact in a society rich in broadcast signals that is totally different from that in one where such signals are few and competition is just beginning.

### ***Strategy and Conclusion***

If we are to overcome these stumbling blocks to comparative research, compromises and methodological strategies have to be adopted. In many cases, simply being aware of the limitations and risks may offer preventive solutions to the comparative methodological problems. In addition, according to Rosengren, McLeod and Blumler, there are three

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35. A fairly extensive literature acknowledging the importance of language as a factor in comparative research and law exists. See, e.g., Bernhard Grossfeld, *The Strength And Weakness Of Comparative Law* Ch. 13, 1990.

36. For two good discussions of the interaction between legal and technological change, see Kohl, Uta (1994), "Legal Reasoning and Legal Change in the Age of the Internet—Why the Ground Rules are still Valid," *International Journal of Law and Information Technology* (7:2), p. 123; and Lessig, Lawrence (1999a), *Code and Other Laws of Cyberspace*. New York: Basic Books.

37. See, e.g., Peter de Cruz, *A Modern Approach to Comparative Law*. Oxford: OUP, 1993

fundamental tasks that need to be carried out in all comparative studies, whether temporally or spatially oriented:<sup>37</sup>

- *Identifying a set of basic parameters and their structural interrelationships;*
- *Measuring the parameter values, as well as assessing the strength of their relationship; and*
- *Comparing differences and similarities in parameter values and structural relationship over space, as well as charting the development of parameter values and structural relationships over time.*

According to the authors, the first task is primarily a theoretical one, the second is an empirical one and the third represents the essence of comparative research. A successfully tested method within this set of tasks is the creation of a uniform template that indicates and defines the parameters and allows consistency and coherent comparisons, as well as flexibility and functionality. When drafting the template, parameters should clearly be theoretically justified and founded. If they are embedded in a theory, they are potentially theoretically relevant. (Indeed, in many cases, the central problem of comparative media law research is not technical but theoretical). Moreover, experience has proven that the empirical implementation is best approached via a “federalistic project management” by which “native scholars” measure the parameters within their own region or country. As Rosengren et al. also note:<sup>38</sup>

*In order to be really successful, comparative research demands that - at least in the long run - all three types of tasks be solved. There is a natural order in solving the tasks and it is only in the nature of things that progress is quite differential in varied areas and fields of research*

This is just one among many possible strategies to deal with the challenges we have outlined above. The primary purpose of this paper, as we stated at the outset, was to examine the benefits, challenges and current approaches in comparative media law studies. The demand has been growing at a dramatic rate in recent years. To an extent, some of the challenges can be attributed to this rapid growth. These are but growing pains, and in the coming years we can expect that some of the conceptual and theoretical vagueness that afflict the field will gradually solidify. Nonetheless, it is essential that researchers conduct their work while remaining aware of the bigger picture (including the challenges confronted by their field). We are not just conducting research in a vacuum, but as part of something bigger; every piece of comparative research is also an act of definition, contributing to a better understanding of the field itself.

Finally, it is worth noting that this act of definition is one of the key tasks remaining in the years ahead. As with all inter-disciplinary disciplines (and particularly nascent ones), comparative media studies are always in danger of being subsumed by a sub- or parent-discipline. This can be added to the list of challenges mentioned above. Yet as we have seen in this paper, the field has its own unique identity, and its own distinctive set of contributions to make. Comparative media researchers therefore have the possibility not only of

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38. See Jay C. Blumler, Jack M. McLeod and Karl Erik Rosengren, (Ed.) *Comparatively Speaking: Communication and Culture Across Space and Time*. London: Sage Annual Reviews of Communication Research, Volume 19, 1992, p. 287.

39. Id.

Verhulst and Price: Comparative Media Law Research and its Impact on Policy  
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contributing to the definition of a new field; in the process, they will also sharpen that field's insights, and enhance its many contributions.



## **A Pilgrim's Progress: The Development of PolicyArchive: An Online Bridge between the Research and Policy Communities**

Tracy Westen

***“A Pilgrim's Progress: From This World to That Which Is to Come: Delivered under the Similitude of a Dream, wherein is Discovered the Manner of his Setting Out, his Dangerous Journey; and Safe Arrival at the Defined Country.***

*“As I walked through the wilderness of this world, I lighted on a certain place where was a Den, and I laid me down in that place to sleep: and, as I slept, I dreamed a dream. I dreamed, and behold, I saw a man clothed with rags, standing in a certain place, with his face from his own house, a book in his hand, and a great burden upon his back. I looked, and saw him open the book, and read therein; and, as he read, he wept, and trembled; and, not being able longer to contain, he brake out with a lamentable cry, saying, “What shall I do?”*”

— From the title and opening paragraph of  
*A Pilgrim's Progress*, John Bunyan (1678)

In 1996, holding one of my own books in my hand, a book that had taken over two years and thousands of hours of research by a small team of lawyers and researchers at the Center for Governmental Studies (CGS) to produce, I began to wonder, after all our attempts to publicize the existence of this significant book:

“Why don't more people—and in particular legislators who have the power to implement its recommendations—even know that this book exists?”

And then, “Why isn't this book online?”

And then, “Why isn't all public policy research available online?”

That thought started me on a “Pilgrim's Progress,” a “Dangerous Journey” and—I hope, possibly, in March 2008—an impending “Safe Arrival” at the launch of a new website, PolicyArchive, that my colleagues and I at CGS have created to archive the world's public policy research and make it available to policymakers and other users without charge. That website is now up and running, and we are preparing for its formal launch (see [www.PolicyArchive.org](http://www.PolicyArchive.org)).

### ***“The Similitude of a Dream”***

In 1996, the Rockefeller Foundation asked me to make a presentation to a foundation conference

on “Philanthropy and the Internet.” I had been teaching communications law and policy for a number of years, both at UCLA Law School and USC Annenberg School of Communication. I had also founded a think tank, the Center for Governmental Studies (CGS), to develop policy recommendations to improve state and local governance and to develop new media systems to encourage citizens to participate in the democratic process. We had built a C-SPAN for California (The California Channel) and developed a website (Democracy Network) to allow candidates for political office to debate each other online.

As I began to think about the role of Philanthropy and the Internet, I reflected on our own experience at CGS. We would apply for and receive foundation grants to research and publish reports on significant aspects of public policy (campaign financing, ballot initiative reform, redistricting, term limits, voter information, electoral systems, etc.). After months or years of research, we would publish our findings and recommendations in a book or report. We would send individual copies to the governor, all state legislators, the media, opinion leaders and academics in the field. We would hold press conferences, distribute press releases and place full texts online.

Despite these efforts, it became clear that, after a few months, most people in the relevant public policy fields did not know of the book. They had forgotten, lost or mislaid it. Over time, as legislative staff turned over and were replaced, new staffers knew nothing of the research. Legislators received so many reports that they simply could not remember individual volumes.

It occurred to me that the Internet offered a solution. Since foundations often funded public policy research, why shouldn't they help create a website that would archive and make available their research online? The value of their funding would be immeasurably extended. Policymakers would have instant access to policy research when they needed it: when they were drafting administrative rules or legislation.

Over a weekend, a colleague of mine, Area Madaras, mocked up a website prototype to illustrate the notion. It simulated the process by which users could find the public policy research they needed. It allowed researchers to upload their own research and users to download that research free of charge. It also allowed users to obtain information on the foundations that funded the research, the publishing organizations or universities sponsoring the research, the authors of the publications and even the geographic areas in which research organizations or universities were located—enabling interested persons to contact those organizations, contribute funding or even volunteer their services.

I showed the prototype to 10 or more foundation program officers at the conference. They were interested, even excited, and several thought it might make an important contribution to the research world. When I followed up with several of them to obtain funding to create a working prototype, no funding ensued. Since a number of them had only recently begun to use email themselves, perhaps the thought of funding a website to archive public policy research might have seemed a bit fantastical.

I shelved the idea for several years.

### ***“The Manner of His Setting Out”***

#### **Analysis of the Use of Public Policy Research by Policymakers**

On a separate track, I obtained a foundation grant to study the need for a Sacramento-based think tank that could assist legislators in obtaining relevant public policy research to use in drafting legislation. I was struck by the fact that policymakers in Washington, DC were ringed with dozens if not hundreds of think tanks, all offering policy research, but that Sacramento had no comparable institutions. My colleague Walter Zelman and I therefore undertook a study of this issue, conducting over 100 interviews with academics and policy makers mostly in Sacramento and Washington, DC. From these interviews, a clear message emerged: *Legislators are swamped with public policy research, but they can never find it when they need it.*

This and a number of other obstacles apparently impeded the use of public policy research by policymakers. Specifically:

- Research materials, when relevant to policymaking, are often produced in formats that are too academic, too long, and not geared for policymakers who have limited time to review issues.
- The California research community produces a limited amount of policy-relevant material. In comparison with federal issue research, relatively few researchers concentrate on state issues.
- Tenure is such an overpowering necessity that academic researchers who might wish to engage in policy- or public administration-oriented research find themselves discouraged from doing so. Academia rewards original research and theoretical research, not applied policy research. (This may be less true with regard to public policy schools, which seem more willing to engage in policy-related research.)
- Few researchers take the time necessary to establish personal or institutional connections that enable them easily to access relevant state policymakers. Building such ties takes effort, but most academics either are not interested enough to make these connections, do not know how to, or do not have the time to make and maintain them.

Of particular relevance to PolicyArchive, we found that:

- Research timetables often do not fit policymaker schedules. Researchers may spend a year or years developing their ideas; policymakers need those ideas yesterday. Policymakers are often frustrated with slow academic research timetables and therefore look to other sources for ideas.
- Valuable ideas and information produced in 2001 policy papers may “be sitting on the shelf” in 2003 or 2005 when they are needed. Policymakers who might benefit from them remain unaware of their existence.

Of special interest were the comments of Mark Peterson, Chair of the UCLA Department of Public Policy, Professor of Public Policy and Political Science and a former Legislative Assistant for Health Policy to former U.S. Senator Tom Daschle. He endorsed the PolicyArchive concept, writing:

“In each of [my] capacities, I have experienced how difficult it is to identify quickly (or at all), collect, synthesize, and utilize the overwhelming body of policy-relevant research that is supported by private foundations and government agencies, conducted by experts in the field, but not typically made available (certainly not in any sort of timely fashion) through the usual paths of academic publication. As a Senate legislative aide, my colleagues and I were constantly grappling with important empirical policy questions with little time or opportunity to find out and assimilate what policy researchers had ascertained or what factors produced either analytical consensus or disagreement.

“At a meeting some years ago of the national advisory committee for the RWJU HCFO program, I vividly recall the Medicaid director from one of the largest states in the country deeply lamenting that she was going to have to make profound policy decisions about the implementation of managed care in Medicaid without the benefit of work from the analytical community, because it was hard to find and not yet accessible. . . . Our search for relevant policy work depended on a combination of hit or miss.”

“In short, in all of my capacities—as a researcher, teachers, consultant and policy adviser—I have had the same experience of wanting and needing access to the extant comprehensive policy research on a subject, but having no easy way to obtain it. I would assume that the problem is even more pronounced for policymakers operating in environments with relatively limited staff resources, such as many state legislatures, county commissions, city councils, and executive offices.”

### **Development of PolicyArchive.Net**

In 2002, I returned to the PolicyArchive project. This time we did additional research and learned a number of significant facts:

- American philanthropic foundations spend over \$1.5 billion a year on research (Foundation Center statistics, 2006).
- Identifying and obtaining copies of this research, however, can often be difficult. Catalogues of current research do not exist or are not widely available. Individual monographs fall out of print. Reports are not digitized and put online. Search engines are limited in their ability to locate public interest research.
- If a digital copy of a report is not placed online, or coded in specific formats, search

engines may not find it. Some nonprofit research organizations at the time lack the time or capacity to do this, or they lack the expertise to code their research in the multiple formats necessary for efficient search engine detection.

- Even research that is placed online may not be detected by many search engines. Search engine techniques vary widely. Some search engines will not find documents unless each page or document is manually registered with the search engine by the organization that produced it. Some search engines will not find research without meta-tags placed on the website. Some will not search the text of PDF files. Some look at the content of a page, others just look at the title. Some automated systems return irrelevant results. Some search engines take over five months to list new sites, making timely research invisible on the Internet. Finding a specific report or piece of research, therefore, depends on the authoring organization's ability to catalogue and program pages in a way that will reveal it easily to a typical search. Authors must be able to do this in multiple formats or search engines may miss them altogether.
- Even if a search engine does find a document, it will probably appear so far down the list that it will be missed by most users. Search engines can return over 1 million results on a single search, yet surveys show that users rarely look past the first page or two of results, and over 80% do not look past the third page. Research that does not appear until page 30 of a search engine tabulation will almost never be found.
- Some search engines rank results according to the number of sites that link to a particular page. Most public interest research will not have many other websites linking to it, at least not in the early weeks of release, so that it will not show up in even the first five or ten pages of results.
- Some search engines are paid to place certain websites at the top of their lists. It is unlikely that public interest organizations will pay to have search engines rank their research highly.

We conducted our own tests of these findings. We selected two documents funded or directly published by each of several foundations (Carnegie, Ford and MacArthur). We entered the author and title of these publications in Google and Yahoo and they immediately turned up as the first return. By this we knew that the documents were online and discoverable. Then, assuming that a researcher did not know the author and title of these publications, we selected keywords reasonably descriptive of the documents and entered them into Google and Yahoo. This time, the documents did not appear by page 55 of the results—at which point we abandoned the search.

We concluded from this research that even if research information is available online, it is often difficult or impossible to find. Search engines are excellent tools for scouring the vast web but less than perfect for finding specific pieces of research. For this reason, specialty databases exist—like Medline for the medical field and Lexis-Nexis for the legal community. No such database existed for public policy research.

## **Design of PolicyArchive**

I began to sketch the outlines of the ideal public policy research website. It would have the following features:

- **Free:** A free, indexed, searchable database of research abstracts and full texts of public policy documents, accessible by subject matter, keyword, grantee, foundation or region.
- **Self Upload of Documents:** An automatic document upload feature allowing research producers to add their own research quickly and easily.
- **Email Notification of New Research:** An email notification service allowing producers to promote their publications and interested parties to learn of new research.
- **Bookshelf:** A personalized “bookshelf” that will contain all the publications a user wishes to retain.
- **Background Information on Publishers:** An information feature that will describe research and funding organizations, including contact information and links to their websites.
- **User Evaluations:** A star-rating system allowing readers to grade research papers and opportunities for them to comment on them.
- **Statistics on Usage:** A statistical package allowing research producers to track the number of their readers and obtain some information on them (e.g., from a.gov or .edu email, or possibly from identifiable geographical regions, etc.).

The benefits of this approach also seemed significant. An online public policy archive would:

- Offer policymakers, research users, the media and the public a one-stop source for foundation-supported, government, academic, private and international policy research.
- Provide public interest organizations with a low-cost system for distributing, publicizing and archiving their research.
- Allow foundations to determine quickly what research has been completed, what organizations are working in specific fields, and how effective their funding practices have been.
- Add significant value to foundation research grants by making the resulting reports easily locatable.
- Preserve the life of public policy research indefinitely, substantially increase its impact and provide long-term permanent access to the benefits of that research.

We then conducted a survey of over 40 think tanks and research producing organizations. Almost all of them cited the need for PolicyArchive. Judith Krug, President of the American Library Association, summarized the comments of many in saying:

“It’s a wonderful idea. You have no idea how difficult is for me, as a librarian, to find the policy documents I need, or even to discover what documents exist in a specific field. I spend hours looking for research that this project might provide in

minutes. I think the idea would make my work enormously more efficient. I would use it all the time, in fact I'd go to it first" (2005 interview).

With foundations now spending over \$1.5 billion a year on research, for a small fraction of this sum, foundations could ensure that this research would be available in perpetuity, instantly accessible online, and without user fees.

### **"His Dangerous Journey"**

The next problem was fundraising: How could we raise the money necessary to build PolicyArchive?

I concluded the most promising source was charitable foundations. My message to them was simple.

*Foundations spend over \$1.5 billion a year on research. Most of it disappears within weeks or months. Your investment is being wasted. But for a cost of about three one-hundreds of one percent of what you now spend on research, we can create an online PolicyArchive that will preserve your research indefinitely and make it available worldwide to policymakers and other users—free of charge.*

I thought this message would be so clear and compelling that foundations would line up to fund PolicyArchive, especially foundations that supported policy research.

I was clearly wrong.

Some foundations said that this was a foundation-wide problem and that they didn't want to be the only one to fund it. Some wondered whether the quality of the research would be "up to snuff." Some wanted to know why research couldn't be found by existing search engines Google and Yahoo. Some wondered whether research organizations would contribute their research to PolicyArchive. Some asked if CGS had sufficient expertise to build PolicyArchive. Some wondered whether legislators and others would actually use PolicyArchive. Some asked how we would market PolicyArchive. Some questioned how PolicyArchive would become self-sustainable and independent of foundation funding.

I was frustrated but I switched gears. Instead of asking for funding to build PolicyArchive, I decided to solicit funding to conduct a *feasibility study into the desirability of building PolicyArchive*. I wanted to start creating PolicyArchive, but I had to prepare a more detailed plan. Fortunately, I received several small grants to do this, but the process still took at least a year.

We interviewed dozens of research organizations, received supporting letters from Congressmen and academics, analyzed the ability of search engines to find policy research, assembled panels of graduate students to assess the "quality" of existing public policy research, prepared long-term financial projections, and in general sought to answer all of the foundations questions. (Some responses appear in a document prepared for one

foundation—<http://www.policyarchive.net/HewlettPolicyArchiveFeasibilityReport.pdf>).

We then submitted a second round of detailed funding proposals. One major foundation that spends over \$100 million a year on public policy research took four years to analyze the proposal and finally concluded that it required funding from multiple program officers within the foundation—but then told me that there was no one in charge of coordinating such foundation-wide funding. Another concluded that if the research were not peer-reviewed, they weren't interested in funding the project.

### ***“Safe Arrival at the Defined Country”***

Fortunately, we did receive start-up funding from several far-sighted (my term) foundations. My colleagues Romulo Rivera and Maggie Stamelman and I created a partnership with the Indiana University Purdue University Indianapolis (IUPUI) University Library, selected the world's leading library database on which to build PolicyArchive (MIT-designed DSpace), created the web interface with the help of professional designers in Washington, DC, built a beta version with the help of Manakin software engineers at Texas A&M, consulted with copyright attorneys to solve distributorship problems, contacted dozens of research organizations to obtain research, uploaded (to date) almost 18,000 policy research documents, added metadata and abstracts where necessary and built Version 1.5 of PolicyArchive (see [www.PolicyArchive.org](http://www.PolicyArchive.org)).

We had to solve many problems along the way:

- How should the user interface be designed?
- Could anyone upload research—or just established research organizations?
- How would we know whether the uploader had obtained the copyright to the publication?
- Would uploading organizations ultimately pay a modest fee for the privilege (e.g., \$100 per upload)?
- Would think tanks participate by contributing research?
- Would the “quality” of the research be sufficiently high?
- Should we adopt a peer-review system, or let users assess the quality of the research themselves?
- Could we develop ways to provide indicators for quality—e.g., user comments, “star ratings” or rankings in terms of numbers of downloads?

We've now resolved most of these issues and are ready to launch.

Our tentative launch date is March 28, 2008.

We continue to believe that public policy will be immeasurably improved by instantaneous, ubiquitous access to the nation's—and ultimately the world's—public policy research. We believe that the Internet and Web offer the opportunities to build this bridge. We believe that PolicyArchive can provide a needed bridge between the two worlds of research and public



Westen/A Pilgrim's Progress: The Development of PolicyArchive  
*Please do not circulate without permission*

policy.

We may not yet have safely arrived “at the Defined Country,” but its borders are in sight.

## **The role of academic research in media policy-making: The case-study of Hong Kong**

YAN Mei Ning

### **Introduction**

1. Ideally, a government consults fully all the stakeholders before devising an important policy. In the process, the academic may make meaningful contributions by researching what kind of policy – and the detailed arrangements of that policy – would be in the public interest. Unfortunately, this is not the norm in Hong Kong. The following is an example that discusses the devising of broadcasting policy.

### **The major broadcasting policy-making exercise in the 1980s**

2. In Hong Kong, the biggest-ever review on broadcasting policy was conducted in the mid-1980s. In February 1984, the Governor-in-Council appointed the Broadcasting Review Board (BRB) to recommend the broadcasting policies to be adopted by the Government. This was done in anticipation of the 1988 and 1989 expiration of the territory's TV and radio licenses. The BRB conducted its review alongside with public consultation and submitted a report in mid-1987. The Hong Kong government took up some of the BRB's recommendations and soon came up with two major decisions: 1) revamping the regulatory mechanism for the territory's broadcasting industry and establishing the Broadcasting Authority (BA), which serves as the regulator for the broadcasting industry; and 2) inviting interested parties to launch cable television services. Nonetheless, the Hong Kong government did not take up some other important recommendations made by the BRB, such as 1) Turning Radio Television Hong Kong (RTHK), a government department until now, into an independent public broadcaster; and 2) setting up pilot scheme to test the feasibility of community radio stations. As will be mentioned below, the reluctance of the Hong Kong government to adopt these two recommendations has had serious repercussions in recent years.
3. It is not clear what Hong Kong academics contributed to the review exercise in 1986. The BRB was a high-powered committee chaired by a High Court judge, Mr. Justice Noel Power. It had eight official members, all heads of various government departments. The eight unofficial members included a member from the Executive Council, Hong Kong's cabinet, and a member from the Legislative Council. Amongst the other unofficial members was Professor Lam Yat-wah. As the BRB presented its research and recommendations as a group, further research had to be done to find out the exact contributions of Professor Lam. The BRB report listed in its annex A the names of people, groups and companies written to BRB during the review period. Further research is also needed to find out if any academics were amongst the some 200 individuals mentioned.
4. When the BRB report was published for consultation, according to the Hong Kong government, the report was greeted with widespread interest by the public and the media. The Hong Kong government received 777 submissions from individual members of the

public or groups of individuals; 91 submissions from 166 organizations and associations; and 73 submissions from commercial and industrial companies.<sup>1</sup>

5. It is interesting to note the following paragraph: “The BRB Report enjoyed less support from commercial and industrial sectors, whose attention was drawn to those recommendations which they felt were incompatible with normal business practices or which could be harmful to the commercial broadcasting industry, such as a ban on tobacco advertising, the proposal for the public broadcaster to monopolize prime time on commercial channels, and proposals aimed at limiting the corporate structure of commercial licensees.”<sup>2</sup> In 1987, Yan Mei Ning joined the news department of TVB, the free-to-air TV broadcaster commanding more than 70% of the viewership. Yan observed and was also told by colleagues that TVB lobbied hard, first for BRB to accept its views and later against many BRB recommendations which TVB didn’t like. Nonetheless, because of the BRB composition and the support by the general public towards most of the BRB recommendations, the lobbying by TVB seemed not so effective. This contrasted with what happened in later consultations exercised in the early 2000s.

### **Academics and the Broadcasting Authority membership**

6. The BA came into being in 1987. It is a statutory body responsible for broadcasting regulation. However, it is far from being an independent regulator because of its composition and operations. Of its twelve members, three are government officials; the nine other unofficial members, including the chairman, are all hand-picked by the Hong Kong government. There is always a mixture of lawyers, accountants, headmasters, academics and media professionals. One communications lecturer and one media law lecturer in turn served on the BA before the 1997 handover. Sources told Yan Mei Ning that the HKSAR government was reluctant to re-appoint the media law lecturer, who is also a human rights expert, after the 1997 handover. Instead, a professor specialized in economics and competition has served on the BA since then.
7. In Hong Kong, most government-appointed statutory or advisory bodies have the above-mentioned mixture of membership. The appointment process is far from transparent and accountable. Moreover, like many other such bodies, the BA conducts most of its meetings behind closed doors. It is therefore very difficult to gauge the contribution and competence of individual BA members. From interviews conducted in the past, the impression emerges that many BA members in their monthly meeting heavily relied on briefings prepared by the BA secretariat, which is a section of the Television and Entertainment Licensing Authority (TELA), a government department.

### **Policy-making and consultations since the late 1990s concerning issues arising from convergence**

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<sup>1</sup> See Administrative Services and Information Branch, Hong Kong Government (1986), A Summary of Public Opinion on The Broadcasting Review Board Report, para. 1.5

<sup>2</sup> See Administrative Services and Information Branch, Hong Kong Government (1986), A Summary of Public Opinion on The Broadcasting Review Board Report, para. 2.3.

8. The row between the British colonial government and the Chinese communist government in the early 1990s over the transitional arrangements of Hong Kong had prevented Hong Kong from devising an effective broadcasting policy to cope with convergence. It was one year after the 1997 Handover that the Hong Kong Special Administrative Region (HKSAR) government began to work on the policy issues arising from convergence. Since then, several major consultation papers have been published as shown in Table 1:<sup>3</sup>

Table 1: Consultations on major broadcasting policy issues arising from convergence

Feb. 1998	Review of the television environment
Sept. 1998	Review of television policy
Dec. 2000	First consultation on digital terrestrial broadcasting
Dec. 2003	Second consultation on digital terrestrial broadcasting
March 2006	Consultation on the establishment of the Communications Authority
Jan 2007	First consultation on mobile TV and related digital broadcasting matters
March 2007	The Committee on Public Service Broadcasting Review submitted its report to the HK government. As of today, the HK government has not published any consultation paper on this topic. Moreover, though this is a very important issue in broadcasting, it is not related to convergence
Jan 2008	Second consultation on mobile TV

9. The consultations listed in Table 1 were conducted in a manner markedly different from the BRB exercise. BRB consists of many unofficial members, including at least one member from the academic field, and these unofficial members had input into the BRB report. On the other hand, the consultation papers concerning convergence listed in Table 1 followed a regular pattern. They were researched and written in-house by government officials, like most consultation papers on other topics published by the HKSAR government in recent years. Currently, the Communications and Technology Branch is responsible for broadcasting policy. The officials writing up the consultation papers are administrative officers who have postings in different departments and, as a general rule, do not have expertise in broadcasting matters. They seek the assistance from the departmental officers in the TELA, who have years of experience in broadcasting regulatory matters. But the TELA only has a few officers in charge of research. The consultation papers listed in Table 1 therefore relied heavily on similar consultation papers published in the UK, Australia and other Western countries. This is a very common practice in Hong Kong. The government officials are able to make reference to these publications because all of them are very proficient in English and a few of them may even come from the UK and Australia.

<sup>3</sup>Source: HKSAR Commerce and Technology Branch <http://www.cedb.gov.hk/ctb/eng/broad/info-consult.htm>.

10. Therefore, as a usual practice, no input is made by local academics into these consultation papers. Instead, the government officials would outsource some research topics and hire consultancy firms if they find it necessary to seek outside expert assistance. In the first consultation paper on digital terrestrial broadcasting published in late 2000, two consultancy firms were hired, one to examine the frequency planning options for the introduction of DTT in Hong Kong<sup>4</sup> and the other to assess the economic and market potential of Digital audio broadcasting.<sup>5</sup> In recent years, Yan Mei Ning came across letters from the Hong Kong government inviting interested parties to bid for consultancy work on telecommunications topics, but not the topics listed in Table 1. Nonetheless, there are major differences between academic research output and consultancy output: the latter is a commercial venture and its focus is more on fulfilling the demands of the HKSAR government rather than finding out what is most in the public interest.
11. Once a consultation paper is published, it is open for all parties to make submissions. The consultation period usually lasts for three months. But on a number of occasions, submissions were too few and the consultation deadline had to be postponed. As far as broadcasting policy is concerned, the stakeholders can roughly be grouped into: 1) those from the broadcasting and telecommunications industries and the related fields; and 2) the public as viewers and listeners. For the consultations listed in Table 1, the submissions have been mainly from the broadcasters, telecommunications services providers and companies and groups from the related industries (see Table 2).
12. In the first DTT consultations, there were only 24 submissions. Among these, 17 were radio and TV stations, and only three were from individuals. When the HKSAR government conducted its second consultations on DTT, there were 29 submissions. Again, only three were from private individuals. In the first consultations on mobile television services, all submissions were from those with a commercial interest.
13. In the first consultations on DTT, there was only one retired academic from Beijing who had made a very short submission of a couple of pages commenting on purely technical matters. In the second consultations on DTT, no academic made any submission.

Table 2: Total number of submissions to consultation papers and their distribution<sup>6</sup>

	TV and radio operators	Telecom services operators	Related industries and bodies *	Political parties	Public bodies	Private individuals	Academics	Total number of submissions
1 <sup>st</sup> consultation on DTT	7	2	8	2	2	2	1	24
2 <sup>nd</sup> consultation on DTT	10	2	9	2	3	3	0	29
Consultation on	7	8	5	1	2	5	2	30

<sup>4</sup> See para. 4.5 of the consultation paper.

<sup>5</sup> See para. 8.3 of the consultation paper.

<sup>6</sup> Source: <http://www.cedb.gov.hk/ctb/eng/broad/info-consult.htm>

CA								
1 <sup>st</sup> consultation on mobile TV	6	6	11	0	0	0	0	23

14. Indeed, the whole of the DTT consultations were dominated by the two free-to-air TV broadcasters, TVB and ATV. They lobbied hard and bitterly opposed the first DTT consultation paper published in late 2000. This led to delays in the introduction of DTT in Hong Kong. The HKSAR government came up with the second DTT consultation paper in late 2003 yielding to demands of TVB and ATV. The most obvious change is that the HKSAR would not allow for the time being any new entrants to operate DTT so to protect TVB and ATV from competition. Eventually, DTT was launched in late 2007. Nonetheless, Hong Kong viewers have no choice for some years to come other than to continue to watch programs produced by TVB and ATV. In addition, the RTHK asked for a dedicated TV channel in the DTT environment but was turned down by the HKSAR government.
15. Meanwhile, the HKSAR government came up with the decision that it would not take the lead to launch digital audio broadcasting (DAB). As a result, Hong Kong for years to come will continue to have a handful of analogue radio channels.
16. It is a pity that the lobbying in DTT consultations had been so one-sided, wholly dominated by the existing TV broadcasters. There was no input from academics into the preparation of the two consultation papers. Moreover, upon the publication of the two consultation papers, no academics made any submissions during the public consultation period on the possible impact of DTT licensing on the viewers and on the refusal by the HKSAR government to give RTHK a dedicated TV channel and to launch DAB. In short, viewers and listeners as stakeholders were absent in DTT consultations and their interests have not been properly voiced out and protected. Of course, apart from the lobbying efforts of the TV broadcasters, the HKSAR have other important considerations, mainly political ones, in its decisions of whether to open up more TV and radio channels for public use or access.
17. Backlash is emerging, albeit slowly. In 2005, some political activists took things into their own hands by launching a pirate radio station. They were prosecuted and the trials surrounding this case in late 2007 and early 2008 attracted significant public attention. This has led to debates of why DAB and community broadcasting are not introduced in Hong Kong. More petitions, demonstrations and forums have also been held since 2006 on the future of RTHK. One issue highlighted is whether RTHK or the future public broadcaster should have a dedicated TV channel. In short, social movements have been emerged and momentum built up challenging the existing HKSAR broadcasting policy.
18. As seen in Tables 1 and 2, the HKSAR has completed its consultation on the issue of single regulator for some time. But it has so far not come up with any decision whether to establish the Communications Authority and when. In other words, there has been delay. Two academics made submissions on this consultation paper. One is Professor Leonard Cheng who has been a BA member for some years. His submission is only one page long, mainly expressing his agreement with the proposals contained in the consultation paper. Another

submission came from Dr. Mark Williams, who is an expertise on competition matters. His submission is five pages long, limited to the competition aspects of the proposed new regulator.

19. As seen in Table 2, no academic made any submission to the January 2007 Mobile TV consultation paper. The second consultation paper was just published in January 2008. Further research is needed to find out why the HKSAR government needs to come up with two consultations on the same topic in such a short time period.

**Where are the academics? What have they been doing? What should they do in the future in relation to media policy-making in Hong Kong?**

20. As seen above, there has always been one academic on the BA since its formation. The first two academic members who served on the BA in the 1990s have become professors and are fully occupied with administrative duties. Moreover, one is a human rights expert who has a lot of research commitments in that area. The two are therefore not very active their broadcasting research these days. The third one now serving BA is Professor Cheng who is specialized in economics and competition. Indeed, there is not a single established academic in Hong Kong at the moment concentrating his or her research effort in the territory's broadcasting policy. One other very well-established communications academic, Professor Joseph Chan, has conducted research in broadcasting matters. But he also spends a lot of time on journalism and communications topics and on issues concerning China.
21. Yan Mei Ning has written some conference papers and a book chapter on Hong Kong broadcasting policy. But as a junior academic, she does not have the necessary resources to conduct detailed research. In the past nine years, she has not been assigned a postgraduate research student to supervise. Yan has also had difficulties applying for funding for the purposes of conducting such research because of her junior position. Moreover, Yan spent a lot of time in 2003 researching Article 23 legislation, the row concerning the HKSAR government's attempt to introduce harsh national security laws. This time period somewhat coincided with the DTT consultations.
22. Yan has some experience participating in the consultation process. In early 2006, Hong Kong invited seven members of the public to form a committee to review the territory's public service broadcasting (PSB). This is a very important issue concerning Hong Kong's broadcasting policy. The Hong Kong Baptist University School of Communication, where Yan worked, held a symposium jointly with the Hong Kong Chinese University's School of Journalism and Communications to discuss the topic. On that occasion, Yan, along with several other academics, made presentations.
23. Later, Yan was invited along with others to participate in focus groups formed by the review committee. Yan joined the PSB governance structure focus group. In that focus group, there were two other academics, one specialized in politics and the other specialized in Chinese language. The focus group was chaired by an accountant; other members included two more accountants, one media professionals and two NGO executives. This was a challenging experience. The focus group had four meetings during the summer. The chairman of the

review board, Mr. Raymond Wong, had served as controller of TVB News for many years, and Yan worked under him when she joined TVB News in 1987. As far as Wong is concerned, Yan was not an academic with legal training or expert knowledge in broadcasting policy, but a former subordinate. Mr. Wong, though not the convener of the focus group, was always at the meetings expressing his views. Yan's opinion carried no weight. In Yan's view, the two other academics in the focus group did not contribute much either. Neither of us made any written submission on the topic of PSB governance. As a result, the focus group meetings and the output of the focus group were largely led by a government official acting as Mr. Wong's assistant and most of her views together with those of Mr. Wong and his ally accountants prevailed. In short, these views are more on conservative side.

24. To sum up, academic input is minimal in HKSAR government broadcasting policymaking process. It does not command a special role. Indeed, the input has been extremely small and carried no weight. In Hong Kong, the HKSAR government is the main driver behind the territory's broadcasting policy and can be heavily influenced by the commercial sectors, namely the broadcasters and telecommunications services operators. Many of the HKSAR government considerations have been political. But the gist is to try to delay the effects of convergence in its opening up of more media platforms for public use and for the public to express political dissent.
25. Unlike the United States and the UK, Hong Kong has no civic groups representing the interests of viewers and listeners, whether liberal or conservative ones. As such, the conservative views of HKSAR government and business entrepreneurs prevail. But somehow, some as of yet unorganized activities and movements are slowly coming onto the stage – thanks to the effectiveness of the Internet in connecting strangers with similar views. In the past couple of years, loose alliances have formed to counteract HKSAR policies on broadcasting, copyright and obscenity laws. This is an extremely interesting development. But what academics can contribute in this upsurge is a topic worthy of exploring.



## Contributor Biographies

**Peng Hwa Ang** has been able to observe policy formation at the highest international level and at the national level as an academic giving inputs at those levels. In 2004, he was appointed by then-Secretary General of the United Nations Kofi Annan to the Working Group on Internet Governance. From 2004 to 2005, he participated in the Group that saw a number of recommendations adopted at the 2005 World Summit on the Information Society in Tunis. Chief among them was the convening of the Internet Governance Forum (IGF) that has since met annually since 2006. Along with fellow Group member Wolfgang Kleinwachter, he organised a symposium in 2006 that led to the establishment of the Global Internet Governance Academic Network (GigaNet) where he served as the inaugural chair. This Network is intended to give academic inputs to the Forum and holds its annual symposium a day before the Forum starts. Back at home in Singapore in 2007, he was inducted into a group to revise the laws and policies on and about the internet. At the time of writing, the group was embarking on a visit to Australia to round up the data collection for the report.

**Georgina Born** is Professor of Sociology, Anthropology and Music in the Faculty of Social and Political Sciences. She trained in Anthropology at University College London and uses ethnography to study cultural production, particularly television, music and IT, and knowledge systems. Her books are *Uncertain Vision: Birt, Dyke and the Reinvention of the BBC* (Vintage 2005), a study of the transformation of the BBC and of Britain's public service broadcasting system in the past decade; *Rationalizing Culture: IRCAM, Boulez, and the Institutionalization of the Musical Avant-Garde* (California 1995), a combined ethnography and cultural history of the musical avant-garde and of music-science collaborations at Pierre Boulez's IRCAM in Paris; and *Western Music and Its Others: Difference, Representation and Appropriation in Music* (California 2000, edited with David Hesmondhalgh). Her most recent ESRC-funded research, 'Interdisciplinarity and Society: A Critical Comparative Study' (2004-6), analyses the nature of interdisciplinary collaborations bridging the natural sciences and engineering, on the one hand, and the arts and social sciences, on the other. Other ongoing research examines the normative dimensions of public service broadcasting, how Britain's broadcast media are changing with digitization, and the evolving modes of creativity attendant on music's digitization. She is also engaged in cultural policy and media policy work on the BBC and PSB in Britain and Europe, and gave evidence to the House of Lords Select Committee on the review of the BBC's Charter.

**Sandra Braman** is currently Visiting Professor at the Department of Information Science and Media Studies, University of Bergen, Norway. She occupies the Freedom of Expression chair endowed by Fritt Ord (the Freedom of Expression Foundation), during the first semester of the 2008 academic year.

Braman has been studying the macro-level effects of the use of new information technologies and their policy implications since the mid-1980s. Current work includes *Change of State: Information, Policy, and Power* (2006, MIT Press) and the edited volumes *Communication Researchers and Policy-makers* (2003, MIT Press), *The Emergent Global Information Policy Regime* (2004, Palgrave Macmillan) and *Biotechnology and Communication: The Meta-technologies of Information* (2004, Lawrence Erlbaum Associates).

## Contributor Biographies

With Ford Foundation and Rockefeller Foundation support, Braman has been working on problems associated with the effort to bring the research and communication policy communities more closely together. She has published over four dozen scholarly journal articles, book chapters, and books; served as book review editor of the *Journal of Communication*; is former Chair of the Communication Law & Policy Division of the International Communication Association; and sits on the editorial boards of nine scholarly journals.

During 1997-1998 Braman designed and implemented the first graduate-level program in telecommunication and information policy on the African continent, for the University of South Africa. Currently Professor of Communication at the University of Wisconsin-Milwaukee, Braman earned her PhD from the University of Minnesota in 1988 and previously served as Reese Phifer Professor at the University of Alabama, Henry Rutgers Research Fellow at Rutgers University, Research Assistant Professor at the University of Illinois-Urbana, and the Silha Fellow of Media Law and Ethics at the University of Minnesota.

**Daniel Brenner** is Senior Vice President for Law & Regulatory Policy at the National Cable & Telecommunications Association, Washington, D.C., where he has served since 1992. Previously, he served as Director of the Communications Law Program and a member of the faculty at UCLA Law School. He also served as Counsel to the Los Angeles office of LeBoeuf, Lamb, Greene & MacRae. Brenner was Senior Legal Advisor to Chairman Mark Fowler of the Federal Communications Commission from 1981 to 1986. He was also Vice-Chairman of the U.S. Delegation to the ITU World Radio Conference in Geneva, Switzerland. He has served as a consultant on telecommunications issues for the RAND Corporation and the International Media Fund, and as a Senior Fellow at The Annenberg Washington Program. He is a graduate of Stanford University and Stanford Law School.

**James Deane** is Head of Policy Development at the BBC World Service Trust

**Rob Frieden** serves as Pioneers Chair and Professor of Telecommunications and Law at Penn State University where he teaches courses in management, law and economics. He also provides legal, management and market forecasting consultancy services in such diverse fields as telecommunications business development, Internet commerce, and carrier facilities interconnection. Professor Frieden has written several books, published over fifty articles in academic journals, and provided background for hundreds of media reports

**Philip M. Napoli** is an Associate Professor at Fordham University's Graduate School of Business Administration, located in New York City. Professor Napoli teaches courses in media economics, the regulation of electronic media, media industries, and new media technologies. Prior to joining the Fordham GBA faculty, Professor Napoli was a member of the faculty at Rutgers University's School of Communication, Information, and Library Studies. Professor Napoli's research interests focus primarily on the areas of media economics and policy. He is the author of the books Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media (Hampton Press, 2001) and Audience Economics: Media Institutions and the Audience Marketplace (Columbia University Press, 2003). His work has been published in journals such as *Telecommunications Policy*, the *Journal of Communication*, the *Policy Studies Journal*, the *Harvard International Journal of Press/Politics*, and the *Journal*

## Contributor Biographies

Advertising. Professor Napoli's specific areas of expertise include the communications policymaking process, the developing field of communications policy analysis, and the economic aspects of media audiences.

**Monroe E. Price** is Director of the Center for Global Communication Studies at the Annenberg School for Communication at the University of Pennsylvania and Professor of Law at the Benjamin N. Cardozo School of Law at Yeshiva University. He also serves as Director of the Stanhope Centre for Communications Policy Research in London and Chair of the Center for Media and Communication Studies at the Central European University in Budapest. He served as dean of Cardozo School of Law from 1982 to 1991 and, in 1996, founded the Oxford University Programme in Comparative Media Law and Policy. Among his many books are a treatise on cable television, *Cable Television and other Nonbroadcast Video: Law and Policy*; *Media and Sovereignty*; and *Television, the Public Sphere and National Identity*.

**Tracy Westen** is Vice-Chairman and CEO of the Center for Government Studies (CGS), which he founded in 1983. He has co-authored more than 12 CGS reports and publications. He helped create key CGS projects, including the California Commission on Campaign Financing, the National Resource Center on State and Local Campaign Finance Reform, the California Channel, the California Citizens Budget Commission, the Democracy Network, the California Citizens Commission on Higher Education, and ConnectLA.

He is also Chairman of the Municipal Access Policy Board for Los Angeles Channel 35, Adjunct Professor of Communications Law and Policy at the USC Annenberg School of Communication (since 1983) and Senior Fellow for Electronic Democracy at the Aspen Institute. He was Deputy Director for Consumer Protection at the Federal Trade Commission (1977-81). He is recipient of national "public service" awards from both Common Cause and the National League of Women Voters for his work on campaign finance reform and online voter information systems.

**Stefaan Verhulst** is Chief of Research at the Markle Foundation. Prior to his arrival Mr. Verhulst was the founder and director of the Programme in Comparative Media Law and Policy (PCMLP) at Oxford University, as well as senior research fellow at the Centre for Socio Legal Studies. In that capacity he was appointed the socio-legal research fellow at Wolfson College (Oxford). In addition, he was the Unesco Chairholder in Communications Law and Policy for the UK.

Before his move to Oxford in 1996, he had been a lecturer on communications law and policy issues in Belgium and founder and co-director of the International Media and info-comms Policy and Law studies (IMPS) at the School of Law, University of Glasgow. Mr. Verhulst has served as consultant to various international and national organizations including the Council of Europe, European Commission, Unesco, UNDP, USAID and DFID.

Among his numerous publications include: *In Search of the Self: Conceptual Approaches to Internet Self Regulation* (Routledge, 2001), *Convergence in European Communications Regulation* (Blackstone, 1999), *EC Media Law and Policy* (AWL, 1998), *Legal Responses to the Changing Media* (OUP, 1998), and *Broadcasting Reform in India* (OUP, 1998). Mr. Verhulst is invited regularly to speak at industry and academic conferences globally. He is also the founder

## Contributor Biographies

and editor of the International Journal of Communications Law and Policy and the Communications Law in Transition Newsletter.

Dr. **Yan Mei Ning** has worked as an assistant professor in the Department of Journalism of the Hong Kong Baptist University since September 1999. She received her Ph.D. degree in law from the University of Essex in 1998. She also obtained a LLM degree in human rights, emergency law and discriminations (1995) from the Queen's University of Belfast, a LLB degree (External) (1993) from the University of London, a BA degree in geography (1979) and a certificate in Education (1981) from the University of Hong Kong. Before joining academia, Dr. Yan worked during a span of 14 years as reporter, researcher, producer and sub-editor for various media organizations in Hong Kong.