

The Co-Protection of Minors in New Media: A European Approach to Co-Regulation

EVA LIEVENS, JOS DUMORTIER AND PATRICK S.
RYAN¹

Abstract

European media policymakers have latched onto the term “co-regulation.” However, despite the term’s frequent use, the underlying concept of “co-regulation” lacks terminological and, more importantly, conceptual clarity. In this article, we will examine the use of the term in the context of measures instituted to protect minors against harmful content in new media. In doing so, we will attempt to sketch a clearer picture of the concept of co-regulation and the current use of media-related co-regulatory measures. Although our analysis is primarily based on the European example, we will show that policies in Europe share a common regulatory

¹ Author Jos Dumortier is Professor of Law at Katholieke Universiteit Leuven (KU Leuven) in Belgium (www.icri.be), and he is Of Counsel at Lawfort, an independent Belgian law firm in Brussels, Antwerp, Ghent, and Liège. He studied law at KU Leuven (LLB, PhD), and he is the founder and director of the KU Leuven Interdisciplinary Centre for Law & Information Technology (ICRI). Author Eva Lievens studied law at the Universiteit Gent (Ghent) in Belgium [Licentiaat in de Rechten (LLB)] and studied at Goldsmiths College in London (Masters in Transnational Communications and Global Media). She is presently a PhD Candidate and Research Associate at ICRI. Author Patrick S. Ryan is Adjunct Professor at the University of Colorado at Boulder and Guest Professor at KU Leuven, and he studied law at KU Leuven (PhD), the Universität St. Gallen in Switzerland [Executive Master of European and International Business Law (MBL-HSG)], and the University of Texas at Austin (JD). Author Eva Lievens is the primary author and of this piece as it falls in the context of her doctoral research project. The authors are grateful to the following people for their valuable comments, editing, and support: Mark Campbell, Carolyn Daughters, Wendy McCallum, Scott Page, Ron Rehling and Peggy Valcke.

context and challenges in the United States. First, we will outline the theoretical state of affairs based on doctrine and on European policy documents and legislation. In reaction to the increasingly obvious shortcomings of traditional legislation in the new, converging media landscape, the European Union searched quite actively for alternative regulatory mechanisms, and we will describe this evolving regulatory quest, first generally and then more specifically with respect to media policy. After outlining the theoretical framework, we will approach the concept of co-regulation in a more pragmatic way by describing concrete co-regulatory practices in different countries and in different media sectors, paying particular attention to the protection of minors against harmful content. Further, we will briefly consider different co-regulatory tools, such as filtering and rating instruments, and draw a tentative picture of the benefits and drawbacks of co-regulation. In short, this article will approach the concept of co-regulation from both a theoretical-descriptive perspective and a practical-illustrative perspective in an attempt to provide a greater degree of clarity to this high-profile regulatory technique.

I. Introduction

In recent years, the protection of minors against illegal and harmful media content has been a hot topic, especially since developments in the media sector, such as “convergence” (*i.e.*, the technological marriage of different ways of delivering information to consumers) and the emergence of new technologies, have called into question traditional methods of regulating content. The Internet and 3G mobile phones, for instance, have increased the likelihood that users of technology in general and minors in particular will come across illegal and harmful content. As a result, we believe that attention has increasingly focused on alternative regulatory mechanisms, such as self-regulation (reliance upon the goodwill of industry players) and co-regulation (the combination of self-regulation and government regulation). This is perhaps a reflection of the rapidly changing “market” for regulatory schemes: seemingly each day, new Internet

Service Provider (ISP) and mobile operator codes of conduct are established; new rating, filtering, and labeling tools are developed; and new hotlines and classification mechanisms are instituted. The landscape of self-regulatory and co-regulatory measures implemented in an attempt to protect minors is constantly shifting.

European policy documents such as the Recommendation on the Protection of Minors² and the Communication on Audiovisual Policy³ have emphasized the importance of co-regulatory and self-regulatory instruments since the late 1990s. However, the practical application and implementation of these instruments continue to cause great difficulties. Notions such as self-regulation, co-regulation, and “regulated self-regulation” (described in greater detail below) mean different things to different people, and the associated regulatory mechanisms are managed in different ways in different countries. For example, regulatory models labeled “self-regulation” in one country can sometimes qualify as “co-regulation” across the border.⁴ Furthermore, commentators, academics, and public bodies have not reached consensus regarding a clear-cut concept of co-regulation, nor

² *Council Recommendation (98/560/EC) on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity*, 1998 O.J.(L 270) 48 [hereinafter: *Council Recommendation Protection of minors*].

³ *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age*, COM (1999) 657 final, December 14, 1999, available at http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/av_en.pdf.

⁴ The Dutch Kijkwijzer system for instance (see infra IV. B. Media-related Co-Regulatory Instruments in Practice) is considered to be a self-regulatory system in the Netherlands, but often referred to as an example of co-regulation, for instance at European level. See Viviane Reding, European Comm’r responsible for Educ. and Culture, *Minors and Media: Toward a More Effective Protection* (September 10, 2003), available at http://www.ebu.ch/CMSimages/en/INFOEN_090_tcm6-8328.pdf.

is a consistent terminology used. Along these lines, scholar Tarlach McGonagle has made the following observation in a report delivered to the European Council:

“For co-regulation to establish itself as a viable regulatory model, it will need to bridge the gap between theory and practice; a gap of considerable scepticism and resistance. In order to do so, its drivers will have to keep a resolute focus on the primary goal to be achieved: to ensure a more equitable type of regulation which would enhance opportunities for freedom of expression, not curtail them.”⁵

Regulators struggle to find the best ways to bridge the gap that McGonagle has identified. What, for example, does McGonagle mean by stating that “a more equitable type of regulation [should] enhance opportunities for freedom of expression, not curtail them?”⁶ What does it mean to “bridge the gap between theory and practice?”⁷

This paper aims to help answer these questions and thereby sketch a clearer picture of the concept of co-regulation and the current use of media-related co-regulatory measures to protect minors. We will focus on protections against *harmful* content. Harmful content is content that, though legal for adults to listen to or view, is considered harmful (and sometimes illegal) for children to listen to or view (*e.g.*, pornographic images or gratuitous violence).⁸ We have postulated that the delineation of “harmful” content varies

⁵ Tarlach McGonagle, *Practical and Regulatory Issues Facing the Media Online*, in SPREADING THE WORD ON THE INTERNET: 16 ANSWERS TO 4 QUESTIONS 94 (Christiane Hardy & Christian Möller eds. 2003) available at <http://www.osce.org/item/13574.html> [hereinafter: McGonagle, *Practical and Regulatory Issues*].

⁶ *Id.*

⁷ *Id.*

⁸ Council Recommendation Protection of minors, *supra* note 2, at 17.

from country to country and from culture to culture, although in most individual countries traditional media face restrictions with a view to protecting minors against universally recognized harmful content. The “supranational” European Union also addressed this issue. For example, in broadcasting, the Television without Frontiers Directive stipulates that Member States should take appropriate measures to prevent broadcasting programs that might seriously impair the physical, mental, or moral development of minors (in particular, programs that incorporate pornography or gratuitous violence).⁹ Furthermore, this concept extends to other programs that are likely to impair the physical, mental, or moral development of minors, except in cases where the time of the broadcast or other initiatives tend to preclude minors from hearing or seeing such broadcasts.¹⁰

Applying existing regulations (even recently developed regulations), however, poses problems in the new high-technology communications and information environment. The effectiveness of this legislation, promulgated by national and regional legislative authorities, is weakened by the international nature, technological qualities, and specific architecture of the new networks. Moreover, any analysis of the protection of minors against harmful media content must take into account an additional point of particular importance: the balance between the fundamental right of freedom of expression and the public-interest objective of protecting minors.

Europe provides an instructive lens to help us take a closer look at recent United States policy, where it becomes apparent that – on both continents – existing legislation cannot appropriately balance freedom of expression and the online protection of minors. In the United States, several legislative

⁹ *Television without Frontiers Directive: Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, Article 22, 1989, *O.J. (L 298)* 23 (as amended by the European Parliament and Council Directive of 1997) [hereinafter: *Television without Frontiers Directive*].

¹⁰ *Id.*

attempts have been made at protecting minors against harmful Internet content, such as the 1996 Communications Decency Act (CDA)¹¹ and the 1998 Children Online Protection Act (COPA).¹² These legislative initiatives, however, have repeatedly run into obstacles.

The CDA offered a first attempt at making the Internet safer for children by criminalizing the “knowing” transmission of “indecent” or “patently offensive” online content to recipients under eighteen years of age.¹³ However, the U.S. Supreme Court ruled the CDA unconstitutional on the grounds that it was not meticulous enough and that less restrictive alternatives were available.¹⁴ Maintaining that freedom of expression needs to be safeguarded in the strictest possible way, the Supreme Court stated that,

Although the Government has an interest in protecting children from potentially harmful materials ... the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive Its breadth is wholly unprecedented.¹⁵

The COPA represented a second attempt at making the Internet safer for children. This law criminalized the communication of content considered “harmful to minors” when that content has a commercial purpose, unless access by minors is restricted through verification of the Internet user’s identity (*e.g.*, by requiring a credit card number or through some other means).¹⁶ The law imposed fines up to \$50,000 and even six months of imprisonment upon anyone who violated

¹¹ The Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 [codified as amended at 47 U.S.C. § 223 (2000)].

¹² The Children Online Protection Act, Pub. L. No. 105-227, 112 Stat. 2681-736 [codified at 47 U.S.C. § 231 (2000)].

¹³ The Communications Decency Act, *supra* note 11.

¹⁴ *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2332 (1997).

¹⁵ *Id.*

¹⁶ The Children Online Protection Act, *supra* note 12.

these provisions.¹⁷ In June 2004, the Supreme Court enjoined COPA's enforcement due to its possible violation of the First Amendment.¹⁸ This case was remanded, to carry out an investigation into recent technological developments to protect minors, which would impose fewer restrictions on freedom of expression.¹⁹ Filtering technology, although an imperfect solution, might be more efficient and better protect freedom of expression than the regime installed by the COPA. In any case, according to the Supreme Court, "the Government did not show that the less restrictive alternatives proposed by respondents [*i.e.* filtering technology] should be disregarded."²⁰

In Europe, the quest has begun to craft regulatory instruments that can address the inadequacies of traditional legislation as a tool to protect minors against harmful new media content. Co-regulation is one such alternative regulatory mechanism that is increasingly put forward as *the* remedy for all regulatory ills.

II. Variations in Co-Regulatory Approaches

A. Delineating Different Concepts

In the past decade, scholars and regulatory authorities have made numerous attempts at clarifying and comparing the different regulatory concepts that can be categorized as examples of self-regulation and co-regulation. A few years ago, self-regulation was hailed as the most efficient way of regulating information and communication networks, though little by little more attention has recently been paid to forms of co-regulation. The strong faith in self-regulation is noticeably and steadily declining, and governments are tightening the reins in order to regain some control over the regulatory

¹⁷ *Id.*

¹⁸ *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783, 2877 (2004).

¹⁹ *Id.* at 2794.

²⁰ *Id.*

process in fields where self-regulation has not been very efficient. Another remarkable finding is the changing use of the terms “self-regulation” and “co-regulation” in policy documents. While past documents referred only to self-regulation, both terms are now increasingly mentioned, though rarely differentiated.²¹

A wide range of definitions is being used, each with its own nuances, emphases, and references to other regulatory methods. While the bottom line is often similar, it is interesting to examine the variations in the co-regulatory approaches and the diverse expressions used. In the following paragraphs, we will briefly highlight several of these approaches and expressions.

1. Two-Tiered Regulation

Scholars Monroe Price and Stefaan Verhulst use the term “two-tiered regulation” when referring to a combination of self-regulation and formal legal systems,²² and argue that such a combination of self-regulatory and formal legal systems functions optimally in addressing public concerns or market or policy failures, both management- and efficiency-wise. In addition, Price and Verhulst point out that two-tiered regulation is especially relevant in complex and transnational industries and areas, such as content regulation.²³

²¹ A comparison of, for instance, the Council Recommendation Protection of minors and the Second Evaluation Report (*Second Evaluation Report from the Commission to the Council and the European Parliament on the Application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity*, COM (2003) 776 final, December 12, 2003, available at http://europa.eu.int/comm/avpolicy/legis/reports/com2003_776final_en.pdf, at 5 [hereinafter: *Second Evaluation Report*]) clearly demonstrates this shift.

²² Monroe E. Price & Stefaan G. Verhulst, *In Search of the Self: Charting the Course of Self-Regulation on the Internet in a Global Environment*, in REGULATING THE GLOBAL INFORMATION SOCIETY 59 (Christopher Marsden ed., London: Routledge 2000) [hereinafter: Price & Verhulst, *In Search of the Self*].

²³ Price & Verhulst, *In Search of the Self* at 59.

2. Consensual Regulatory Processes

French scholar Christian Paul builds on this idea and describes co-regulation as a method by which a consensus between different actors in the regulation process (e.g., legislators, judges, enterprises, civil associations, and regulatory authorities) can be reached.²⁴ Together, these actors coordinate, exchange information, and establish a body entrusted with supervision, provision of information, consultation, and advice.²⁵ In other words, co-regulation appears to be a “pre-normative” process that occurs in the preliminary phases that precede the passage of a regulation. Such a process can reinforce the legitimacy and efficacy of the ensuing regulation, especially when the state or other regulatory authority takes into account the interests of all actors concerned and obtains their agreement that they will respect the consensus reached.

3. Regulated Self-Regulation

Scholars Wolfgang Schulz and Thorsten Held prefer to use the term “regulated self-regulation,” defined as “self-regulation that fits in with a legal framework or has a basis laid down in law.”²⁶ Schulz and Held wonder if co-regulation could be the “middle road” that regulators in the information society might follow.²⁷ Wolfgang Hoffmann-Riem, from whom they borrow the term “regulated self-regulation,” sees

²⁴ Christian Paul, *Du Droits et des Libertés sur l’Internet – La Corégulation, Contribution Française pour une Réglementation Mondiale, Rapport au Premier Ministre*, (May 2000) available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/004001056/0000.pdf>; Yves Poulet, *Technologies de l’Information et de la Communication et ‘Co-Régulation’: Une Nouvelle Approche?* DROIT ET NOUVELLES TECHNOLOGIES, 5-6 (May 27, 2004), available at http://www.droit-technologie.org/2_1.asp?dossier_id=126 [hereinafter: Poulet, *Technologies de l’Information*].

²⁵ *Id.*

²⁶ Wolfgang Schulz & Thorsten Held, *Regulated Self-Regulation as a Form of Modern Government* 1, 7 (2001) available at <http://www.hans-bredow-institut.de/publikationen/apapiere/8selfreg.pdf> (study commissioned by the German Federal Commissioner for Cultural and Media Affairs) [hereinafter: Schulz & Held, *Regulated Self-Regulation*].

²⁷ *Id.* at 5.

this concept as “a kind of self-regulation with a state safety net.”²⁸

4. The “Co” in Co-Regulation

If co-regulation implies some sort of joint regulation, it is still unclear who (if anyone) fulfills the role of primary regulator, and it is unclear if the regulation is truly managed as part of a collaborative effort. Scholars Michael Latzer, Natascha Just, Florian Saurwein, and Peter Slominski define co-regulation as “self-regulation with public oversight or ratified by the state; in other words, it is self-regulation with a legal basis.”²⁹ Examples of this kind of strong state involvement include supervision of regulatory activities by the state and state-dictated instructions regarding structure, transparency, or goals.³⁰ Interestingly, Latzer, Just, Saurwein, and Slominski distinguish two rationales for applying alternative regulatory mechanisms: (1) a “makeshift solution” that occurs when the failure of traditional regulation forces the state to choose an appropriate regulatory mechanism, and (2) an “ideal solution,” specifically chosen because of the advantages it offers over traditional state regulation.³¹

Scholars David Goldberg, Tony Prosser, and Stefaan Verhulst build on this idea but distinguish between enforced *self*-regulation, defined as “negotiation between the state and individual firms to establish appropriate standards and regulations, which can then be publicly enforced,” and *co*-regulation, defined as “regulation undertaken by an industry association with some oversight and/or ratification by

²⁸ WOLFGANG HOFFMANN-RIEM, *REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES* 1, 326 (New York and London: The Guilford Press, 1996), [hereinafter: Hoffmann-Riem, *REGULATING MEDIA*].

²⁹ Michael Latzer, Natascha Just, Florian Saurwein, & Peter Slominski, *Regulation Remixed: Institutional Change Through Self- and Co-Regulation in the Mediamatics Sector*, in 50 *COMMUNICATIONS & STRATEGIES*, 2nd quarter 2003, at 135 [hereinafter: Latzer et. al., *Regulation Remixed*].

³⁰ *Id.*

³¹ *Id.* at 142. For an overview of the advantages of alternative regulatory mechanisms, see *infra*.

government.”³² They believe that an important technique for law in the future will involve laying down the conditions for such enforced self-regulation or co-regulation by specifying basic standards, delegating details of drafting and enforcement machinery to private actors and associations, and ensuring thorough enforcement takes place.³³

Along these lines, scholar Carmen Palzer suggests there are two techniques to structure a co-regulatory mechanism: a top-down approach (where the public authority lays down a legal basis for the self-regulation framework) and a bottom-up approach (where the public authority integrates an existing self-regulatory system into a public authority framework).³⁴

Scholars Ian Ayres and John Braithwaite address “enforced self-regulation” from such a bottom-up perspective, meaning that firms are required to write their own sets of corporate rules, which are then publicly ratified. In such cases, the rules can be publicly enforced if private enforcement of these rules fails.³⁵

5. *Audited Self-Regulation*

The United States, predominantly uses the term “audited self-regulation,” legally defined as “congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency.”³⁶

³² REGULATING THE CHANGING MEDIA – A COMPARATIVE STUDY X, 313 (David Goldberg, Tony Prosser, & Stefaan Verhulst, eds., Oxford: Clarendon, 1998).

³³ *Id.*

³⁴ *Id.* This topic will be explored in greater detail later in the article.

³⁵ IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford: Oxford University Press, 1995).

³⁶ *The Use of Audited Self-Regulation as a Regulatory Technique*, Administrative Conference of the United States, Recommendation 94-1, available at <http://www.law.fsu.edu/library/admin/acus/305941.html>.

The U.S. government oversees the regulatory authority it delegates, thus providing a deterrent to the potential abuse of self-regulatory powers.

B. Weeding Through the Terms

What does all this mean? We embrace the suggestion of Tarlach McGonagle, who counsels against getting too caught up in the (sometimes small) differences between the propounded concepts.³⁷ To him, the principle of co-regulation simply implies a novel approach to regulation “by virtue of its in-built potential for involving an increased number of interested parties (to a greater or lesser extent) in a flexible regulatory process.”³⁸ Scholar Christopher Marsden, too, favors a practical attitude towards co-regulation, describing it as “a pragmatic response to the common perception that regulatory frameworks must quickly adapt and continually be optimized to maintain relevance and effectiveness in rapidly evolving markets.”³⁹

Nonetheless, the differences in these scholars’ opinions show that co-regulation lacks a clearly delineated definition. Characteristics that can distinguish co-regulation from either state regulation or self-regulation include the degree of involvement and participation of the different actors, the roles these actors play, and the method of enforcing regulatory measures.⁴⁰ Combining these elements into an acceptable and workable concept is a challenge that has not yet been adequately addressed. So even though scholars across Europe have expended great energy in defining co-regulation, there is

³⁷ McGonagle, *Practical and Regulatory Issues*, *supra* note 5, at 88-89.

³⁸ *Id.*

³⁹ Christopher Marsden, *Co- and Self-Regulation in European Media and Internet Sectors: The Results of Oxford University’s Study www.selfregulation.info*, in *THE MEDIA FREEDOM INTERNET COOKBOOK* 76, 77-78 (OSCE, 2004), available at <http://www.osce.org/item/8819.html>.

⁴⁰ See e.g., the analytical approach used by Latzer et al. regarding regulatory institutions and state involvement, operational scope and regulatory objectives, international involvement and stakeholder participation, and regulatory processes and instruments. Latzer et al., *Regulation Remixed*, *supra* note 29, at 137.

no consensus on either the terminology or the pragmatic effect of it.

III. The European Concept of Co-Regulation

While there is a noticeable lack of discussion in the academic literature, several European policy documents provide some guidance and clarification regarding the concept of co-regulation. We will describe some of the most important of these documents below.

A. *White Paper on European Governance*

The White Paper on European Governance⁴¹ has established five principles of good governance: openness, participation, accountability, effectiveness, and coherence.⁴² One of the policy instruments that can help to implement these principles is co-regulation:

Co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation. It should only be used where it clearly adds value and serves the general interest. It is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State. Equally, the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. This will be a key factor in deciding the added value of a co-regulatory approach in a given case. Additionally, the resulting

⁴¹ *European Governance – A White Paper*, COM (2001) 428 final, (July 25, 2001), available at http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf.

⁴² *Id.* at 10.

co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. Where co-regulation fails to deliver the desired results or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed.⁴³

The concept of co-regulation described here could be considered quite strict, depending on the narrowness of the interpretation. For instance, a large number of seemingly “co-regulatory” measures may fail to meet the above-mentioned definition of co-regulation, assuming that a great level of detail is required regarding description of enforcement and appeals mechanisms in the legislation. On the other hand, a much broader interpretation could be applied in which only general guidelines on the part of the government are considered sufficient.

Moreover, it is important to consider the requirement that co-regulation should not be used in situations where rules need to apply in a uniform way in every Member State. With this thought in mind, the media sector appears to be a sector in which co-regulation could be desirable. Media regulation is still, and will probably remain, very much culture colored and country specific regarding the protection of minors. On the other hand, the description above also introduces the condition that co-regulation is suited only to cases where fundamental rights or major political choices are not called into question. It could be argued that the fundamental right to freedom of expression is challenged in matters related to the protection of minors against *harmful* content. Scholar Yves Poulet, however, argues that the White Paper (and subsequent documents on the same subject) does not intend to forbid co-regulatory intervention in this field; instead, he suggests

⁴³ *Id.* at 21.

that such intervention should have a more limited, although certainly not insignificant, scope than it does in other fields.⁴⁴

B. The Final Report of the Mandelkern Group on Better Regulation

In November 2001, the Mandelkern Group on Better Regulation, a group established in November 2000 for the purpose of developing a coherent strategy to improve the European regulatory environment, delivered its final report. The majority of its key recommendations were included in the Commission's Better Legislation Action Plan of June 2002, which will be discussed later in this article. The report addresses co-regulation in the context of regulation and user responsibility,⁴⁵ finding that no single definition of co-regulation exists. In fact, as the report notes, "on the contrary, the effective implementation of public policies, may, in order to achieve the same objective, lead to combining legislative or regulatory rules and alternatives to regulation."⁴⁶

Nonetheless, the report distinguishes two approaches: (1) a top-down approach that involves setting objectives by the regulatory authority and the delegation of implementation details, and (2) a bottom-up approach that involves regulatory validation of rules stemming from self-regulation.⁴⁷ In the top-down approach, regulation enacts the global objectives, main implementation mechanisms, and methods for monitoring the application of a public policy, and private players are asked to intervene in order to define a comprehensive set of rules.⁴⁸ The bottom-up approach, on the other hand, involves the transformation of a non-compulsory rule established by private partners into a mandatory rule established by the

⁴⁴ Pouillet, *Technologies de l'Information*, *supra* note 24, at 11.

⁴⁵ Mandelkern Group on Better Regulation, Final Report, (November 13, 2001) at 16 available at http://europa.eu.int/comm/secretariat_general/impact/docs/mandelkern.pdf, [hereinafter: Mandelkern Group on Better Regulation].

⁴⁶ *Id.* at 17.

⁴⁷ *Id.*

⁴⁸ *Id.*

public authority.⁴⁹ In other words, a public authority executes a self-regulatory mechanism, with or without some modifications by that authority.⁵⁰ One can argue (and deduce from certain policy documents, such as the White Paper on European Governance) that the European Commission is inclined towards the top-down approach.⁵¹

The Mandelkern report also establishes some conditions for co-regulation.⁵² First of all, while the primacy of the public authority remains intact, the responsibility for the implementation of the rules is shared.⁵³ Second, certain guarantees are deemed necessary.⁵⁴ Co-regulatory activities should be appropriate and proportionate, and participating organizations should be credible, representative and supervised by the regulatory authority.⁵⁵

C. Better Legislation Action Plan

The Better Legislation Action Plan describes co-regulation and self-regulation as “tools which in specific circumstances can be used to achieve the objectives of the Treaty of the European Union while simplifying lawmaking activities and legislation itself.”⁵⁶

Co-regulation, in particular, can facilitate the implementation of the objectives identified by the legislator in the context of measures carried out by actors in the field concerned. Moreover, co-regulation can prove useful “when it comes to adjusting legislation to the problems and sectors concerned, reducing the burden of legislative work by

⁴⁹ *Id.*

⁵⁰ Poullet, *Technologies de l'Information*, *supra* note 24, at 13.

⁵¹ *Id.* at 12.

⁵² Mandelkern Group on Better Regulation, *supra* note 45, at 17.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Communication from the Commission, Action Plan “Simplifying and Improving the Regulatory Environment,”* COM (2002) 278 final, (June 5, 2002) at 11, available at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0278en01.pdf. In the article, this plan is referred to as the Better Legislation Action Plan.

focusing on the essential aspects of legislation, and drawing on the experience of interested parties, particularly operators and social partners.”⁵⁷

Thus, within the framework of the policy, the Better Legislation Action Plan puts forward “A framework for co-regulation”⁵⁸ and sets out a number of co-regulatory criteria. An abbreviated summary of these criteria is included verbatim below:

- Co-regulation [should] be used on the basis of a legislative act.
- The co-regulation mechanism, within the framework of a legislative act, must be in the interests of the general public.
- The legislator [should establish] the essential aspects of the legislation: the objectives to achieve; the deadlines and mechanisms relating to its implementation; methods of monitoring the application of the legislation and any sanctions which are necessary to guarantee the legal certainty of the legislation.⁵⁹
- The legislator determines to what extent defining and implementing the measures can be left to the parties concerned because of [their] experience.
- The principle of the transparency of legislation applies to the co-regulation mechanism.
- The parties concerned must be considered to be representative, organised and responsible by the Commission, Council and European Parliament.⁶⁰

⁵⁷ *Id.* at 12.

⁵⁸ *Id.* at 13.

⁵⁹ Again, the narrowness or broadness with which this criterion is interpreted is of crucial importance and can have significant consequences regarding whether or not measures are classified as co-regulatory.

⁶⁰ *Id.*

While these criteria are oriented in particular to the European legislative and regulatory process, they could prove useful in any number of regulatory forums.

D. Interinstitutional Agreement on Better Lawmaking

In December 2003, the European Parliament, Council, and Commission drafted an interinstitutional agreement on better lawmaking.⁶¹ This agreement can be considered the first general legal framework for the use of self- and co-regulation at the European level, as it formally recognizes the need to use alternative methods of regulation in cases where the use of a legal instrument is not required (by the Treaty) and sets up general rules and conditions with which alternative regulatory methods need to comply. The agreement defines co-regulation as “the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field (such as economic operators, the social partners, non-governmental organizations, or associations).”⁶² The legislative act on which the co-regulatory mechanism is based should specify the level of authority that the recognized parties possess and the relevant measures to be taken in the event of non-compliance by one or more parties or of failure of the agreement.

E. Preliminary Conclusions from European Policy Documents

Clearly, alternative regulatory mechanisms have been the subject of serious reflection over the last few years. The definitions and criteria associated with these mechanisms, however, remain quite abstract and general. Accordingly, it might be useful to examine a few elements in greater depth, particularly the role of the state in a co-regulatory concept. For example, which role can (and should) the state, the regulatory

⁶¹ European Parliament, Council, and Commission, *Interinstitutional Agreement on Better Law-making*, 2003/C 321/01, *OJ (C 321)* 31.12.2003, at 1.

⁶² *Id.* at 18.

authority, or the legislator play? Is some sort of minimum or maximum degree of intervention required to be able to categorize an instrument as “co-regulatory?” These are important and pressing questions. Fortunately, some inspiration about possible governmental roles in the regulatory process can be drawn from the Canadian government, which in 1998 identified the different roles it could play in the process of effective and efficient code development. An abbreviated summary of these roles is included verbatim below:

- **Catalyst:** Government representatives can encourage parties to explore voluntary approaches even if laws or regulations are not imminent.
- **Facilitator:** Governments can provide meeting rooms, teleconference facilities, information, advice, and in some cases financial assistance in the early stages of code development.
- **Endorser:** In some circumstances, government departments can explicitly endorse a particular code or association that satisfies the provisions of a code.
- **Broker:** Government can act as a negotiator to ensure that all relevant parties are involved.
- **Provider of framework rules and regulatory support:** A regulatory authority can insist on adherence to voluntary codes as a condition of issuing a license. Enforcement and procurement policies can encourage voluntary code compliance.
- **Direct participant:** Governments may also act as direct participants in the process if such participation is deemed acceptable and relevant.⁶³

Of course, one could argue that the process can be considered explicitly co-regulatory only in the last two roles,

⁶³ Government of Canada, *Voluntary Codes: A Guide for Their Development and Use*, 21 (1998), available at [http://strategis.ic.gc.ca/epic/internet/inocabc.nsf/vwapj/volcodes.pdf/\\$FILE/volcodes.pdf](http://strategis.ic.gc.ca/epic/internet/inocabc.nsf/vwapj/volcodes.pdf/$FILE/volcodes.pdf).

where presumably the government provides framework rules and regulatory support or acts as a direct participant. Instances where the government plays the role of endorser or broker could thus possibly be seen as “soft” co-regulation. In any case, the degree of state involvement can distinguish co-regulation from self-regulation and state regulation (also referred to as “command-and-control” regulation).⁶⁴

	COMMAND-AND-CONTROL REGULATION	CO-REGULATION	SELF-REGULATION
Involvement of the state	High (e.g., law)	“Partnership” (catalyst, facilitator, endorser, broker, provider of framework rules and regulatory support, direct participant)	None (e.g., voluntary agreement)

(Classification on the basis of the level of involvement of the state)

IV. Co-Regulation in the Media Sector

Since the precise requirements, conditions, and characteristics of co-regulation are not concretely defined, it is difficult to classify existing alternative regulatory mechanisms beyond all doubt under a particular heading. In this section, we will take a closer look at a specific sector – the media sector – and a number of media-related alternative regulatory instruments in an attempt to provide a more understandable and practical picture.

A. Co-Regulation in Media Policy Documents

The media and audiovisual policy sector – at least at the European level – shows increasing signs of a cautious

⁶⁴ Schulz & Held, *Regulated Self-Regulation*, *supra* note 26, at 6.

consensus backing the exploration of alternative regulatory mechanisms.⁶⁵ For example, the 1998 Council Recommendation concerning the protection of minors and human dignity, which complements the fifth chapter of the Television without Frontiers Directive, established guidelines for the development of national self-regulation regarding the protection of minors in audiovisual and information services. This document was the first community legal instrument that covered all electronic media, including the content of online audiovisual and information services transmitted via the Internet.⁶⁶ The proposed guidelines concern four key components of a national self-regulation framework: (1) consultation and representativeness of the parties concerned, (2) codes of conduct, (3) national bodies facilitating cooperation at a national level, and (4) national evaluation of self-regulation frameworks.⁶⁷ Although the Recommendation uses the term “self-regulation” instead of “co-regulation,” certain scholars consider the document to be a “co-regulatory recommendation.”⁶⁸

In the Second Evaluation Report on the 1998 Recommendation, the Commission states that the Recommendation “has a cross-media approach and emphasizes the cross-border exchange of best practices and the development of co-regulatory and self-regulatory

⁶⁵ McGonagle, *Practical and Regulatory Issues*, *supra* note 5, at 90.

⁶⁶ *Second Evaluation Report from the Commission to the Council and the European Parliament on the Application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity*, COM (2003) 776 final, December 12, 2003, available at http://europa.eu.int/comm/avpolicy/legis/reports/com2003_776final_en.pdf, at 3 [hereinafter: *Second Evaluation Report*].

⁶⁷ *Council Recommendation of 24 September 1998, on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity*, 98/560/EC, 1998 O.J. (L 270) 48, Annex, at 52.

⁶⁸ *Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis*, in COMP. MEDIA L. & POL'Y 1, 7 (April 30, 2004), available at <http://www.selfregulation.info/iapcode/0405-iapcode-final.pdf>, [hereinafter: *Self-Regulation of Digital Media*].

mechanisms.”⁶⁹ The Commission indicates that co-regulation implies an appropriate level of involvement by the public authorities and that there should be cooperation between the public authorities, industry, and other interested parties. Again, this idea remains quite abstract (*e.g.*, it is difficult to gauge an “appropriate” level of involvement). According to the Commission, the advantages of co-regulation include flexibility, adaptability, and efficiency.⁷⁰ In particular, co-regulation often offers a better mechanism for achieving set objectives regarding the protection of minors, where many sensibilities must be taken into account.⁷¹ The Commission also emphasizes this last point in its Communication on the future of European regulatory audiovisual policy.⁷² While the protection of minors has always been a primary policy issue, recent developments such as convergence and the emergence of new technologies further challenge the policy approach in the audiovisual field. In fact, co-regulation is increasingly put forward as *the* regulatory solution in this field. Furthermore, an update to the 1998 Recommendation is currently being discussed in order to bring it in line with the challenges posed by new technological developments.

On November 16, 2004, the Council of the European Union endorsed a general approach in a draft European Parliament and Council Recommendation on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry. The Commission argues that the

⁶⁹ *Second Evaluation Report*, *supra* note 66, at 5.

⁷⁰ *Id.*

⁷¹ Schulz and Held seem to agree in their study on regulated self-regulation: “As objectives and areas for self-regulation according to these criteria the protection of minors as far as broadcasting or Internet content is concerned can be seen as a field where the concept is promising.” See Schulz & Held, *Regulated Self-Regulation*, *supra* note 26, at 29.

⁷² *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee of the Regions – The Future of European Regulatory Audiovisual Policy*, COM (2003) 784 final, December 15, 2003, available at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0784en01.pdf, at 23 [hereinafter: *The Future of European Regulatory Audiovisual Policy*].

need for a safe environment is greater than ever, especially when “taking into account the ever-increasing processing power and storage capacity of computers, and the fact that broadband technologies allow distribution of content such as video on 3G mobile telephones.”⁷³ The proposal emphasizes awareness, literacy, and education, and it facilitates identification of and access to quality content and services for minors. This seems to favor a bottom-up harmonization through cooperation between self-regulatory and co-regulatory bodies in the Member States and through the exchange of best practices concerning such issues as a system of common, descriptive symbols that would help viewers assess program content.⁷⁴ This bottom-up stance is remarkable, given that the European Commission usually advocates a top-down approach.⁷⁵ On November 25, 2004, the Committee on Culture and Education of the European Parliament discussed the draft Recommendation, and an amended version was approved by the European Parliament on September 7, 2005.⁷⁶

⁷³ *Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness on the European audiovisual and information services industry*, COM (2004) 341 final, April 30, 2004, available at

http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/com04-341-en.pdf, at 2-3.

⁷⁴ *Id.* at 7.

⁷⁵ See Pouillet, *Technologies de l'Information*, *supra* note 24, at 12.

⁷⁶ *European Parliament legislative resolution on the proposal for a recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry*, (COM(2004)0341 – C6-0029/2004 – 2004/0117(COD)), available at

http://www.europarl.eu.int/omk/sipade3?SAME_LEVEL=1&LEVEL=2&NAV=X&DETAIL=&PUBREF=-//EP//TEXT+TA+P6-TA-2005-0330+0+DOC+XML+V0//EN&L=EN. The shift from self- to co-regulation is again very clear in this amended version of the proposal: “(5a) On the whole, self-regulation of the audiovisual sector is proving an effective additional measure, but it is not sufficient to protect minors from messages with harmful content. The development of a European audiovisual area based on freedom of expression and respect for citizens’ rights, as laid down in the Treaty establishing a Constitution for Europe,

Directive 2000/31/EC of the European Parliament and of the Council,⁷⁷ the “e-commerce directive,” also contains some provisions on alternative regulatory instruments relevant to the protection of minors. Specifically, article 16(1)(e) requires Member States and the Commission to encourage the drafting of codes of conduct regarding the protection of minors and human dignity.

Regarding the online environment, one should consider the Safer Internet Action Plan (1999-2004)⁷⁸ and the Safer Internet Plus Program (2005-2008). The Safer Internet Action Plan was established with the objective of promoting safer use of the Internet and encouraging, at a European level, an environment favorable to the development of the Internet industry.⁷⁹ Heavily inspired by self-regulatory principles, the plan was implemented through three main action lines: creating a safer environment through the development of hotlines and codes of conduct, developing filtering and rating

should be based on a continuous dialogue between national and European legislators, regulatory authorities, industries, associations, consumers and civil society.” Noteworthy amended considerations refer to article 24 and 1 Charter of the Fundamental Rights of the European Union (on the right of a child to human dignity: “*in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration*”), the need for legislative measures and a directive in this area (consumer protection with respect to information and communication technologies including the protection of minors), and the fact that there is nothing in the Recommendation to prevent Member States from applying their constitutional provisions and other laws and their legal practice regarding free speech.

⁷⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000, O.J. (L 178) 1, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf.

⁷⁸ Originally, the Safer Internet Action Plan was supposed to be in effect from 1999-2002, but it was extended through 2004.

⁷⁹ Decision no. 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, 1999 O.J. (L 033) 1, 1-11.

systems, and increasing public awareness.⁸⁰ In November 2003, the plan received fairly positive evaluations, though safer use of the Internet continued to be a real concern. Moreover, it concluded that new technologies and new ways of using these technologies increase the challenge of protecting children.⁸¹ Therefore, in March 2004, the Commission adopted a proposal for the Safer Internet Plus Programme, which the European Union Telecommunications Council approved on December 9, 2004. This proposal points out that a variety of means must be combined in order to deal with unwanted and harmful content efficiently (e.g., enforcement of legal provisions, self-regulation, technical means such as filtering, and awareness raising).⁸² The proposal also asserts that self-regulation does not exclude the need for legal underpinning.⁸³ Again, the approach is shifting from advocating pure self-regulation to endorsing some form of co-regulation.

The Council of Europe, an intergovernmental organization with forty-six “European” members active in the area of media and human rights (the Council of Europe is *not* a governmental body of the European Union but nonetheless influential in human rights matters), also draws attention to the use of self- and co-regulatory measures in various policy documents.⁸⁴ The 2001 Council of Europe Recommendation

⁸⁰ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, concerning the evaluation of the Multiannual Community Action Plan on promoting safer use of the Internet and new online technologies by combating illegal and harmful content primarily in the area of the protection of children and minors*, COM(2003) 653 final, November 11, 2003, available at http://europa.eu.int/eurlex/en/com/cnc/2003/com2003_0653en01.pdf, at 2.

⁸¹ *European Commission, Proposal for a decision of the European Parliament and of the Council on establishing a multiannual Community programme on promoting safer use of the Internet and new technologies*, COM (2004) 91 final, March 12, 2004, available at http://europa.eu.int/information_society/activities/sip/docs/pdf/si_plus/act_en.pdf, at 2 [hereinafter: *Proposal Safer Internet Plus Programme*].

⁸² *Id.*

⁸³ *Id.* at 8.

⁸⁴ See generally, Marta Requena, *Activities of the Council of Europe in the*

on self-regulation concerning cyber content (self-regulation and user protection against illegal and harmful content on new communications and information services)⁸⁵ encourages Member States to establish organizations whose members represent a variety of Internet actors (*e.g.*, ISPs, content providers, and users). The Recommendation also encourages Member States to define a set of content descriptors on the widest possible geographical scale and in cooperation with the above-mentioned organizations, which should provide for the neutral labeling of content (thus enabling users to make their own value judgments regarding such content) and for the development of content selection tools.⁸⁶ Similarly, the 2003 Declaration of freedom of communication on the Internet⁸⁷ declares that Member States should encourage self- or co-regulation of content disseminated on the Internet.⁸⁸

B. Media-Related Co-Regulatory Instruments in Practice

Co-regulation is more than just an abstract notion used on a European policy level. Various European countries have

Field of Family Law, 31 CAL. W. INT'L L.J. 53 (2000) (describing the role and function of the Council of Europe and its activities in family law and the protection of minors).

⁸⁵ *Recommendation Rec(2001)8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)*, available at <http://cm.coe.int/ta/rec/2001/2001r8.htm> [hereinafter: *Recommendation on self-regulation concerning cyber content*].

⁸⁶ *Id.* at Appendix, Chapter II and III.

⁸⁷ *Declaration of freedom of communication on the Internet*, 2003, available at [http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/PDF_H_Inf\(2003\)007.pdf](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/PDF_H_Inf(2003)007.pdf).

⁸⁸ In an international context, and specifically with regard to the Internet, it can be deduced from the Declaration of Principles enacted by the World Summit on the Information Society that co-regulation is put forward as the method to govern the Internet. See *Launch of the European Internet Coregulation Network*, European Internet Coregulation Network, World Summit on the Information Society, Geneva, December 2003, available at <http://www.foruminternet.org/telechargement/forum/dp11122003.pdf>, at 2-3 [hereinafter: *Launch of the European Internet Coregulation Network*]; Poulet, *Technologies de l'Information*, *supra* note 24, at 2.

implemented co-regulatory measures in a number of ways and in a number of areas. Of course, the classification of a measure as “co-regulatory” greatly depends on the definition of co-regulation used. Thus, the aim of this short overview is not to provide an exhaustive list, but to instead demonstrate the variety of classifications for co-regulation that exists in different countries.

1. *Germany*

On April 1, 2003, the German *Jugendschutzgesetz* [Law for the Protection of Minors] and the *Jugendmedienschutz-Staatsvertrag*, [State Contract for the Protection of Minors in Media], a co-regulatory framework for the protection of minors across new and old media, entered into force in Germany. This new framework is a response to the market dynamics surrounding technological convergence, and one important element of the framework is the creation of one supervisory body for broadcasting, the Internet, and other forms of digital media (including 3G mobile phones) for the purposes of protecting minors and human dignity.⁸⁹ This supervisory body is called the “Commission for the protection of minors in the media” (*Kommission für Jugendmedienschutz*, or KJM),⁹⁰ and it is composed of twelve experts nominated by the regulatory authorities’ supervising broadcasters and nominated from amongst the highest state and federal authorities.⁹¹ The task of the KJM is to ensure compliance with norms defining the protection of minors, recognize and license voluntary self-regulation organizations such as the *Selbstkontrollenrichtungen* [Self-Regulatory Framework] and others, like the *Freiwillige Selbstkontrolle Fernsehen* [Voluntary Television Regulation] approve various technical measures such as content filtering and rating systems.

⁸⁹ Christian Ahlert, *The Triumph of German Engineering? PCMLP SELF-REGULATION REVIEW*, May 2003, available at <http://www.selfregulation.info/iapcoda/0305xx-selfregulation-review.htm> [hereinafter: Ahlert, *Triumph of German Engineering*].

⁹⁰ Kommission für Jugendmedienschutz website, available at <http://www.kjm-online.de/>.

⁹¹ *Jugendmedienschutz-Staatsvertrag*, §14, (3).

The new framework has been described as “regulated self-regulation”⁹² since the state defines and enforces legal norms, as well as grants licenses to self-supervising bodies. If the licensed bodies act outside the scope of their competences, they can be fined or their licenses can be revoked.⁹³ The conditions under which the government can delegate competences are narrowly defined and revocable, and the government reserves the right to intervene, actively monitor, and set the norms that describe and define harmful content.⁹⁴

Scholar Christian Ahlert argues that this model seems to benefit parties involved since it offers a well-defined, and therefore more secure, legal framework:

[This model] benefits the content providers because they operate under a framework with defined obligations, and if they oblige they cannot be prosecuted. It benefits the consumer, because she is not left to the will of self-interested private parties that try to minimize the cost of content control, arguably often at the expense of morality and those who should be protected most: children. And it benefits the state, because the government facilitates compliance and fosters accountability of regulation. The new model keeps the benefits of self-regulation (low economic cost of regulation), while reducing its structural

⁹² See e.g., Wolfgang Schulz, Uwe Jürgens, Thorsten Held, & Stephan Dreyer, *Regulation of Broadcasting and Internet Services in Germany: A Brief Overview*, October 2002, available at <http://www.hans-bredow-institut.de/publikationen/apapiere/13mediaregulation.PDF>, at 12, and Ahlert, *Triumph of German Engineering*, *supra* note 89.

⁹³ For example, if the Freiwillige Selbstkontrolle Fernsehen exceeds its scope of assessment, the KJM can overturn a decision regarding a program already televised and can impose fines of up to €500,000. KJM, *The new German regulation for the protection of minors and digital media – the first six months*, available at http://europa.eu.int/comm/avpolicy/regul/new_srv/workshop_ring.pdf, at 3 [hereinafter: KJM, *The new German regulation*].

⁹⁴ Ahlert, *Triumph of German Engineering*, *supra* note 89.

deviancies (reduced accountability and low incentives to comply).⁹⁵

An assessment by the KJM six months into the application of the new regulatory framework claims that the new system works satisfactorily,⁹⁶ not only because it balances the needs of content providers, consumers, and the state, but also because it fosters a paradigm of consistency throughout different media sectors.

2. Netherlands

In 1999, the Nederlands Instituut voor de Classificatie van Audiovisuele Media (NICAM) [the Dutch Institute for Classification of Audiovisual Media] was established. An independent institution broadly supported by institutions and companies in the audiovisual industry, NICAM was created in close collaboration with the Ministry of Education, Culture and Science; the Ministry of Health, Welfare and Sport; and the Ministry of Justice. NICAM uses a single classification system for television, videos, film, games, and – since April 2005 – mobile content: *Kijkwijzer*. This system works as follows: (1) content providers classify their own content by responding to a list of standardized questions, to which (2) NICAM subsequently applies a formula and then assigns an age recommendation and pictograms indicating which aspects of the content have led to recommended age restrictions. The government, in turn, keeps a close watch over the proceedings. The Dutch Media Authority evaluates the overall functioning of NICAM in its annual report, and an independent research agency is commissioned to monitor and evaluate the scheme's implementation.⁹⁷ An assessment conducted by scholar Carmen Palzer at the end of 2002 concluded that NICAM functioned well and met its objectives and that both the

⁹⁵ *Id.*

⁹⁶ KJM, *The new German regulation*, *supra* note 93, at 4.

⁹⁷ The Media Act, Stb. 1987, 249, at § 53, available at <http://www.cvdm.nl/documents/mediaact.pdf> (Neth.). See also Kijkwijzer, NICAM (Netherlands Institution for the Classification of Audio-visual Media), <http://www.kijkwijzer.nl/pagina.php?id=3> (“English” hyperlink).

industry and consumers were satisfied with the system.⁹⁸ In addition, Palzer found that NICAM and the *Kijkwijzer* system have been incorporated into the national regulatory framework.⁹⁹ This system has been cited as an example of co-regulation,¹⁰⁰ notwithstanding the fact that state involvement is limited (and that the state's role is less clear than in the German model).

3. *United Kingdom*

The United Kingdom is also actively exploring the use of self-regulation and co-regulation in different media sectors. The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), is an industry-funded co-regulatory body that regulates premium rate telecommunications services. Set out in the 2003 Communications Act,¹⁰¹ this co-regulatory scheme ensures compliance with industry codes, which sets standards for the promotion, content, and overall operation of premium rate services with the goal of protecting those who may be especially vulnerable, particularly children. Ofcom, the communications regulatory authority, approves the industry codes if certain statutory criteria have been fulfilled.¹⁰² If there

⁹⁸ Carmen Palzer, *Horizontal Rating of Audiovisual Content in Europe – An Alternative to Multi-Level Classification?* 10 IRIS PLUS 2003, at 4 [hereinafter: Palzer, *Horizontal Rating*].

⁹⁹ For instance, Section 52d of the Dutch Media Act, as quoted *supra* note 97.

¹⁰⁰ See e.g., Viviane Reding, European Comm'r responsible for Educ. and Culture, Minors and Media: Towards a More Effective Protection (September 10, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/400&format=HTML&aged=0&language=EN&guiLanguage=en>. See also Tarlach McGonagle, *The Potential for Practice of an Intangible Idea*, IRIS SPECIAL 2003, Strasbourg, European Audiovisual Laboratory, at 6.

¹⁰¹ Communications Act, n° 120 *et seq.* (Regulation of premium rate services), available at <http://www.legislation.hms.gov.uk/acts/acts2003/30021--c.htm#120> [hereinafter: Communications Act]. See also Ofcom, *Promoting effective self-regulation: criteria for transferring functions to co-regulatory bodies*, available at http://www.ofcom.org.uk/consult/condocs/co-reg/pdf_version.pdf, at 5.

¹⁰² Communications Act, *supra* note 101, at n° 121 (Approval of code for

is no code or the code is no longer sufficient, Ofcom can take measures. At first sight this scheme seems to satisfy a number of co-regulatory criteria: the framework of the mechanism is set out in legislation (the 2003 Communications Act), it is based on a code of practice developed by a co-regulatory body, and the regulatory authority can intervene if necessary.

Ofcom, is also taking steps towards establishing a common content labeling system for electronic audiovisual material delivered across all platforms.¹⁰³ Ofcom's underlying concern is to ensure media information is presented in a clear, consistent manner in order to protect young people from inappropriate material using the Dutch *Kijkwijzer* system as a model.¹⁰⁴ A working group consisting of the different players has been established, and research into the feasibility of such a system is currently being carried out.

4. France

In France, a system of uniform television program pictogram rating symbols (in French: *signalétique*) was adopted in 1996 in order to protect youth (*jeunesse*) from harmful media. This system, called *la signalétique jeunesse*, applies to all broadcast services and to all kinds of programs, and broadcasters themselves are responsible for rating the programs they broadcast.¹⁰⁵ These broadcasters, establish a viewing committee that suggests ratings by taking into account a non-exhaustive list of rating criteria developed by the French authority *Conseil supérieur de l'audiovisuel* (CSA).¹⁰⁶ The CSA plays an important role in the system: it designed and revised the *signalétique*, and it currently monitors the application of the system, applies sanctions, and

premium rate services).

¹⁰³ Ofcom, Ofcom's Strategy and Priorities for the Promotion of Media Literacy – A Statement, (2004) available at http://www.ofcom.org.uk/consult/condocs/strategymedialit/ml_statement/?a=87101.

¹⁰⁴ *Id.* at 79, 82, 94.

¹⁰⁵ Conseil Supérieur De L'audiovisuel, *La signalétique jeunesse*, available at http://www.csa.fr/infos/controlle/television_signalétique2.php.

¹⁰⁶ *Id.*

reviews complaints from viewers or from viewer and family organizations.¹⁰⁷

Furthermore, in April 2004 a joint initiative of the French government and *l'Association des Fournisseurs d'Accès et de Services Internet* (AFA)¹⁰⁸ (the French association of Internet access and service providers) led to the publication of a charter in which the AFA pledges to strengthen its contribution to the fight against child pornography, racist content, and anti-Semitic content. In the charter, the providers commit to offering better methods of signaling harmful content, facilitating the signaling of content, and to immediately communicating any such content to the police.¹⁰⁹ Outside of its role as a fellow initiator, however, the government does not really participate in the enforcement of the code of conduct.

The *Forum des Droits sur l'Internet*, established in 2001, seeks to encourage collaboration between private and public actors and to initiate and maintain a process of consultation on legal and social questions regarding Internet rights (*droits*).¹¹⁰ The Forum, which has been labeled a co-regulatory institution,¹¹¹ undertakes legal and technical studies, informs and sensitizes the public, and formulates recommendations addressed to the public authorities and Internet actors.

5. Australia

The Australian regulatory model is often cited as an effective example of media co-regulation.¹¹² A cornerstone

¹⁰⁷ *Id.*

¹⁰⁸ *l'Association des Fournisseurs d'Accès et de Services Internet (AFA)*, available at <http://www.afa-france.com>.

¹⁰⁹ AFA, *Charte des prestataires de services d'hébergement en ligne et d'accès à Internet en matière de lutte contre certains contenus spécifiques*, June 14, 2004, available at http://www.afa-france.com/charte_contenusodieux.html.

¹¹⁰ Forum des droits sur Internet, *Quelles sont nos missions ?*, available at <http://www.foruminternet.org/quisommesnous/missions.phtml?PHPSESSID=550465aac0fbb2fab933f2b19697d2d0>.

¹¹¹ Poulet, *Technologies de l'Information*, *supra* note 24, at 1.

¹¹² Schulz and Held conducted interviews with Australian experts in the

principle is that the industry largely develops its own codes of practice to which enterprises must adhere and thus determines its own regulatory arrangements within the legislative framework.¹¹³ A developed code of practice is submitted for registration to the Australian Communications and Media Authority (ACMA),¹¹⁴ Australia's radio, television, film, and Internet regulator.¹¹⁵ In assessing a code of practice for registration, the ACMA considers three mandatory criteria, quoted verbatim below:

- The code of practice [must provide] appropriate community safeguards for the matters covered by the code; and
- The code [must be] endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- Members of the public [must be] given an adequate opportunity to comment on the code.¹¹⁶

If no code of practice is developed or if a code is failing, then the ABA (Australian Broadcasting Authority), through its state designation and regulation authority, can establish an industry standard through a *de jure* process of

framework of their study *Regulated Self-Regulation as a Modern Form of Government*. Both experts seemed to agree that the co-regulatory model was “a positive move which on the whole improved the effectiveness of regulation,” but at the same they found that for certain aspects “the shift to self-regulation went too far.” See Schulz & Held, *Regulated Self-Regulation*, *supra* note 26, at 22.

¹¹³ Andree Wright, *Australia's Co-Regulatory Scheme for Internet Content*, Council of Europe Steering Committee on the Mass Media, Strasbourg, October 17, 2000, available at <http://www.humanrights.coe.int/media/events/2000/hearing/wright.doc>.

¹¹⁴ On July 1, 2005 the former Australian Broadcasting Authority (ABA) and Australian Communications Authority (ACA) merged into the ACMA.

¹¹⁵ Broadcasting Services Act, Schedule 5 – Online Services, Section 62, available at <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/frame/0A9D0E76D7E36FB3CA256F71004C55C3>.

¹¹⁶ Broadcasting Services Act, Part 9 (Program Standards), Section 123, (4), 1992, available at http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/.

adoption.¹¹⁷ Media scholars often believe that the degree of success of self- or co-regulation depends in part on the lurking threat of state intervention, so such an approach may make sense.

Regarding the co-regulatory scheme for Internet content, in 1999 the ABA registered three codes of practice, developed by the Internet Industry Association (IIA), that outline the obligations of ISPs and Internet content hosts. The ABA website containing the register of industry codes noted, “The ABA registered the codes after consideration of a number of factors including whether consultation had been undertaken with the community, industry and the community advisory body, NetAlert, and whether the codes contained appropriate community safeguards.”¹¹⁸

The 1992 Australian Broadcasting Services Act, schedule 5, clause 60, delineates a framework for these industry codes by summing up matters that the codes must address, such as the following: (1) procedures to ensure that online accounts are not provided to children without the consent of a parent or responsible adult, (2) procedures to help parents and responsible adults supervise and control children’s access to Internet content, (3) actions to assist in the development and implementation of Internet content filtering technologies (including labeling technologies), and (4) providing information to customers about the availability, use, and appropriate application of Internet content filtering software.¹¹⁹ Furthermore, clause 66 prescribes that the ABA can dictate the rules of industry code compliance.

Wolfgang Schulz and Thorsten Held note that the Australian regulatory concept is “not merely state regulation with a few self-regulatory elements, but relies on self-

¹¹⁷ *Id.* at Section 125.

¹¹⁸ Australia Broadcast Authority, Register of Industry Codes, *available at* http://www.aba.gov.au/newspubs/news_releases/archive/1999/134nr99.shtm.

¹¹⁹ Broadcasting Services Act, Schedule 5 – Online Services, Section 60, *supra* note 115.

regulation as far as possible.”¹²⁰ While this observation is technically accurate, the legislative framework provides ways for the state to intervene. For example, the ABA has the authority to impose a standard when no code exists or when an existing code fails. In this way, state regulation can remain as a safety net.¹²¹

The online content co-regulatory scheme was reviewed in May 2004. The majority of review submissions clearly supported the scheme, suggesting that it has effectively met its objectives and is in line with community views on this issue.¹²²

C. Harmful Content, the Protection of Minors and Co-Regulation

The information and communications sector has been – and still is – undergoing profound changes. New technologies such as digital television, the Internet, and 3G mobile phones have led to serious questions about the regulation of content disseminated via these technologies. In fact, with the advent of the Internet and 3G mobile, traditional concerns that minors can encounter illegal and harmful content have multiplied. Due to the nature and inherent characteristics of these technologies, governments, consumer associations, and other user interest groups have taken a strong interest in investigating different regulatory methods and mechanisms that can protect minors who access digital media. In this context, a growing number of experts feel that co-regulation could play an especially important role in regulating these new electronic media.

In this section, we will examine various traditional and recent media sectors, their implications regarding the protection of minors against harmful content, and the latest developments and possible future trends in these sectors.

¹²⁰ Schulz & Held, *Regulated Self-Regulation*, *supra* note 26, at 15.

¹²¹ See Hoffmann-Riem, *Regulating Media*, *supra* note 28, at 326.

¹²² Australian government, *Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992 – Report*, May 13, 2004, available at http://www.dcita.gov.au/data/assets/pdf_file/10920/118872.pdf, at 14.

1. Broadcasting and Television

The protection of minors against harmful television content has long been a source of regulatory concern. Accordingly, most countries have passed some sort of regulation dealing with this issue. Two types of content that are usually restricted include content that is absolutely prohibited and content that requires special precautions that sharply decrease the likelihood that minors will see or hear it.¹²³ This distinction is also reflected in article 22 of the Television without Frontiers Directive, which, as noted in our introduction, stipulates that Member States should take appropriate measures to prevent the broadcast of programs that might seriously impair the physical, mental, or moral development of minors (in particular, programs that incorporate pornography or gratuitous violence).¹²⁴ The same restriction holds true for other programs likely to impair the physical, mental, or moral development of minors, *except* where it is ensured, through the time of the broadcast (the so-called “watershed”) or technical measure, that minors will not normally hear or see such broadcasts. Moreover, article 22 stipulates that programs broadcast in unencoded form should be preceded by an acoustic warning or identified by a visual symbol throughout their duration.

Interestingly, European governments are increasingly shifting responsibility for the development and management of content regulation to the broadcast industry and independent organizations. This movement away from centralization makes sense because it embraces the depth that media interest has within individual countries and (where possible) through reliance upon existing structures rather than through *sui generis* means. Along these lines, a recent study discovered a trend towards continued deregulation in European broadcasting:

The regulatory environment created is one that permits the tasks of supervision of content to be

¹²³ Hoffmann-Riem, *Regulating Media*, *supra* note 28, at 315.

¹²⁴ *Television without Frontiers Directive*, *supra* note 9.

discharged by increasingly autonomous mechanisms. The authorities retain supervision at a higher level while the mechanisms of implementation are the ones entrusted with the day-to-day task of implementing codes of conduct.¹²⁵

The above-mentioned Dutch *Kijkwijzer* classification system and French *signalétique*, for example, illustrate this trend. Furthermore, Italian public and private broadcasters have signed and presented to the Ministry of Communications the *Codice di Autoregolamentazione TV e Minori*, a code of conduct on television and minors that aims “to provide adequate protection for under-age viewers and to actively limit minors’ exposure to harmful content on television.”¹²⁶ Proposals borne out of industry—are likely to continue to be developed, and may be cheaper and more effective than parental governmental approaches. This European “deregulation” trend contrasts with U.S. policymakers’ recently renewed vigorous interest in tackling “indecent,” especially in cable and satellite broadcasting.¹²⁷ The threat of government intervention (*e.g.*, through bills proposing an increase in fines for broadcasters and stricter enforcement)¹²⁸ has prompted several broadcasters to install self-regulatory content rating systems.¹²⁹

¹²⁵ *Self-Regulation of Digital Media*, *supra* note 68, at 29.

¹²⁶ Marina Benassi, *New Self-Regulatory Code of Conduct on Television and Minors*, IRIS MERLIN, available at <http://merlin.obs.coe.int/iris/2003/4/article21.en.html>.

¹²⁷ Krysten Crawford, *Smackdown in Smut War?* CNN MONEY (April, 28 2005), available at http://money.cnn.com/2005/04/27/news/fortune500/indecency_courts/index.htm.

¹²⁸ See Broadcast Decency Enforcement Act, H.R. 310, 109th Cong. (2005), available at <http://www.congress.org/congressorg/bill.xc?billnum=H.R.310&congress=109>, and Indecent and Gratuitous and Excessively Violent Programming Control Act, S. 616, 109th Cong. (2005), available at <http://www.congress.org/congressorg/bill.xc?billnum=S.616&congress=109>.

¹²⁹ John Eggerton, *NBC Adopts Content Ratings* (April 28, 2005), available

The growth of new communication technologies such as the Internet will undoubtedly have further implications on traditional broadcast regulation. Mechanisms like the aforementioned “watershed” simply do not work since Internet content is accessible anywhere and anytime. A review of the Television without Frontiers Directive is currently being discussed, and one frequently raised question is whether the present regime is still justified when many new networks offer unrestricted access. It remains to be seen how this challenge will be addressed. The revised Television without Frontiers Directive is expected to be completed by the end of 2005, and the Commissioner for Information Society and Media, Viviane Reding, has already announced that the intention is to create a modern, technology-neutral legal framework for all audiovisual content.¹³⁰

2. *Internet*

The Internet has opened up completely new ways of dealing with audiovisual content.¹³¹ For example, video clips, music, and films can be consulted and circulated with considerable ease, even more so with the increasing speed of broadband connections. Moreover – as we are experiencing in Voice over Internet Protocol (VoIP) telephony – the broadcast industry is also exploring the use of Internet protocols for digital broadcasting.

In its Second Evaluation Report of the 1998 Recommendation on the protection of minors, the Commission to the Council enumerates some fundamental differences between traditional broadcasting and the Internet:

at

<http://www.broadcastingcable.com/article/CA528315.html?display=Breaking+News&referral=SUPP>.

¹³⁰ See Viviane Reding, *Challenges ahead for the European Commissioner for Convergence – Opening of the European Cable Communication Association Conference*, Brussels, January 18, 2005, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/18&format=HTML&aged=0&language=EN&guiLanguage=en>

¹³¹ *The Future of European Regulatory Audiovisual Policy*, *supra* note 72, at 5.

Whereas in traditional broadcasting (analog or digital) the individual broadcaster is easily identifiable, it is difficult and sometimes impossible to identify the source of content on the Internet. Access to harmful and illegal content is easy and can even occur without intent. In addition, the volume of information in the Internet is massive in comparison to broadcasting.¹³²

Indeed, the Internet is *the* area that, due to its particular characteristics, has highlighted the shortcomings of traditional legislation. Not unexpectedly, then, the Internet's advent has drawn attention to alternative regulatory mechanisms, first and foremost self-regulation. According to the study by the Programme in Comparative Media Law and Policy entitled *Self-Regulation of Digital Media Converging on the Internet*, "the development of Internet content self-regulation over the past decade has been a rapid, disorganized and creative project."¹³³ Codes of conduct covering diverse themes have surfaced everywhere and have been signed by diverse actors. Other self-regulatory initiatives have also emerged, such as the Internet Content Rating Association (ICRA), an international organization that promotes self-labeling of Internet content. In this system, content providers select neutral and objective descriptive words from a list provided by ICRA in order to indicate the kinds of content found on their websites. Users can then run filtering software to allow or block access to websites based on the information supplied by the content providers.

However, self-regulation of the Internet has recently been greatly criticized, due to problems of legitimacy and accountability, as well as concerns about private censorship and the protection of freedom of expression. Co-regulation in the online context is therefore increasingly proposed as a possible answer to these concerns. Examples include the

¹³² *Second Evaluation Report*, *supra* note 66, at 6.

¹³³ *Self-Regulation of Digital Media*, *supra* note 68, at 37.

Australian co-regulatory Internet content scheme (discussed earlier) and the Italian code of conduct on Internet and minors. The Italian code was inspired by the principle of co-regulation and thus implies shared responsibility through an agreement between the private and public sectors.¹³⁴ Little by little, formerly purely self-regulatory instruments are now incorporating co-regulatory elements.

In this spirit, the European Internet Coregulation Network (EICN) was established in December 2003. Initiated by the Forum des Droits sur l'Internet, the EICN has nine members from seven European countries.¹³⁵ Within the EICN, co-regulation has been proposed as a multi-stakeholder process aimed at organizing a "cooperation on rights and usage issues between all players of the Internet sharing responsibility in building the rules: representatives of States, private companies and the civil society."¹³⁶ In addition to the implementation of state regulation, co-regulation allows the application of new mechanisms derived from self-regulation, such as best practices and technical regulatory methodologies.

The EICN has four main objectives: (1) build a resource and expertise network on Internet legal issues, (2) organize public debates with all stakeholders, (3) provide European institutions with proposals, and (4) prepare to support the World Summit on the Information Society (WSIS) follow-up process.¹³⁷ The EICN has already made a policy statement on the subject of child protection on the Internet, an

¹³⁴ See Press Release, Minister for Innovation and Technologies, Self-regulation Code: "Internet & Minori" (Nov. 19, 2003), available at http://www.innovazione.gov.it/eng/comunicati/2003_19_11b.shtml.

¹³⁵ The UK Internet Watch Foundation and the Oxford Internet Institute, the French Forum des droits sur l'internet, the Italian Forum per la Tecnologia della Informazione, the Swedish IRI (Law and Informatics Research Institute), the Hungarian ITTK (Information Society Research Institute Technical University Budapest), the Belgian Observatoire des Droits de l'Internet the Austrian ÖIAT (Austrian Institute for Applied Telecommunication) and the Confederation of European Computer User Associations (CECUA), see <http://network.foruminternet.org/>.

¹³⁶ *Launch of the European Internet Coregulation Network*, *supra* note 88, at 1.

¹³⁷ *Id.* at 4.

issue particularly suited to the regulatory debate since “the principles of co-regulation are so well illustrated by the necessary cooperation required from all members of the “chain of responsibility” (public authorities, content and service providers, users *i.e.* parents and children).”¹³⁸ The statement calls for the establishment of more awareness-raising projects, the development of age-control and age-verification devices, improved information on parental control tools, increased protection against spam (as a carrier of harmful content), and a forward-looking strategy for the mobile Internet (*e.g.*, 3G and UMTS).¹³⁹ Implementing effective procedures for the protection of minors against online harmful content will, according to the EICN, continue to pose significant challenges. With this thought in mind, it is all the more important that co-regulatory mechanisms be considered as a means of carrying this debate a step further.

3. Electronic Video Games

In 2002, the European Union Council issued a resolution on the protection of consumers, in particular young people, through the labeling of certain video and computer games according to the appropriate user age group.¹⁴⁰ This resolution acknowledged self-regulation as an adequate method (in its own right or as a complement to other Member State initiatives) of supporting age-rating systems for interactive video and computer games, especially since self-regulation encourages the participation of all interested parties.

In 2003, a (nearly) pan-European classification mechanism was implemented by the Interactive Software Federation of Europe (ISFE). ISFE’s Pan European Game

¹³⁸ *Child Protection on the Internet – Preventing the Exposure of Children to Harmful Content – A Policy Statement*, European Internet Coregulation Network, available at <http://network.foruminternet.org/IMG/pdf/childprotection-policystatement.pdf>, at 1-2 [hereinafter: *Child Protection on the Internet*].

¹³⁹ *Id.* at 2-4.

¹⁴⁰ *Council Resolution of 1 March 2002 on the protection of consumers, in particular young people, through the labeling of certain video and computer games according to the age group*, 2002 O.J. (C 65) 2.

Information System (PEGI) replaces a number of existing national rating systems with a single system used throughout most of Europe.¹⁴¹ The system comprises two separate but complementary building blocks: an age rating and a number of game descriptors.¹⁴² The Second Evaluation Report concerning the protection of minors and human dignity stated that the “voluntary PEGI system is subordinate [in all countries] to the pre-existing, wider framework established, run and enforced by governments to ensure the protection of minors.”¹⁴³ Though privately run, the PEGI system takes into account and builds on existing legal provisions.^{144 145} However, there is no consensus on the regulatory nature of this initiative. For instance, the European Commissioner for Education and Culture, Viviane Reding,¹⁴⁶ cites the PEGI system as an example of co-regulation, while others see it as a self-regulatory system.¹⁴⁷ In any case, the initiative shows that in

¹⁴¹ Germany does not take part in the system because its new laws situate video and computer games within the overall media co-regulatory framework.

¹⁴² These game descriptors are icons, displayed on the back of the game box, that describe the game content type.

¹⁴³ *Second Evaluation Report*, *supra* note 66, at 16.

¹⁴⁴ *Code of conduct of the European Interactive Software Industry regarding age rating labeling, promotion and advertising of interactive software products*, available at <http://www.isfe-eu.org> (“Key Issue” drop-down menu; then “Age-Rating” hyperlink; then scroll to “Download” PEGI Code of Conduct hyperlink). See article 2: “This industry’s contribution complements existing national laws, regulations and enforcement mechanisms.” See also article 6: “The signatories to the Code shall see to it that the content, distribution by any means, promotion and advertising of the products covered by this Code do comply with existing laws and regulations at EU and Member States’ level.” The PEGI system also established a Legal Committee that is in charge of securing the coherence of the system with national legal frameworks (article 3).

¹⁴⁵ Palzer, *Horizontal Rating*, *supra* note 98, at 5.

¹⁴⁶ Viviane Reding, European Comm’r responsible for Educ. and Culture, *Minors and Media: Towards a More Effective Protection* (September 10, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/400&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁴⁷ Olsberg *et al.*, *Empirical Study on the Practice of the Rating of Films Distributed in Cinemas, Television, DVD and Videocassettes in the EU and*

certain areas a (nearly) pan-European consensus can be achieved, thus providing a promising example for a potential pan-European, cross-media approach to protect minors against harmful audiovisual content. It has been suggested, however, that part of the success in achieving a pan-European agreement for electronic games can be explained because few Member States already had a regulatory framework in place in this sector, as opposed to, for instance, the broadcasting sector.¹⁴⁸

4. 3G Mobile Telephony

The regulation of content circulating on 3G mobile networks is a hot topic these days. Emerging 3G and UMTS technology enables users to connect to the Internet and facilitates the delivery and exchange of audiovisual content. Not surprisingly, concerns have arisen about adult and premium services (so-called “girls, games and gambling,” a possibly unintended derivative of the term “3G”)¹⁴⁹ with respect to the protection of minors. Research suggests that future profits from adult content transmitted to mobile phones will be significant.¹⁵⁰ As more and more children use mobile phones, concerns about minors coming across harmful content through their phones increase.¹⁵¹ In particular, children’s use of mobile phones is oftentimes totally unsupervised, which does not exist to the same extent in fixed locations – such as the

*EEA Member States, Final Report - May 2003, available at http://europa.eu.int/comm/avpolicy/stat/studpdf/rating_final_report2.pdf, at 19 [hereinafter: Olsberg et. al., *Empirical Study on the Practice of the Rating of Films*].*

¹⁴⁸ Palzer, *Horizontal Rating*, *supra* note 98, at 5.

¹⁴⁹ See Katya Zapletnyuk, *3G to Debut Next Level in Mobiles*, THE PRAGUE POST, Sep. 21, 2005, available at <http://www.praguepost.com/P03/2005/Art/0922/busi2.php>.

¹⁵⁰ For instance, some predict that 2006 profits worldwide will account for \$4 billion in an industry whose profits total \$70 billion. See *Bang Goes the Phone Porn*, BBC NEWS, August 1, 2003, available at <http://news.bbc.co.uk/1/hi/technology/3116099.stm>.

¹⁵¹ See also, e.g., *Second Evaluation Report*, *supra* note 66, at 17. “Taking into account [...] the fact that broadband technologies allow distribution of content such as video on 3G mobile telephones, the need for a safe environment is greater than ever.”

home – where parents can supervise and monitor their children’s activities.

While this regulatory domain is still relatively new, a few (mainly self-regulatory) initiatives have already been undertaken, such as the UK code of practice for the self-regulation of new forms of content on mobiles.¹⁵² Established by six UK mobile operators, the code provides for the self-regulation of new forms of content on mobile phones and aims to facilitate the responsible use of mobile phone services while safeguarding children from unsuitable content. The code promotes the use of special filters that control Internet access for all users of phones under eighteen years of age.¹⁵³

Vodafone was the first operator to implement such a filter by using an “opt-in” approach (*i.e.*, customers are not able to access adult websites unless they request that the filter be removed and provide credit card information).¹⁵⁴ This filter system, however, already has had to contend with content-related criticism and technical difficulties. In October 2004, another aspect of the code was implemented through the appointment of the Independent Mobile Classification Body,¹⁵⁵ an independent subsidiary of ICSTIS that (1) defines classification criteria for 18+ content that is consistent with other media, (2) provides advice to commercial content providers on whether or not content should be classified as 18+ in accordance with the classification framework, and (3) investigates and handles complaints of misclassification. A first draft of the classification framework was completed in early 2005. Along these same lines, in Germany the age check

¹⁵² *The UK code of practice for the self-regulation of new forms of content on mobiles*, available at <http://www.vodafone.co.uk> (click on “About Vodafone”; then “The company”; then “code of practice”).

¹⁵³ See *e.g.*, Lucy Sherriff, *So Why Does Vodafone Filter Block Sky News?* THE REGISTER, July 6, 2004, available at http://www.theregister.co.uk/2004/07/06/voda_filter_chaos/.

¹⁵⁴ *Vodafone Blocks Access to Porn*, BBC NEWS, July 2, 2004, available at <http://news.bbc.co.uk/1/hi/business/3860095.stm>.

¹⁵⁵ Press Release, UK Mobile Operators, UK Mobile Operators Announce Independent Classification Body (October 21, 2004), available at http://www.icstis.org.uk/icstis2002/pdf/IMCB_release_191004.pdf.

and user identification system (based on personal contact) proposed by Vodafone's German operation, Vodafone D2, for the protection of minors, was approved by the KJM under the new regulatory framework (see the earlier discussion).¹⁵⁶

The Global System for Mobile Communication (GSM) Association joined ICRA¹⁵⁷ in June 2004. An industry-led effort, GSM Association is following the self-regulatory trends that we have already seen. Moreover, discussions are underway regarding the potential of ICRA labeling for mobile content and the development of a new version of Platform Internet Content Selection (PICS)¹⁵⁸ that would work across all digital devices. Thus, we can likely expect more proposals from industry consortia in Europe as new 3G and other mobile services are launched.¹⁵⁹ While the industry has taken an early initiative in the emergence of 3G mobile phones, European governments are increasingly jumping on the bandwagon and voicing their concern in recent policy documents and in other forums. Many experts hope that mobile Internet regulatory initiatives will benefit from lessons learned from corresponding fixed Internet initiatives.¹⁶⁰

V. Possible Tools of Co-Regulation

The previous sections have illustrated the close connection between co-regulatory mechanisms and tools such as filtering technologies, content labeling and rating devices,

¹⁵⁶ *Mobile content: Vodafone commits itself to the protection of young persons*, Vodafone Germany, October 22, 2003, available at http://www.vodafone.com/article_with_thumbnail/0,3038,CATEGORY_ID%253D20701%2526LANGUAGE_ID%253D0%2526CONTENT_ID%253D208061,00.html#.

¹⁵⁷ The GSM Association represents more than 630 mobile operators across 200 countries.

¹⁵⁸ Platform Internet Content Selection, <http://www.w3.org/PICS/>.

¹⁵⁹ On the other side of the ocean, in the United States, rating and filtering schemes for wireless content are also being developed. See *Wireless Rating System to Tackle Porn*, ZDNet.com, April 25, 2005, available at http://news.zdnet.com/2100-1035_22-5682956.html.

¹⁶⁰ *Child Protection on the Internet*, *supra* note 138, at 4.

and codes of conduct. At this point, it may be useful to briefly focus on possible components of a co-regulatory approach, particularly regarding content regulation in the digital media sector.

A. Filtering / Blocking Technologies

Filtering technologies can prevent or block access to specified types of content.¹⁶¹ These technologies are often mentioned in the context of protecting minors against harmful content in certain media, especially the Internet and 3G mobile technology (see the earlier discussion). However, opinions diverge on the use and usefulness of filtering technologies to protect minors. On one hand, filtering technologies can shift control of and responsibility for harmful content from governments, regulatory agencies, and supervisory bodies to end users, primarily parents.¹⁶² Put another way, filtering promotes parental bottom-up control rather than top-down censorship by state agencies.^{163 164} On the other hand, filtering technologies have received a great deal of criticism. Some believe these technologies are over-inclusive, whereas others believe they are under-inclusive. In other words, some filters block words that are inoffensive in context (*e.g.*, “breast” cancer), an argument often advanced by free speech

¹⁶¹ *Review of the Operation of Schedule 5 to the Broadcasting Act 1992 – Report*, Australian Government, Department of Communications, Information Technology, and the Arts, 2004, available at http://www.dcita.gov.au/_data/assets/pdf_file/10920/118872.pdf, at 15.

¹⁶² *Self-regulation of Internet Content*, Bertelsmann Foundation, 1999, available at <http://www.cdt.org/speech/BertelsmannProposal.pdf> [hereinafter: *Self-regulation of Internet Content*].

¹⁶³ *Illegal and harmful content on the Internet*, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (1996) 487 final, (October 16, 1996), available at <http://europa.eu.int/ISPO/legal/en/internet/communic.html>.

¹⁶⁴ On the subject of filter technology in the case *Ashcroft v. American Civil Liberties Union et al.*, *supra* note 18, the U.S. Supreme Court stated that “[f]ilters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. [...] Promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.”

advocates, while other content deemed offensive is not flagged or filtered at all. A study by the Consumers for Internet Safety Awareness (CISA) in the framework of the Safer Internet Plan concluded only three of the eighteen filters they tested proved effective.¹⁶⁵ In December 2004, the European Commission issued a three-year benchmarking study of filtering software and services, again in the framework of the Safer Internet Programme, with a view toward identifying special issues related to new or immature filtering technologies and assessing the scope of future products, services, and areas that should be targeted by research.¹⁶⁶

If filtering technology is approached realistically and seen as an empowerment tool rather than as an infallible way of protecting minors, it can help to prevent minors from coming across harmful content, thus making it a very useful component of co-regulation. The question remains as to the optimal way to implement such technology. Some have argued that the government should promote rather than mandate and enforce the use of filters.¹⁶⁷ The Council of Europe, for instance, stated that users should apply filtering on a voluntary basis.¹⁶⁸ In any case, it is inevitable that in the future, technological tools will play an important role in “regulating” the new media environment, certainly regarding the protection of minors. Actually implementing technology as a regulatory tool requires in-depth consideration, particularly to the balance between different normative goals (*e.g.*, freedom of expression and the protection of minors).

¹⁶⁵ CISA (Consumers for Internet Safety Awareness), Final Report, available at http://resources.eun.org/insafe/final_CISA_report.pdf, at 9.

¹⁶⁶ See *Call for Tenders – SIP-Bench, Benchmarking of Filtering Software and Services*, available at http://europa.eu.int/information_society/activities/sip/call/index_en.htm (follow “Closed calls” hyperlink; then follow “Call for tenders” hyperlink).

¹⁶⁷ OSCE, *op. cit.*, at 19. *Self-regulation of Internet Content*, *supra* note 162.

¹⁶⁸ *Recommendation on self-regulation concerning cyber content*, *supra* note 85.

B. Content Labeling and Age Rating

The labeling and rating of content, closely linked to filtering and blocking technology, plays an important role safeguarding minors against harmful content. In a European Commission study, Olsberg *et. al.* note four trends regarding rating practices and legislation in Europe (quoted verbatim):

1. A distinct shift in rating practices from a “censorship” approach to a “guardian” approach [*e.g.*, implementation of policies aimed at helping guardians protect minors from harmful content and empower them with the appropriate tools (descriptive ratings, screen icons, etc.) to make their choice]
2. Movement within territories towards rationalisation of different rating systems under single authorities covering the classification of content delivered through different platforms
3. Increasing awareness of the need to extend rating systems beyond traditional delivery channels due to convergence of globally accessible technologies
4. A search for more effective rating processes.¹⁶⁹

Notably, all four trends share the important characteristic of flexibility. The trends will likely become more concrete as the various models and proposals become *de facto* standards and as their adoption rates increase.

For example, positive experiences with mechanisms like NICAM and PEGI have recently led to a call for the harmonization of content descriptive symbols, content labeling criteria and methods across different (and converging) media, as well as across countries.¹⁷⁰ The idea is promising, even though a common content labeling system cannot be developed overnight. Such a system could become a potentially useful component of a co-regulatory approach

¹⁶⁹ Olsberg et al., *Empirical Study on the Practice of the Rating of Films*, *supra* note 147, at 10.

¹⁷⁰ *Second Evaluation Report*, *supra* note 66, at 18. Palzer, *Horizontal Rating*, *supra* note 98, at 6.

towards the protection of minors against harmful content, provided the implementation is pragmatic. It is worth noting that Olsberg *et al.* point out that the continually increasing number of content delivery methods makes it increasingly difficult to rate content on an *ex ante* basis.¹⁷¹ The Internet is just one example where it is seemingly impossible to manage the labeling and rating of all content. In fact, Olsberg *et al.* predict that there “will be increasing pressure to consider *ex post* methods of content rating, which will involve efficient and effective channels of consumer complaint.”¹⁷² This prediction seems realistic.

C. Codes of Conduct

As we have seen in previous sections, codes of conduct play a role of paramount importance in initiatives taken to protect minors against harmful content.¹⁷³ European policy documents have strongly promoted such codes since the advent of the Internet and 3G mobile technology.

As we have seen in the Australian example, codes of conduct can be very useful co-regulatory tools so long as certain safeguards (*e.g.*, a legislative framework and government enforcement) are put in place. Increasingly, governments seem more interested in these tools, once considered purely self-regulatory. Codes of conduct may be industry initiated, possibly due to a lurking threat of government intervention, but the degree of government involvement has nonetheless intensified. Simply put, a bottom-up co-regulatory approach (one that enables government approval of industry-initiated codes of conduct) generally seems more amenable to policymakers. This tendency towards greater government involvement may to an extent obviate some frequently cited drawbacks of codes of conduct (*e.g.*, privatization of government competences, low accountability, and lack of effective sanctioning).

¹⁷¹ Olsberg et al., *Empirical Study on the Practice of the Rating of Films*, *supra* note 147, at 111.

¹⁷² *Id.* at 110-111.

¹⁷³ For a discussion of codes of conduct, see *Self-Regulation of Digital Media*, *supra* note 68.

VI. Benefits and Drawbacks of Co-Regulation

Since co-regulation is a fairly recent phenomenon, it is difficult to present a comprehensive, balanced picture of its benefits and drawbacks based on actual co-regulatory experiences.¹⁷⁴ It is clear, however, that co-regulation has lately been put forward as the best remedy for most regulatory issues in the new media environment. Interestingly, overviews of the disadvantages of co-regulation oftentimes reflect dissatisfaction with *self*-regulatory mechanisms and techniques, when in fact the gradual shift to co-regulation in certain areas might be a way of attempting to overcome the drawbacks of self-regulation.

Frequently cited concerns regarding self-regulation include the lack of credibility, transparency, and accountability of self-regulatory forums, as well as problems with the effectiveness and enforceability of sanctions. Co-regulation could diminish a number of these worries so long as certain guarantees are established and a greater degree of government involvement is ensured. Such a co-regulatory mechanism would need the following components: (1) a more balanced constitution of co-regulatory bodies with the equal participation of different partners (government, industry, and users), (2) systems that ensure that co-regulatory bodies are accountable to the government if they act outside the scope of their competences, (3) a clear, unambiguous legal basis, (4) easily accessible arrangements regarding the operation of the co-regulatory bodies, and (5) a clear division of tasks and competences between those bodies and the government. Regarding the enforcement and effectiveness of sanctions, co-regulation could provide a form of government backup in case of co-regulatory system failure. In the Australian and German examples, the government truly acts as a safety net. In other words, when the co-regulatory system falls short, the

¹⁷⁴ It is important to keep in mind that the weight given to the benefits and drawbacks of co-regulation, as presented here, can vary according to the particular definition of co-regulation that is applied.

government can step in and take action when certain conditions are met. The fact that non-compliance with established co-regulatory rules can be sanctioned by the state is a major difference between co-regulation and self-regulation.

Another recurring concern, applicable to alternative regulatory mechanisms, is that their growing use may lead to a steady decrease in the democratic quality of regulation. Regulatory authority is increasingly being privatized, meaning that some former government competences are now being delegated to other regulatory bodies, consequently decreasing the regulatory participation of democratically elected parliaments.¹⁷⁵ Many fear that self- and co-regulation could lead to “private censorship” (*i.e.*, censorship by companies or private bodies), which in turn could curb fundamental rights such as freedom of expression. It has even been argued that this privatized form of censorship is even more coercive and sweeping in nature than state censorship.¹⁷⁶ Nevertheless, co-regulation provides more guarantees than a purely self-regulatory approach. It might be useful to recall that the European Commission stated in its White Paper on European governance that co-regulation is not suited to cases where fundamental rights are called into question. Along with Yves Pouillet, however, we believe that this constraint does not preclude the use of co-regulation in the media sector, so long as a sensible balance is sought between protecting freedom of expression to the greatest extent possible (through the provision of certain democratic government guarantees) and establishing a flexible, effective, and enforceable system of co-regulation.

Even if certain co-regulatory issues require resolution, co-regulation possesses a number of assets that justify the enthusiasm of policymakers. For example, a well-structured co-regulatory model can more easily and swiftly adapt to changing and converging information and communication technologies than a state-regulatory model (here referred to a

¹⁷⁵ Latzer et al., *Regulation Remixed*, *supra* note 29, at 146.

¹⁷⁶ Price & Verhulst, *In Search of the Self*, *supra* note 22, at 63-64.

state regulatory model, self-regulatory models that are supposed to be more easily adaptable than state-run systems). Furthermore, a well-structured co-regulatory model also can be more effectively enforced.¹⁷⁷

The active involvement of the different key actors can help increase the participants' confidence in the decisions made. In addition, practical industry expertise can lead to greater understanding of the swiftly changing realities of the different new media and technologies. Moreover, a less cumbersome regulatory procedure can be adapted more quickly to these changing circumstances, and a system of sanctions, endorsed by all actors and backed by the government, can lead to more effective regulatory enforcement.¹⁷⁸ Furthermore, co-regulation has been deemed a useful way of regulating areas sensitive to state regulation, such as content regulation, and it can allay concerns about state censorship, since on the one hand co-regulatory bodies are autonomous to a certain extent, and on the other hand co-regulation provides more democratic guarantees than does a pure self-regulatory approach. In the same context, the greater the degree of government involvement in a co-regulatory approach, the greater the degree of assurance that regulations will consistently meet public interest objectives rather than private sector objectives. Such protection of public interests, especially regarding the protection of minors, is of paramount importance. On this issue, the Commission has stated that co-regulation is often more capable than self-regulation of achieving set objectives, particularly related to the protection of minors, where many sensibilities have to be taken into account.¹⁷⁹

¹⁷⁷ McGonagle, *Practical and Regulatory Issues*, *supra* note 5, at 90.

¹⁷⁸ *Id.*

¹⁷⁹ As previously mentioned, Schulz and Held seem to agree in their study on regulated self-regulation: "As objectives and areas for self-regulation according to these criteria the protection of minors as far as broadcasting or Internet content is concerned can be seen as a field where the concept is promising." See Schulz & Held, *Regulated Self-Regulation*, *supra* note 26, at 29.

In 2004, Ofcom published a statement on the criteria for promoting effective forms of co- and self-regulation and for establishing co-regulatory bodies. Although quite general, these criteria are sensible and worth keeping in mind when evaluating a co-regulatory mechanism. In particular, the statement indicates that the mechanism must be able to do the following:

- Provide consumer benefits.
- Establish a clear division of responsibilities between the co-regulatory body and the regulatory authority.
- Remain accessible to members of the public.
- Offer independence from interference by interested parties.
- Receive adequate funding and staff.
- Enable the near-universal participation of all relevant parties.
- Possess the capability to institute effective and credible sanctions.
- Ensure auditing and review are permitted by the regulatory authority.
- Enforce transparency and accountability.
- Institute independent appeals mechanisms.
- Possess the capability to diverge from the above criteria where appropriate.¹⁸⁰

Similar evaluation criteria might be included in any legislative framework that establishes a co-regulatory mechanism.

¹⁸⁰ Criteria for promoting effective co and self regulation, Ofcom (2004), available at http://www.radioauthority.org.uk/consult/condocs/co-reg/promoting_effective_coregulation/co_self_reg.pdf, at 3.

VII. Conclusion: New Media Environment, New Regulatory Model?

Without question, co-regulation has considerable terminological and conceptual pitfalls. For example, the examples cited above highlight many of the different (and potentially confusing) interpretations of “co-regulation” that currently exist. These pitfalls must be addressed sooner rather than later, especially since regulatory policy is increasingly leaning towards co-regulation as a possible way of regulating media and protecting minors against harmful content. New media have exposed the shortcomings of traditional legislation and have subsequently revealed the need for alternative regulatory instruments. At first, self-regulation seemed to be the favored regulatory mechanism, but little by little self-regulation has manifested numerous serious flaws, prompting governments to attempt to regain some control over the regulatory process. In recent years, co-regulatory schemes have gradually gained the spotlight, especially where such schemes are discussed in the context of the protection of minors against harmful content. A number of initiatives are beginning to incorporate co-regulatory characteristics, a promising trend. For co-regulation to evolve into an effective and widely accepted regulatory mechanism, however, policymakers and other interested parties will need to clarify ambiguities and reach a consensus on the widest possible scale with regard to a future common co-regulatory policy.

In April 2004, the Programme in Comparative Media Law and Policy at the University of Oxford finalized a three-year research project entitled “selfregulation.info,” a wide-ranging, concept-clarifying study on the issue of self-regulation.¹⁸¹ Around the same time, the European Commission issued a one-year comprehensive pan-European study on media-related co-regulatory measures.¹⁸² The objective of this study is to provide European decision makers

¹⁸¹ *Self-Regulation of Digital Media*, *supra* note 68.

¹⁸² Information on the study, carried out by the German Hans-Bredow Institut, can be found at <http://www.hans-bredow-institut.de/forschung/recht/co-reg/index.html>.

with a comprehensive description of the way that co-regulation works in the media sector. After constructing a theoretical and methodological framework on co-regulation, the study should provide a synopsis of all co-regulatory measures taken to date in the twenty-five European Union Member States, establish examples of best practices, and clarify options for further development. It is our hope that the study will attain these objectives and provide useful, forward-thinking conclusions regarding the concept of co-regulation. The study and others like it that have been discussed in this article may further reinforce the possibility that co-regulation will be able to protect minors against harmful content in new media. The two crucial elements on which this idea can be based are (1) the “involvement” element, which shifts crucial aspects of the regulation to relevant parties, and (2) the legal underpinning and possibility of government backup, which can provide (democratic) guarantees. In any case, co-regulation is a concept that has formed a keystone to recent European media regulation, and the debate surrounding co-regulation undoubtedly will continue to deepen in the coming years.

Furthermore, the revised Television without Frontiers Directive will be a crucial milestone in the future regulation of harmful content. Fundamental decisions on dealing with audiovisual content in a technologically neutral, cross-media, and (possibly) pan-European level will be made in the course of this year. Protection of minors is one of the main normative goals to be achieved by means of this new European regulatory framework in which, without question, co-regulation will play a key role.

