

1-1-2010

Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom

Christopher Witteman

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Christopher Witteman, *Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom*, 33 HASTINGS INT'L & COMP. L. REV. 95 (2010).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol33/iss1/4

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom

By CHRISTOPHER WITTEMAN*

* Christopher Witteman has written about and litigated media law and policy issues for over twenty years. He is currently counsel to the California Public Utilities Commission. The views expressed herein, however, are entirely his own.

Thanks are due to many who have provided understanding of German, European, and United States broadcasting and telecommunications law, including but not limited to: Professors Wolfgang Hoffmann-Riem, Donald Kommers, Karl-Heinz Ladeur, Jürgen Säger, Wolfgang Schulz; attorneys Guido Evers, Torsten Giebel, Thorsten Held, Silke Ruck, Sascha Sajuntz, and Kai Classen, as well as Tom Kiedrowski of Ofcom and Scott Marcus of WIK-Consulting, and my colleagues at the CPUC. Particular thanks are due to German attorney Sascha Arnold who read the final manuscript with a critical eye, and to Marci Hoffmann, the International & Foreign Law Librarian at Boalt Hall, who fielded many requests for obscure German sources. Any errors in this piece, though, are wholly mine.

Table of Contents

I. Introduction — Converging Media, Divergent Values: European and United States' Approaches to Electronic Media.....	98
II. Background.....	103
A. <i>Beginning at the End: German Broadcasting and Electronic Media Today</i>	103
B. <i>History and Early Development of Broadcasting Freedom</i>	111
III. Recent Decisions of the Constitutional Court: the Affirmation of Broadcasting and Information Freedom in a Market Economy	117
A. <i>Overview of Broadcast Decisions 1986–2007</i>	117
B. <i>The Market Challenge to Broadcasting Freedom</i>	121
C. <i>Defending Broadcast Freedom: Institutional Freedom, Objective Law, and the “Radiating Effect” of Constitutional Rights on Private Law Relationships</i>	125
1. <i>The Underlying Constitutional Concepts</i>	125
2. <i>Objective vs. Subjective Rights</i>	130
3. <i>The Constitutional Duty of Legislatures</i>	134
D. <i>State as Censor: Insulation of both Public and Private Broadcasters from State Influence</i>	136
E. <i>Market as Censor: Criticism of the Marketplace, and Insulation of Public Broadcasters from Market Influence</i>	138
F. <i>Reaffirmation of Broadcasting Freedom in a “Dual Broadcasting” Landscape</i>	143
G. <i>An Existence Guarantee for Public Broadcasting — the Allocation to Public Broadcasting of the Duty to Provide a Basic Information Service</i>	147
H. <i>Financing of Public Law Television</i>	151
I. <i>Commercial Broadcasters — Licensing, (Re)Transmission, Oversight, and Residual Duties of Balance and Diversity</i>	158
J. <i>Combating Market Failure in Private Broadcasting: Ownership Limits, Antitrust Enforcement, Window Programs, and Open Access</i>	165
1. <i>Dominant Opinion Power and the Inter-State Treaty</i> ...	165
2. <i>Rejection of the ProSiebenSat. 1/Springer Merger</i>	170

K. <i>Extension of Broadcasting and Information Freedom to the Internet?</i>	173
1. <i>Broadcasting Freedom Extended to Services Ancillary or "Similar to" Broadcasting</i>	173
2. <i>Information Freedom and the Internet</i>	176
a. <i>Information Freedom as Part of Broadcasting Freedom</i>	176
b. <i>Information Freedom as a Separate and Independent Right</i>	177
c. <i>Information Freedom as a Guaranty of "Information Justice"?</i>	179
3. <i>Current "Convergence" Issues in Germany</i>	183
a. <i>General Reevaluation of Broadcasting and Information Freedom in a Multi-Channel, Multi-Media, Digital World</i>	183
b. <i>Extension of German Public-Law Broadcasters' Activities onto the Internet and other Digital Platforms, and Ensuing Controversy</i>	186
c. <i>Broadcast Media in a Telecommunications World — Conflict between State and Federal Government</i>	191
d. <i>Separation of Conduit and Content: a German Network Neutrality Problem?</i>	196
IV. <i>Conclusion</i>	201

In totalitarian states of both the left and right, it is self-evident that broadcasting serves as an instrument of the ruling elite; so too in a democratic society must it be evident that broadcasting will be the object of struggle among the powers that be.

— Hans Bausch, *Former Director, ADR Broadcasting, Germany*¹

I. Introduction — Converging Media, Diverging Values: European and United States' Approaches to Electronic Media

While the First Amendment of the United States Constitution proclaims that government shall make “no law” infringing the freedom of speech, the German constitution — known as the Basic Law or *Grundgesetz* — “guarantees” that freedom.² While the First Amendment focuses on the speaker, the Basic Law’s speech and communication guarantees encompass speaker and listener,

1. HANS BAUSCH, *RUNDFUNKPOLITIK NACH 1945* 525 (1980) (“*So selbstverständlich es ist, daß in totalitären Staaten linker und rechter Prägung der Rundfunk Instrument der Herrschenden im Staat ist, so selbstverständlich ist er in einer freiheitlichen Gesellschaft auch Objekt der Auseinandersetzung der pluralistischen Kräfte.*”).

2. Compare U.S. Const. amend. I, with *Grundgesetz für die Bundesrepublik Deutschland* [GG] [Basic Law] art. 5(1), May 23, 1949, REICHSGESETZBLATT [RGBI] [Federal Law Gazette], as amended (F.R.G.), available in English at <https://www.btg-bestellservice.de/pdf/80201000.pdf> and <http://www.iuscomp.org/gla/statutes/GG.htm> (all URL websites in this article last visited on November 14, 2009). See DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 404-15 (2d ed., 1997):

The Basic Law . . . entered into force on May 23, 1949. It was called a ‘basic law’ (*Grundgesetz*) because the Parliamentary Council did not want to bestow the dignified term ‘constitution’ (*Verfassung*) on a document drafted to govern a part of Germany for a transitional period that would only last until national reunification When that day finally did arrive, on October 3, 1990, German unity was achieved within the framework of the Basic Law. The decision to retain the Basic Law as an all-German constitution . . . was not unanticipated. Over the course of the preceding forty years, the Basic Law had come to assume the character of a document framed to last in perpetuity.

Id. at 30.

The application of the speech freedoms in Article 5(1) of the Basic Law to broadcasting is described in Christopher Witteman, *West German Television Law: An Argument for Media as an Instrument of Self-Government*, 7 HASTINGS INT’L & COMP. L. REV. 145 (1983); see also KOMMERS *supra*, at 404-15.

broadcaster and viewer.³ While similar on their face, the two constitutions arrive at quite different results.

I first wrote about this subject twenty-five years ago, in a Note entitled *West German Television Law – an Argument for Media as an Instrument of Self-Government*,⁴ in which I described the first three post-war broadcasting decisions of the German Constitutional Court. These decisions claimed television and radio for the project of democratic self-governance, and described a theory and practice of “public service broadcasting.”

This article will focus on a series of further decisions of the Constitutional Court over the last twenty-five years. In these decisions, the Court has built a communications theory of general applicability, one that can usefully be applied to contemporary issues as varied as Internet neutrality, the societal role of public television, and the digital divide. Collectively, these rulings provide a theoretical framework rich in implications for a world where – increasingly, and in different ways – information is power.⁵

“Broadcasting freedom” and the related constitutional norm of “information freedom” are found in Article 5(1) of the Basic Law.⁶

3. Witteman, *supra* note 2, at 172, 191-93; compare generally, e.g., SASCHA SAJUNTZ, DER REZIPIENTENBEZOGENE SCHUTZ MASSENMEDIALER KOMMUNIKATION [THE RECIPIENT-ORIENTED PROTECTION OF MASS MEDIA COMMUNICATION] (2007).

4. Witteman, *supra* note 2.

5. A literal application of this maxim is found in William Gravel, *Some Observations along the Road to “National Information Power”*, 9 DUKE J. COMP. & INT’L L. 401 (1999) (discussing information as a strategic asset, “at a time when virtually every aspect of life on Earth is hurtling headlong toward expression in informational form”); see also John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES, Aug. 12, 2008, at A1 (describing attack on government information systems preceding Russian invasion of Georgia); see also, in place of many, FCC *En Banc* Hearing on Broadband Network Practices, Docket 07-52 (Stanford, April 17, 2008) (testimony of Barbara van Schewick, addressing business opportunity costs of information bottlenecks); cf. C.D. McLean, 1993 *Call for Papers: Death and Rebirth of a National Information Policy: What We Had and What We Need*, 85 LAW LIBR. J. 743 (1993).

6. “Broadcasting freedom” is the translation here of *Rundfunkfreiheit*, the term most often used by the German Constitutional Court to refer to the constitutional guarantee of “freedom of reporting through broadcast” (*Freiheit der Berichterstattung durch Rundfunk*) found in Article 5(1) of the German Basic Law. See *infra* note 7. “Information freedom” is the translation of the commonly used term *Informationsfreiheit*, used to refer to the constitutional guarantee of every person of the right to “freely inform him/herself from generally accessible information sources” (*jeder hat das Recht . . . sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten*), also as found in Article 5, par. 1. As discussed below (see sections II(B), III(B)(2), and III(K)(2)), the German Court has not definitively described or

The Court has developed these rights to create a special role for television and radio in Germany's public and political life, similar to that played by the BBC in England, but unique in its particulars.⁷ The not uncontroversial genius of the German Court's jurisprudence has been to craft a public broadcasting system that is neither state nor private, insulated (to a significant degree) from both political and marketplace pressures.

This "public service" view of the broadcast media is more prevalent in Europe than in the United States:

Indeed, [it is] the United States [that] is unusual in its largely unqualified commitment to markets in broadcasting, in its reliance on advertising revenues for stations, and in its conception of television as purely commercial. Other countries tend to see television as a medium principally for education and information, and to view its entertainment role as merely one among others.⁸

What distinguishes the broadcasting jurisprudence of the

developed the relationship between information and broadcasting freedom, found in sentences 1 and 2, respectively, of Article 5. See *infra* note 44 and accompanying text for the complete translation of Article 5, par. 1.

All translations are by the author unless otherwise noted. Other translations of complete or partial decisions of the German Constitutional Court broadcasting decisions can be found in KOMMERS, *supra* note 2, at 404-415, and in the German Constitutional Court's own sponsored translations, DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (1998). In addition, the University of Texas has published English-language translations of the First, Third, Fourth, Fifth, Sixth, and Eighth Decisions on its website, along with other helpful Article 5 cases, including *Lüth*, *Blinkfüer*, *Spiegel*, and *Leipzig Newspaper* cases (most attributed to Nomos) http://www.utexas.edu/law/academics/centers/transnational/work_new/german/table.php?id=131. All decisions are available in the German original at <http://www.bverfg.de/entscheidungen.html>.

These sources were sometimes consulted, and occasionally borrowed from, in the translations found here. As translation is an inexact science, and certain German expressions are susceptible to varying translations or are more telling in the original, I have included an excerpt of the original German where it could potentially add to the reader's comprehension. Similarly, I have translated the titles of German sources where that might further the reader's understanding.

7. The Germans in fact take the BBC as a model. See WOLFGANG HOFFMANN-RIEM, *REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES* at 4, 11, *passim* (1996). When he wrote this book, Professor Hoffmann-Riem was on the faculty of the law department at the University of Hamburg, and *Justizsenator* for the city of Hamburg; he recently retired as a Justice on the German Constitutional Court.

8. CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 77, 267 n.61 (1993). For a wide-ranging discussion and comparison of the British, French, Italian, and United States' approaches to broadcasting, see BARENDT, *BROADCASTING LAW, A COMPARATIVE STUDY* (1993).

Constitutional Court is its depth and consistency over forty five years since its first broadcasting decision, the “*Magna Carta* of German television,” issued in 1961.⁹ The Court’s approach has been steadfast in the face of both technological change and criticism by commercial interests. The closest American analog to the German approach is the United States Supreme Court’s formulation in *Red Lion v. FCC*, upholding the now-defunct Fairness Doctrine. The Court held that “[i]t is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here.”¹⁰ The Fairness Doctrine, as unworkable as it might have been in practice, was not declared impracticable or ineffectual, but rather *unconstitutional*, by the very agency charged with enforcing it.¹¹

The German Constitutional Court, by contrast, persists in its support of a diverse and at least partially non-commercial media landscape, founded on a media architecture that insures diverse public input *to* the media, as well as access to a broad range of information and opinion *through* the media. The Constitutional Court’s broadcasting and information jurisprudence thus offers a clear alternative to the United States’ *laissez faire* market approach to communications issues.

The German model has been discovered by a small coterie of Americans who call for a new First Amendment thinking, focused on the rights of the listener and information consumer *as well as* those of the speaker. These scholars argue that an increased diversity of information and programming, including non-

9. UWE WESEL, DER GANG NACH KARLSRUHE: DAS BUNDESVERFASSUNGSGERICHT IN DER GESCHICHTE DER BUNDESREPUBLIK 121 *passim* (2004).

10. *Red Lion v. FCC*, 395 U.S. 367, 390 (1969). *Red Lion* remains the most explicit expression in United States constitutional jurisprudence of a First Amendment right to receive information. In my 1983 article, I suggested that something akin to German “broadcasting freedom” jurisprudence might help reinvigorate the then moribund *Red Lion* line of cases. See Witterman, *supra* note 2, at 190 *passim*. The opposite occurred: *Red Lion* fell into obscurity, while the Fairness Doctrine was increasingly marginalized, and finally declared unconstitutional by the FCC. See OWEN FISS, THE IRONY OF FREE SPEECH 58-74 (1996) (describing in detail the rise of *Red Lion* and its subsequent fall into obscurity).

11. *Syracuse Peace Council v. WTVH*, 2 FCC.Rcd. 5043 (1987), *aff’d sub nom* *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). Congress subsequently passed legislation to re-establish the Fairness Doctrine, but President Reagan vetoed it. *The Fairness in Broadcasting Act of 1987*, S. 742, 100th Cong. (1987); H.R.1934, 100th Cong. (1987); President Reagan’s Veto of the Fairness in Broadcasting Act, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987).

commercial programming, is necessary for a twenty first Century democracy.¹² There are skeptics on these shores as well, who reject this approach as a dangerous "collectivist" fantasy¹³ that puts too much faith in the state as a benevolent "friend."¹⁴ And, indeed, the two systems can be reduced to fundamentally opposing viewpoints – the government "shalt not" approach of the First Amendment ("make no law") versus the "government shall" approach of the German constitution ("freedom of broadcasting is guaranteed"), sometimes described as the clash "between a libertarian and a democratic theory of speech."¹⁵

It is my contention that mass media communications issues in this country are examined more often in a constitutional vacuum, as matters of contract, property, or administrative law.¹⁶ Under

12. See, e.g., FISS, *supra* note 10, at 6; SUNNSTEIN, *supra* note 8, at 77-81 (discussing the specifics of German media jurisprudence); John David Donaldson, "Television Without Frontiers": the Continuing Tension Between Liberal Free Trade and European Cultural Identity, 20 FORDHAM INT'L L.J. 90, 143 & nn.308-09 (1996) ("Europe to a large degree still requires broadcasters to fulfill a public task obligation"); Stephen A. Gardbaum, *Broadcasting, Democracy and the Market*, 82 GEO. L.J. 373, 395-96 & n.50 (1993); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 297 & nn.124-25 (2003).

13. See, e.g., Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 *passim* (1993); cf. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996).

14. Uli Widmaier, *German Broadcast Regulation: A Model for a New First Amendment?* 21 B.C. INT'L & COMP. L. REV. 75, 128-41 *passim* (1998).

15. FISS, *supra* note 10, at 3. A norm of "balanced diversity" can, the libertarians posit, just as easily become a repressive norm; for instance the national unity norm in the Weimar Constitution was invoked by the Nazis to quell dissent. Cf. Widmaier, *supra* note 14, at 107-09. The democrats counter that the U.S. minimalist or "proceduralist" approach enshrines a norm of its own, that of the unregulated marketplace. Cf. FISS, *supra* note 10, at 2 ("impact that private aggregations of power have on our freedom"). The full development of this polarity is the subject of another article; my primary purpose here is to provide an overview of the German constitutional model and see what it might contain of use for our domestic debate.

16. The First Amendment is, for example, mentioned only in a couple of footnotes to the seminal article on network neutrality by Profs. Lemley and Lessig, *The End of End-to-End*. Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 954 nn.74 & 76, 955 n.79 (2001). Perhaps due to a First Amendment orthodoxy focused on speakers and the prohibition of state (but not private) censorship, Lemley and Lessig assert that they "don't see the case for open access as a first amendment argument at all, but rather as an antitrust and regulatory issue." *Id.* at 955 n.79. Opponents of network neutrality also note the lack of a constitutional framework. Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*,

German law, by contrast, these areas of law are strongly influenced by constitutional priorities, particularly in the area of electronic media as will be shown below.

II. Background

A. *Beginning at the End: German Broadcasting and Electronic Media Today*

The end result of the Constitutional Court's communications jurisprudence can be most clearly seen in a fully funded public broadcasting system, co-existing with private broadcasters, in what has been called a "dual" broadcasting system.¹⁷ Substantially all Germans have access to at least four or five public television stations, a similar or larger number of public radio stations, as well as various foreign and international public and private television and radio stations, delivered by broadcast, cable, satellite, and –

94 GEO. L.J. 1847, 1851 n.13 (2006) ("Since network neutrality proponents defend their proposals almost exclusively in terms of the economic benefits of innovation, this Article discusses the issues solely in economic terms. I therefore set aside for another day any discussion of noneconomic issues, such as network neutrality's implications for democratic deliberation or the First Amendment.").

Similarly in the area of digital television, Prof. Yoo (an opponent of public interest standards) sees the lack of a coherent First Amendment standard as chilling progress:

Despite the ongoing deployment of digital television, little progress has been made in determining whether and how digital broadcasting should be regulated . . . Under the technology-specific approach to the First Amendment, the constitutionality of digital television regulations cannot finally be resolved until the courts address the constitutional standard that will be applied to this medium. Until that occurs, lingering questions about the proper scope of regulation threaten the reliance interests of broadcasters, programmers, and viewers alike in ways that can forestall the realization of the new technology's potential benefits.

Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. REV. 245, 250-51 (2003).

Some see the lack of a constitutional dimension in such debates as a systemic problem. See, e.g., Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 347 (1989) ("An important underlying theme of American constitutional law is thus the withdrawal of the Constitution from society – both in its restriction of constitutional limitations to actions of the state and its exclusion of other types of constitutional provisions that might require the government to act in society.").

17. See generally WOLFGANG HOFFMANN-RIEM, *REGULIERUNG DER DUALEN RUNDFUNKORDNUNG* [REGULATION OF THE DUAL BROADCASTING SYSTEM] (2000).

increasingly — the Internet.¹⁸

Public broadcasting is carried out by public-law agencies or corporations, entities that are neither state nor private.¹⁹ While the

18. Public broadcasting stations include (in most locations) a local affiliate of the ARD [*Arbeitsgemeinschaft Rundfunk Deutschlands*] chain of stations, a local affiliate of the ZDF [*Zweites Deutsche Fernsehen* or Second German Television], and a regional broadcaster like *Radio Berlin Brandenburg* (formerly *Sender Freies Berlin*) or *Radio Bremen* — as well as a fourth station, ARTE, a co-production of French and German public television, a public *Kinderkanal*, and the Phoenix station. See, respectively, www.ard.de, www.zdf.com (English introduction), <http://www1.ndr.de> and <http://www.br-online.de/> (examples of “Third Program” from Northern Germany and Bavaria), and www.arte.tv/de. A detailed overview of the German television landscape can be found in the April 24, 2007 European Commission decision in case E3/2005 on state aid to German public broadcasters, on alleged state aid to German public television, otherwise beyond the scope of this article. See http://ec.europa.eu/competition/state_aid/register/ii/doc/E-3-2005-WLWL-en-24.04.2007.pdf; see also Schulz/Held/Dreyer, *Regulation of Broadcasting and Internet Services in Germany — a brief overview* 2d Ed. (2008), at n. 6-10 and accompanying text for a brief English language summary of issues in German broadcasting, available at http://www.hans-bredow-institut.de/webfm_send/124.

As used herein and unless indicated otherwise, “broadcasting” includes the dissemination of both radio and television by over-the-air transmission, cable, satellite, or broadband.

19. An analysis of the unique German organizational form known as the public-law agency (*rechtsfähige Anstalt des öffentlichen Rechts*) is a subject worthy of further study, although beyond the scope of this article except for a brief discussion of the middle ground between the state and the private sector which public broadcasting agencies occupy. Like most legal systems, German law is roughly divided into public law (*öffentliches Recht*) and private law (*privates Recht*). “Public law consists of the rules controlling the relationship of public authority (the state and its emanations) with each other, and between public authorities and individuals (unless the public authority was acting as if it were a private body,” whereas “private law is concerned with relationships between individuals and private bodies, and covers such areas as tort, contract, restitution and property and family law.” RAYMOND YOUNGS, *ENGLISH, FRENCH AND GERMAN COMPARATIVE LAW* 79-80 (2d ed. 2007). Public-law agencies or *Anstalten* like the German public-law broadcasters are part of what is referred to as the “mediate state administration” (*mittelbare Staatsverwaltung*) which is employed when the state wants to use independent and stand-alone organizations to carry out public tasks. HARTMUT MAURER, *ALLGEMEINES VERWALTUNGSRECHT* 433 *passim* (4th ed. 1985). Because they are independent and autonomous decisionmakers (see description of “internal pluralism” at note 21, *infra*, and accompanying text), they stand apart from the executive and administrative arms of the state (even while indirectly within the umbrella of state authority); because they are public-law agencies, they are also clearly not commercial. Other forms of German public-law entities are the public-law corporation (*öffentlich-rechtliche Körperschaften* — one of the major German public broadcasters, *Deutschland Funk*, is in fact a public-law corporation), and the public-law foundation (*öffentliche Stiftung*), which can also provide similar insulation from state power. *Id.* at 460 *passim*, 473.

legislator may rely on regulated market forces to provide diversity in the *private* or *commercial* broadcasting sector,²⁰ the Court has favored structures for the public sector that implant diversity *within* the public-law broadcasting agencies (*öffentlich-rechtliche Rundfunkanstalten*). Thus, in contrast to the external pluralism that a functioning commercial marketplace would produce, public broadcasting is governed by the principle of internal pluralism (*Binnenpluralismus*), which takes the form of pluralistically-constituted boards of directors for each of the public broadcasting entities. It is a form unique to the Germans, and certainly a cardinal distinction between the German and American approaches to public broadcasting.²¹ Whereas appointments to the board of directors of the United States' Public Broadcasting System are made by the President and are, by most accounts, highly political, the German Constitutional Court has ruled that public broadcasting governance must be insulated from state influence (*staatsfern*) and must reflect the diversity in society.²² To accomplish this goal, state

The Independent Media Agencies that regulate private broadcasters, described in *infra* notes, at 25 & 27, are also forms of public-law agencies. See ULRIKE BUMKE, DIE ÖFFENTLICHE AUFGABE DER LANDESMEDIENANSTALTEN 10-11 *passim* (1995) ("polycentric distribution of competencies").

20. Although the constitutional mandate of broadcasting freedom encompasses commercial broadcasters, diversity and fairness rules for the private sector remain controversial and of limited efficacy. See section III(I) below. Still, the public service obligations of private broadcasters are, at least on paper, substantially more specific than the vaporous public trustee obligations still nominally applicable to broadcasters in the United States. Compare e.g., 47 U.S.C. §§ 303, 307(c)(1), 312(a)(7), 315(a) (2006); see also Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997).

21. See, e.g., Peter Humphreys, *The Goal of Pluralism and the Ownership Rules for Private Broadcasting in Germany: Re-regulation or De-regulation?* 16 CARDOZO ARTS & ENT. L.J. 527, 529 (1998) ("The accountability mechanisms for German public broadcasting are rather unique Germany's public broadcasting institutions are classic examples of distinctly non-state, non-market media."). On the contrast between internal and external pluralism, see note 225, *infra*, and accompanying text.

22. See section III(D) below, describing the Constitutional Court's rulings regarding the insulation of broadcasting from state influence. The internally pluralistic governing boards for public broadcasters are an ingenious mechanism in this regard, although they have been criticized on a number of counts, as too politicized, not sufficiently pluralistic, etc. See, e.g., Widmaier, *supra* note 14, at 111-15; Witteman, *supra* note 2, at 163-68; compare criticism of U.S. public broadcasting governance in Phillips, *Freedom by Design: Objective Analysis and the Constitutional Status of Public Broadcasting*, 155 U. PA. L. REV. 991, 992 (2007) ("[T]he system is supposed to be independent, yet nearly half of the state public broadcasters are run by the government, and the President appoints the leadership of the CPB. As a

broadcasting laws generally require that the boards of directors of German public broadcasting institutions be drawn from representatives of specifically identified "socially relevant groups."²³ Representatives come from a wide variety of groups — religious organizations, labor and chamber of commerce organizations, political parties, arts and film societies, and social organizations running the gamut from women's groups to athletic clubs to disabled rights' organizations.²⁴ Although German critics continue to complain that these councils are inefficient and subject to undue political influence, the fact remains that they provide a community-based legitimacy apart from the state political apparatus.

As explained further below, State (rather than Federal) legislators are charged with the implementation of the Constitutional Court's rulings on the mission, scope, licensing, governance, and financing of both public and private broadcasting in Germany. The States coordinated their policies in a decades-long process which eventually involved the Eastern as well as Western parts of Germany, and resulted in the Inter-State Treaty on Broadcasting in the United Germany, dated August 31, 1991. The Inter-State Treaty is a constantly evolving document, periodically updated by amending treaties (twelve to date), and comprised of various Articles dealing with the different aspects of broadcast regulation (collectively "Inter-State Treaty").²⁵ The Inter-State

result, the possibility appears to remain that ruling political interests could exercise significant influence . . . "); cf. Monroe E. Price, *Public Broadcasting and the Crisis of Corporate Governance*, 17 CARDOZO ARTS & ENT. L.J. 417 (1999).

23. Witteman, *supra* note 2, at 158-59; see also Ruck, *Development of Broadcasting Law in the Federal Republic of Germany*, 7 EUROPEAN JOURNAL OF COMMUNICATION 219, 225 (1992).

24. This innovative governance structure is described in more detail in Witteman, *supra* note 2, at 161-63 (examining in detail the statutory provisions for such broadcasting council functions, including specification of the different "socially relevant groups" — unions, business associations, religious groups, political parties, and social groups of parents, teachers, women, sports fans, artists, and trade groups of various kinds — entitled to send representatives to the council).

25. The German title of this document is *Staatsvertrag über den Rundfunk im vereinten Deutschland vom 31 August 1991* [Inter-state Treaty of August 31, 1991 Concerning Broadcasting in United Germany], (hereinafter "Inter-State Treaty"). The Inter-State Treaty contains a number of sub-parts or Articles, which (although not often printed together) together build the entire Treaty. Although the entire Treaty is sometimes referred to as *Rundfunkstaatsvertrag* (RStV), this name is sometimes reserved for the first, and most important, Article containing the basic provisions applicable to both public and private broadcasting. That Article is accompanied by

Treaty contains provisions relating to the protection of minors, broadcasters' access to major public events, a mission statement and financing provisions for public broadcasting, licensing provisions for private broadcasters, limits on advertising, diversity and balance standards for commercial broadcasters, ownership and media concentration limits, and audience share reporting.²⁶ Enforcement

seven further Articles addressing: Media Services (Article II, revoked and moved into a separate law in 2007); protection of youth (Article 3); contract provisions relating to ARD and ZDF (the two *de facto* national public television networks – Articles 4 and 5); Deutschland Radio, the national public radio service operated by ARD and ZDF (Article 6); and the determination and collection of broadcasting fees (Articles 7 and 8).

The Inter-State Treaty is regularly updated by *Rundfunkänderungsstaatsverträge* [Amending Treaties for Broadcasting], which create a moving target for analysts and commentators. The Tenth Amending Treaty, for example, was signed off by the various State Minister Presidents in December 2007, passed into law in the individual German States in the succeeding months, with an effective date of September 1, 2008; its primary accomplishment was the creation by the separate States of a central licensing agency for private broadcasters. The Eleventh Amending Treaty was signed by the Minister Presidents in July 2008 and was scheduled to take effect January 1, 2009; it primarily addresses broadcasting fee issues discussed below in section III(H)(2). The Twelfth Amending Treaty was finalized by a vote of the Minister Presidents in October 2008 and passed into law in March 2009; its primary subject matter is the very contentious issue of the scope of public broadcasters' activities on the Internet, as discussed in section III(K)(3)(b) below. The integrated Inter-State Treaty as of June, 2009 is found at http://www.hans-bredow-institut.de/webfm_send/369. The Tenth, Eleventh and Twelfth Amending Treaties are more difficult to find in original text, although the Twelfth Amending Treaty was found (November 2009) at <http://www.swr.de/unternehmen/gremien/dreistufentest/-/id=4790902/property=download/nid=4439636/1h3l84s/index>.

The coordination of broadcasting laws and policies in the several *Länder*, and their fourteen Independent Media Authorities, evident in the Inter-State Treaty, is accomplished, at least in part, by the Association of Independent Media Authorities, and its Conference of Directors (*Direktorenkonferenz der Landesmedienanstalten*). See www.alm.de and (in English) <http://www.alm.de/14.html>. An English translation of the 2007 version of the Inter-State Treaty is found at their website, http://www.alm.de/fileadmin/Englisch/9_RAESTV_Englisch.pdf. The author has used this and other translation resources, although translations are primarily his own, unless noted otherwise.

Each individual State adopts the Inter-State Treaty, as well as its own media law. The Media Law for Hamburg/Schleswig Holstein, for example, is found at the website of the Independent Media Authority for that area, and regulates areas like must-carry and retransmission (section III(I) below). See http://www.ma-hsh.de/cms/upload/downloads/Rechtsvorschriften/1.1_MedienStV0908.pdf; see also *infra* note 34 and accompanying text.

26. *Id.* Article 1 at §4 (transmission of major public events), §7 (advertising and sponsoring rules and limitations), §11 (public-law broadcasting mission), §§12-14 (public-law financing), §§15-18 (further limitations on advertising and sponsoring

of these rules falls to the Independent Media Authorities, which are public-law bodies independent of local and state governments, constituted pluralistically like the governance structures of public broadcasters.²⁷

The primary revenue source for German public television comes from a user or "broadcast fee" (*Rundfunkgebühr*) that every owner of a television or radio must pay. The current broadcast fee is a little less than 18 Euros per month, about 26 US dollars per month.²⁸ It is collected from users each month by an entity known

on public-law broadcasts), §§20-24, 37 (licensing of commercial or private-law broadcasters), §25 (fairness obligations for commercial broadcasters), §26 (ownership limits), §27 (audience share reporting), §§ 31, 42 (third-party access to commercial broadcasting), §§ 35-39 (oversight by States' Independent Media Authorities), §§ 44-46 (further regulation of advertising for commercial broadcasters), §§ 50-51 (allocation of transmission capacity), and §52 (must-carry). Child-protection measures are found in Article 3.

27. See *supra* note 19; see also Inter-State Treaty, *supra* note 25, at §§ 20, 35(1) *passim* ("The responsible Independent Media Authority [*Landesmedienanstalt*] oversees compliance with the provisions of this Treaty regarding plurality of opinion both before and after licenses are issued to commercial broadcasters."). The English-language translation of the Inter-State Treaty provided by the German association of *Landesmedienanstalten*, *supra* note 25, translates *Landesmedienanstalt* as State Media Authority, although — as the Constitutional Court has made clear on several occasions — these are emphatically *not* state agencies, but rather public-law law bodies. See, e.g., discussion in section III(I) and note 226, *infra*, citing 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVerfGE) 118, 165 (1986), where the Court emphasizes that these bodies are public-law entities, and may be controlled neither by the state nor by commercial forces, much like the internally pluralistic broadcasting councils which oversee public television. Accordingly, *Landesmedienanstalt* [literally State Media Agency] and the similarly situated *Landesrundfunkanstalt* [State Broadcasting Agency] will be translated as Independent Media Authority. The public-law form is necessary to insulate these entities from State influence, as described in section III(D) below. The Media Law for Hamburg/Schleswig-Holstein, *supra* note 25, at § 42, for example, provides for an Independent Media Authority with a governing Media Council elected from candidates nominated by "socially relevant groups"; compare provisions for the broadcasting councils or boards of directors of public broadcasting entities, described in *supra* note 21 & 23, and accompanying text.

28. See http://www.gez.de/gebuehren/gebuehrenuebersicht/index_ger.html (as of October, 2009); see also Thomas Darnstädt & Dietmar Hipp, *Dreißig Jahre zurück*, DER SPIEGEL 126-27 (Sept. 17, 2007). While the public and some private, commercial programs are available over the air (RTL, for instance), viewers may obtain these and a further array of private programs over the local cable system, and in fact most choose that option or direct broadcasting programs. Thus, another fee of 13-20E or higher is incurred. See <http://www.kabeldeutschland.de/fernsehen/digitales-fernsehen-fuer-kabelanschluss-nutzer.html>. The constitutional aspects of the broadcast fee have been extensively litigated, as described in section III(H) below.

as the GEZ.²⁹ The GEZ collected over 7 billion Euros in 2008, and distributed it primarily to Germany's public broadcasting entities, and (in much smaller part) to the Independent Media Authorities which regulate commercial broadcasting.³⁰

A further factor distinguishing German from United States broadcasting is the historical separation of conduit from content. Such a separation was easy when the transmission facilities (transmitters, backhaul transmission, and electronics) were owned by the German Post Office.³¹ In its First Broadcasting Decision, the Constitutional Court made clear that the *Bundespost* ("Post") was to provide only the necessary "*sendetechnische Angelegenheiten*" or "technical broadcasting facilities," and only in service of broadcasting's constitutional role as information disseminator.³² While transmission remained within the Federal jurisdiction over telecommunications,³³ broadcasting was a "cultural phenomenon"

29. The formal name of the agency is the *Gebühreneinzugzentrale*, literally Fee Intake Central.

30. GEZ annual reports are available at http://www.gez.de/gebuehren/gebuehreneinzug/index_ger.html, showing revenue of approximately 7.3 billion Euros in each of the last three years, which is then distributed primarily to ARD, ZDF, and the regional public broadcasting stations

31. Article 73(7) of the Basic Law states "The Federal government shall have exclusive power to legislate with respect to . . . postal and telecommunications services." An exception to this rule, however, was allowed by the German Constitutional Court in its first television decision, in which it held that the principle of "federal friendly conduct" [*bundesfreundlichen Verhaltens*] prevented the central government from taking back the technical broadcasting apparatus that was in the hands of the individual public-law broadcasting companies after being expropriated from the central government and given to them after the war). See 12 BVerfGE 205, 210, 239-40 (1962). Thus, today ARD has its own transmitters, but the centralized public broadcaster ZDF, all the third-program public broadcasters, and the private broadcasters all rely on broadcasting transmission facilities provided by a subsidiary of Deutsche Telekom or its private successors in interest.

32. 12 BVerfGE at 225, 227, 230 *passim*.

33. The German Telecommunications Law (*Telekommunikationsgesetz*, or TKG) is enforced by the Federal Network Agency (*Bundesnetzagentur*), with jurisdiction similar to a super public utilities commission. Unlike the Federal Communications Commission, the German Network Agency has no jurisdiction over broadcasting content. And unlike United States' Communications Act, the TKG applies equally to telephone, cable, broadcast, and other forms of electronic transmission are all considered part of the "telecommunications network" (eliminating certain distinctions between "telecommunications services," "information services," and cable transmission found in the Communications Act.). Compare TKG § 3(27) ("telecommunication network" includes "fixed and mobile telephony, cable, broadcast, optical fiber, satellite networks, powerlines, and other devices capable of transmitting electronic signals"); 47 U.S.C. §§ 153(7) (cable); (20) (information

under the jurisdiction of the States.³⁴ The situation changed when the Post's telecommunication network, which included telephone, cable, and terrestrial broadcast facilities, was largely privatized as part of *Post Reform II* in 1994. Privatization consisted of the government's sale of a 60% ownership share in the network to Deutsche Telekom AG ("DTAG"). DTAG has in turn sold its interest in the terrestrial broadcast facilities to a French firm, and its interest in the cable transmission facilities to an assortment of companies largely owned by investment firms.³⁵

This trend inevitably caused conflict. Because of the constitutional primacy of "broadcasting freedom," States continue

service), and (43) telecommunications). The new German Telecommunications Act (*Telekommunikationsgesetz* or TKG) was passed into law in 2004. It succeeded a previous version that had, like its American cousin, become law in 1996. Axel Spies & Jan Wrede, *The New German Telecommunications Act [of 1996]*, 4 MICH. TELECOMM. TECH. L. REV. 1 (1998), available at http://www.mttl.org/volfour/spies_art.html. An English translation of the 1996 TKG (with amendments through 1998) is available at <http://www.iuscomp.org/gla/statutes/TKG.htm> but the law was largely rewritten in 2004, and that version is not yet available in English. The full German text of the 2004 TKG is available at http://www.gesetze-iminternet.de/tkg_2004/BJNR119000004.html. An authoritative commentary to the Telecommunication Law is found in BERLINER KOMMENTAR ZUM TELEKOMMUNIKATIONSGESETZ (Franz Jurgen Säcker, ed., 2006) [hereinafter BERLINER KOMMENTAR].

34. The Constitutional Court's First Decision on broadcasting set up a Federal/State jurisdictional division:

The "post and telephone" [jurisdiction of the Federal government under Basic Law Art. 73(7)] encompasses only the broadcast-technical side of broadcasting, and excludes the so-called studio technology . . . It must be added that broadcasting is also a cultural phenomena. Inasmuch as cultural affairs can be administered and regulated, they fall within the area of the States, pursuant to the fundamental determination of the Basic Law.

12 BVerfGE at 225-27, 229 (citations omitted); see also ERNST HERRMANN, DIE DEUTSCHE BUNDESPOST 48, 72 (1986), noting that as, of his writing, the Post supplied over 200 broadcast facilities, and thousands of transformers (*Fernsehumsetzer*), as well as satellite and cable transmission facilities, to what were then still primarily public broadcasting institutions. Herrmann notes that these services were just beginning to be offered to private broadcasters as well.

This dominion of the individual German States in cultural matters has been referred as *Kulturhoheit*, or "cultural sovereignty." See Humphreys, *supra* note 21, at 529. See also discussion in Section III(K)(3)(c) below, relating to Federal-State jurisdictional clashes along this interface between telecommunications and broadcasting. As discussed briefly in the next section, the assignment of broadcasting jurisdiction to the individual German States was a policy originally put in place by the Western Allies after World War II, as part of an anti-fascist, pro-democratic strategy of localizing political power.

35. The *Bundespost* or Federal Post retained a roughly 40% share in these assets. BERLINER KOMMENTAR, *supra* note 33, at 167-68, *Einleitung* III(B)(I), ¶¶ 250-54.

to have at least theoretical say as to frequency allocation, must-carry assignment of cable and satellite transmission capacity, and other broadcast-related areas that tread on the Federal jurisdiction over telecommunications. The legal status of the mass media is thus increasingly unstable, and is not made any less so by the directives of the European Commission which would allocate broadcasting frequencies pursuant to market mechanisms, with little or no consideration of the cultural and political importance of these facilities, as described below. In many ways, this clash between the cultural/political and the technical/commercial aspects of communications exposes the same faultlines as the network neutrality debate in the United States.³⁶ The majority view in Germany remains that cultural and political diversity trumps the commercial interests of network owners (whether they be terrestrial broadcast, cable, satellite, or broadband).³⁷

B. History and Early Development of Broadcasting Freedom

The separation between conduit and content can be traced to the belief of Allied occupation forces after 1945 that a decentralized and localized media would best promote a democratic culture. This approach was clearly a reaction to the abuses of broadcasting during the Nazi era.³⁸ Hitler's propaganda chief, Josef Goebbels, had recognized early the propaganda value of the still nascent broadcasting technology:

You [broadcasters] have in your possession the most modern instrument in existence for influencing the masses. By means of this instrument you are the creators of public opinion As the piano is to the pianist, so the transmitter is to you, the instrument on which you play as sovereign masters of public opinion.³⁹

36. Cf., e.g., Yoo, *supra* note 16, at 1905, 1857 & n.45 *passim*, noting how the conduit/content separation of common carrier regulation was rejected for broadcast and cable television, and approving the result in *NCTA v. Brand X*, 545 U.S. 967 (2005), which rejected such a separation for broadband on the assumption that market competition between networks would provide price and access discipline.

37. 119 BVerfGE 181, at 215-17, *passim* (2007).

38. See *infra* notes 39-43 and accompanying text; see also Michael Libertus, *Essential Aspects Concerning the Regulation of the German Broadcasting System 4* (Rundfunk Insitut Köln, Working Paper No. 193, 2004), available at <http://www.rundfunk-institut.uni-koeln.de/institut/pdfs/19304.pdf>.

39. Josef Goebbels, Speech to German radio management (Mar. 23, 1933), quoted in DAVID WELCH, *THE THIRD REICH — POLITICS AND PROPAGANDA* 39, 184 (Routledge

After the war, Americans joined their allies in insisting that the new broadcasting bodies be decentralized and free of state influence: "It is a basic policy of the U.S. Military Government that the control of the means of public opinion such as press and broadcasting be widely distributed, and free of government control."⁴⁰ What is more remarkable in view of its own domestic policy, the United States' Military Information Control Division ordained a non-commercial broadcasting system for Germany, one that would be "neither directly nor indirectly a stalking horse of the government, nor . . . the tool of any particular groups or personalities."⁴¹ This policy

2d Ed. 2002) (1993); see also GORDON CRAIG, *GERMANY 1866-1945* at 573 (Oxford University Press, Inc. 1978) (Goebbels "immediately sensed the potentialities of the new medium and saw to it that Hitler's principal speeches were broadcast by all stations."); KLAUS SCHEEL, *KRIEG ÜBER ÄTHERWELLEN [WAR OVER THE AIRWAVES]* 40 *passim* (1970) (East German history describing how Goebbels and his fellow Nazis commandeered state radio to produce a live broadcast of the torchlight parade celebrating Hitler's assumption of the office of Chancellor on January 30, 1933).

40. November 21, 1947, Order of the American Military Governor Lucius Clay, reprinted in H. BAUSCH, *supra* note 1, at 34 (translated from the German). The British were of a similar mind. BBC journalist Hugh Carlton Greene, who was assigned to lead the Northwest German Broadcasting Co. in Hamburg, told his German colleagues, when first he met with them in 1946:

This broadcasting company must never become a party broadcaster, or a government broadcaster, or the mouthpiece of commercial interests. If I could sum up the policy of this broadcaster in two words, they would be dispassionate substantiveness and objectivity (*Sachlichkeit und Objektivität*) in all areas.

Arnulf Kutsch, *Unter britischer Kontrolle, Der Zonensender 1945-1948*, in *DER NDR ZWISCHEN PROGRAMM UND POLITIK; BEITRÄGE ZU SEINER GESCHICHTE* 120 (Kohler, ed. 1991); see also Libertus, *supra* note 38 ("[I]t was the British BBC that served as a role model, exemplifying impartial broadcasting In light of the fresh memories of the abuse of broadcasting by the National Socialists, however, an effort was made to ensure even greater independence from the state with institutional and legal approaches than was the case with the BBC."); cf. 12 BVerfGE at 210 ("[T]he western occupation forces pursued a policy of excluding all government influence on broadcasting.").

Some German politicians made common cause with German postal authorities after 1945, in an effort to return broadcasting to the jurisdiction of the federal *Deutsche Post*, an effort that was defeated by the Allies insistence on a decentralized broadcasting structure. See ALBRECHT HESSE, *RUNDFUNKRECHT* 9-10 (Verlag Franz Vahlen 3d ed. 2003). This decentralized arrangement was ratified by the Constitutional Court's First [Broadcasting] Decision, which affirmed the role of the individual German States in all things cultural, including broadcasting. 12 BVerfGE at 229.

41. Draft of the Americans' Information Control Division, "Broadcasting freedom in Germany," (1946) quoted in ARNULF KUTSCH, *Rundfunk unter alliierter Besatzung*, in *MEDIENGESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND* 78 (Böhlau Verlag GmbH & Cie 1999); see *infra* note 63. Kutsch reports that this U.S. document

may have grown out of the perception in American government circles that large German cartels had marched in step with the Nazi dictatorship.⁴²

The Constitutional Court claimed the Allied legacy as Germany's own in a series of decisions initially coming every ten years, in 1961, 1971, and 1981.⁴³ The Court based its decisions primarily on the "broadcasting freedom" clause in Article 5(1) of the German constitution. While the United States' entire free speech regimen is based on a short phrase in the First Amendment to the United States Constitution — "Congress shall make no law . . . abridging the freedom of speech, or of the press," Article 5(1) of the Basic Law gives the German Constitutional Court something more with which to work:

Everyone has the right to freely express and disseminate his

also discussed the need for "all interest groups in society to have the chance to articulate themselves in a mediated public sphere." *Id.*; see also BAUSCH, RUNDfunkPOLITIK NACH 1945, *supra* note 1, at 72; Hesse, *supra* note 40, at 10 (quoting the post-war slogan "[b]roadcasting belongs to no one").

The irony is that, eleven years earlier, the United States had rejected a similar non-commercial media system. See, e.g., ROBERT MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY — THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING 1928-1935 177 ff, 188 ff, 197 (1993) (social and legislative history of 1934 Communications Act, noting early public outcry about the overtly commercial tone that radio had taken on, as well as candidate Roosevelt's reticence to address this subject in the 1933 electoral campaign. McChesney also describes proposed legislation which would have dedicated up to 25% of available spectrum to non-commercial broadcasters, and the defeat of this proposal upon lobbying efforts of RCA, AT&T and the National Association of Broadcasters).

42. Letter from President Franklin D. Roosevelt to Cordell Hull, Secretary of State, articulated one view of this connection *apropos* international anti-trust enforcement:

[A] number of foreign countries, particularly in continental Europe, do not possess such a tradition against cartels. On the contrary, cartels have received encouragement from these governments. Especially is this true with respect to Germany. Moreover cartels were utilized by the Nazis as governmental instrumentalities to achieve political ends.

Quoted in Joel Davidow, *The Seeking of a World Competition Code: Quixotic Quest? in COMPETITION IN INTERNATIONAL BUSINESS — LAW AND POLICY ON RESTRICTIVE PRACTICES* 362 (Robert Hellawell & Oscar Schacter ed., 1981).

43. PETER J. HUMPHREYS, MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE 137 (1996) (describing a unique and "very special role" for constitutional law in development of German broadcasting policy, partly because of the historic *Rechtsstaat* tradition ("state within which law plays a very special role"), and partly because "the Nazi dictatorship had showed how necessary were constitutional underpinnings of democratic pluralism in the media field").

opinion by speech, writing and pictures, and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by broadcast and film are guaranteed. There shall be no censorship.⁴⁴

The relative modernity and prolixity of the German constitutional speech guarantees can be traced in part to the fact that they were written not in the eighteenth century as the First Amendment was, but at the beginning of the electronic age, with the totalitarian abuse of broadcasting fresh in mind.⁴⁵ If fascism flourished where broadcasting was able to feed the masses a one-sided and distorted view of the world, its democratic opposite would in theory be secured by a diverse and balanced information base. From its earliest broadcast decisions, the German Court has embraced this democratic concept of speech, and (implicitly) its colloquial corollary, "garbage in, garbage out," i.e., the unremarkable deduction that the quality of democratic decisionmaking depends on the quality of information possessed by the public.⁴⁶

44. Basic Law, *supra* note 2, art. 5, par. 1 ("Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt."). Paragraph 2 provides that these "rights shall find their limits in the provisions of general laws," in the provisions for the protection of young persons for example. Paragraph 3 provides for the related freedoms of art, scholarship, research, and teaching.

45. The Basic Law was drafted by a group of leading judges and attorneys meeting in 1948 at the Herrenchiemsee Conference in August 1948, and continued meetings of a constitutional convention called the Parliamentary Council in Bonn in September 1948, under the watchful eyes of at least three of the four Allies, United States, France and England. See KOMMERS, *supra* note 2, at 7-9; see *supra* note 31. Interpreting the Basic Law's concepts of broadcasting and information freedom, the cooptation and misuse of broadcasting during the Nazi period could never have been far from the mind of the Constitutional Court, although this connection has been expressed only indirectly. See sections III(D and E) below.

46. 27 BVerfGE 71, 81 (1969) (*Leipziger Newspaper case*) ("The Basic Law seeks to guarantee that the individual is informed as comprehensively as possible"); see also discussion of this case in sections III(C) and III(K)(2) below.

The common-sense notion that the quality of democratic decisionmaking would be determined by the quality of information reaching the electorate would seem to apply universally, whether or not a country had experienced a fascist interlude, yet the concept is not foregrounded in the U.S. media discussion. The governing assumption in domestic media thinking seems to be that the commercial marketplace will provide all the diversity and balance the public wants or needs. See, e.g., *FCC v. WNCN Listener's Guild*, 450 U.S. 582 (1981) (upholding FCC decision that "public interest" standard was best served by market forces); for

The Court understood from the outset that the commercial marketplace operated by its own rules, and imposed its own filter on reality.⁴⁷ While it was obvious that the Court would have to rule that German broadcasting be *staatsfrei* or “state-free,” as it did in the first television decision in 1961,⁴⁸ in its second television decision in 1971 the Court went further, declaring that the dissemination of information and opinion through broadcasting was so fundamental to the democratic process that not only must it be kept free of state control, it also could “not be left to the free play of [market] forces.”⁴⁹

Article 5, Paragraph 1 contains a number of constituent parts: a free speech guarantee; a dissemination guarantee (extended to writing and pictures); freedom of information; freedom of the press; freedom of reporting by broadcast and film; and a prohibition of censorship. The Court has referred collectively to these as “communication freedoms.”⁵⁰ “Freedom of reporting by broadcast,” or broadcast freedom (*Rundfunkfreiheit*), is of course the focus of the German Court’s broadcasting jurisprudence.⁵¹ Parallel to this, the Court has developed its jurisprudence under the information freedom (*Informationsfreiheit*) clause, which guarantees an individual’s right to inform herself from all “generally accessible sources.”⁵²

contrasting German view, *see* section III(E) below, regarding the market as censor.

47. *See* Witteman, *supra* note 2, at 151-60, 168-87; *see also* section III(E) below.

48. 12 BVerfGE at 263.

49. 31 BVerfGE314, 325 (1972); *see also* Witteman, *supra* note 2, at n. 64; 12 BVerfGE at 259 (broadcasting “of fundamental importance for the [the States’] entire public, political, and constitutional life”).

50. 90 BVerfGE60, 88 (1994) (“The communication freedoms were originally directed against state influence on the communication media.”) (“*Gegen die Gängelung der Kommunikationsmedien durch den Staat haben sich die Kommunikationsgrundrechte ursprünglich gerichtet.*”).

51. *See, e.g.*, RUCK, *supra* note 23, at 222 ff.

52. While broadcast freedom protects the public against state as well as private interference in the journalistic process of broadcasting, the German Court has not yet gone so far with regard to information freedom. On the one hand, this may be merely a matter of semantic construction, whether the Court relies on the first sentence of Article 5 paragraph 1 of the Basic Law (“everyone has the right”) or the second (“freedom of . . . broadcasting [is] guaranteed”). *See* Silke Ruck, *Zur Unterscheidung von Ausgestaltungs- und Schrankengesetzen im Bereich der Rundfunkfreiheit*, 117/1992 ARCHIV FÜR ÖFFENTLICHES RECHT (AÖR) 543, 547-48 (distinguishing between subjective rights of sentence 1 and objective rights in sentence 2); *see also* discussion below, at section III(C)(2), concerning subjective vs. objective rights. Broadcasting freedom has been held to protect the *process* of the

Broadcasting freedom is found in the second sentence of Article 5, Paragraph 1. It is primarily a *guarantee* that broadcasting *as an institution* will function freely, not the right (found in sentence 1) of an *individual* to speak freely.⁵³ Broadcasting freedom incorporates the constitutional protections for both broadcast speaker and information-recipient under its umbrella; it is the point where

different constitutional positions meet, and possibly collide . . . on the one hand the claim based on information freedom of a right to comprehensive and truthful information, on the other hand [the claim based on] the freedom of expression of those who produce the programming or speak in the broadcasts.⁵⁴

Broadcasting freedom thus protects a *process* more than a particular individual.

There is of course a potential contradiction in the Constitutional Court's holdings that Article 5 not only prevents the government from censoring the media, but also *requires* that same government to act to preserve a diversity of voices in the "marketplace of ideas." How the German Court has handled this paradox is the subject of several of the Decisions discussed below.⁵⁵

"freedom of reporting by broadcast" where as information freedom is interpreted as a narrower, individual right. On the other hand, it is a question of enormous consequence whether the rationale of the Court's nine broadcasting decisions (broadcasting as instrument of self-government) can be applied to a new medium which is fast becoming the functional equivalent of broadcasting. Both the nature of information freedom and its potential application to the Internet neutrality question are discussed at some length below. See section III(K), particularly (III)(K)(3)(d).

53. See, e.g., RUCK, *supra* note 23, at 222 ("The guarantee of freedom of broadcasting has yet another, objective, component, which the Federal Constitutional Court terms the 'public mandate' of broadcasting.").

54. 57 BVerfGE 295, 321 (1982) ("*Namentlich treffen [bei Rundfunkfreiheit] verschiedene Grundrechtspositionen zusammen, die in Kollision miteinander geraten können, einerseits der aus der Informationsfreiheit folgende Anspruch auf umfassende und wahrheitsgemäße Information, andererseits die Freiheit der Meinungsäußerung derjenigen, welche die Programme herstellen oder in den Sendungen zu Wort kommen.*"). See also *infra* note 295.

55. This potential paradox or contradiction is seen most clearly in the discussion of the state's role in the financing of public broadcasting, in section III(H) below.

III. Recent Decisions of the Constitutional Court: the Affirmation of Broadcasting and Information Freedom in a Market Economy

A. Overview of Broadcast Decisions: 1986-2007

In the twenty-one years beginning in 1986 and running through 2007, a series of Constitutional Court Decisions reaffirmed the principles of broadcasting and information freedom, even while the dominant paradigm shifted from a public broadcasting monopoly to a mixed or “dual” public/private system.⁵⁶

As recounted in my earlier work, a number of factors in the early 1980s including technological advances such as cable systems and the dawning of satellite broadcasting, as well as the resulting economic and political pressure for commercial broadcasting, had created a judicial and political opening for commercial broadcasters.⁵⁷ The individual German States enacted legislation designed to ease the transition to a mixed marketplace. In 1986, the Court’s Fourth or “Lower Saxony” Decision upheld one of these laws allowing commercial broadcasting, while reaffirming Article 5’s mandate of independent media in the context of the new “dual” broadcasting landscape.⁵⁸ For true believers in the public-service broadcasting ideal, however, the Fourth Decision marked the beginning of the end of public television as an intellectually adventurous and politically challenging medium.⁵⁹

56. All of the principal broadcasting Decisions described below were unanimous; indeed, of the ten Decisions considered to be the primary canon of broadcasting freedom, only the Second Decision in 1971 contained concurring (and dissenting) opinions. 31 BVerfGE at 334 (concurring opinion of Justices Geller and Rupp); *id.* at 337 (dissenting opinion of Justices Geiger, Rinck and Wand).

57. Wittman, *supra* note 2, at 182-87.

58. 73 BVerfGE 118 (1986).

59. See, for example, Hoffmann-Riem, *Rundfunkrecht und Wirtschaftsrecht – ein Paradigmenwechsel in der Rundfunkverfassung* [Broadcasting Law and Commercial Law – a Change of Paradigms in the Constitution of Broadcasting], in 2 MEDIA PERSPEKTIVEN 57 (1988). In this 1988 article, Hoffmann-Riem expressed a weary resignation about the fate of this concept of broadcasting:

At the dawn of the dual broadcasting system, the Third (or FRAG) Decision confirmed a broadcasting concept based on the commonweal (*gemeinwohlorientierter Rundfunkkonzept*) and at the same time flexibilized the conditions for the realization of this concept: internal and external pluralism were seen as almost equivalent broadcasting models, even if not equally realizable. Even during this phase of ever finer nuance [*Abfederung*] in response to national and international pressure for a commercial

The Fifth or "Baden-Württemberg" Decision found that a prohibition on local and regional public broadcasting (designed to protect commercial broadcasters) violated the basic principle of free opinion-building (*Grundprinzip der freien Meinungsbildung*).⁶⁰ The Court also struck down limits on public law stations' provision of dial-up services to their viewers and listeners, while upholding limits on advertising by public law stations in the local and regional market, a subject that would be revisited in the Seventh Decision.

In some ways, the Sixth or "WDR" Decision in 1991 is the mirror opposite of the Fourth Decision. Whereas liberal legislators had challenged the Lower Saxony Law at the center of the Fourth Decision, the Sixth Decision was precipitated by a contingent of conservative legislators who challenged the state broadcasting laws of North-Rhine Westphalia, which governed the activities of West German Broadcasting (*West Deutscher Rundfunk* or WDR).⁶¹ The gravamen of this challenge was a claim that the broadcasting law at issue disenfranchised conservative groups from participation in WDR's broadcasting council. Again, the Constitutional Court generally upheld the law,⁶² reading into it the conditions necessary for its constitutional application. The Court noted that the broadcasting council was not constitutionally required to represent every "relevant social group," but a broad spectrum of groups which in turn would represent the public as a whole.⁶³

The Seventh or "Hessen 3" Decision in 1992 was the first of a run of four Decisions in which the Constitutional Court addressed the financing of public service television. While the three subsequent Decisions would address user fees paid by owners of

opening, that pressure continued to increase, and in the *Lower Saxony* [Fourth] Decision the sluice gates were thrown open. The commercialization of broadcasting was no longer to be stopped, one could only try to channel the flood

Id. at 62.

60. 74 BVerfGE 297, 335 (1987).

61. See, e.g., ALBRECHT HESSE, *Anmerkung [zum sechsten Rundfunkurteil]*, 46/1991 JURISTISCHE ZEITUNG [JZ] 357. Hesse describes the partisan aspect of these battles: "While the CDU-led 'B-States' strive for the introduction of private broadcasting, the media policy of the SPD 'A-States' seek to protect the public law broadcasting system."

62. The Court did find some sections of the law directed to the distribution of transmission capacity to be unconstitutional. 83 BVerfGE 238, 322-24 (1991) (transmission decisions not sufficiently insulated from state influence).

63. 83 BVerfGE at 333 ff.

televisions, radios and (more recently) some computers, the primary mode of financing for German public broadcasting, the Court's Seventh Decision addressed advertising as a supplementary revenue source, rejecting a public broadcaster's claim that limits on its advertising would seriously weaken its ability to provide the constitutionally required service.⁶⁴

The Eighth or "*Cable Penny*" Decision in 1994 concerned a part of the broadcasting fee known as the "cable penny," a small surcharge designated for financing of a cable television pilot project. Although it eventually found that the cable penny itself was not unconstitutional, the Court held the entire process by which the Bavarian legislature had set broadcasting fees to be constitutionally infirm, and used the occasion to describe more precisely how a constitutional (i.e., politically insulated) financing mechanism would work.⁶⁵ Above all, the fee-setting process had to be insulated from politics, as described more particularly in section III(H) below.

It appears unlikely that German scholars will officially enshrine the Constitutional Court's 2005 decision in another Bavarian broadcasting fee dispute (the "second Bavarian Fee Decision") as the "Ninth Broadcasting Decision," but it is firmly in the line of cases developing the concept of broadcasting freedom. The Decision addressed an attempt to require all cable subscribers to pay a surcharge to support regional and local commercial programming in concededly underserved markets. Essentially using a balancing test, the Court concluded that the invasion of individual contract freedom, protected by Article 2 of the Basic Law, posed by such a forced surcharge was not justified by a sufficient public purpose or enhancement of Article 5 broadcasting freedom.⁶⁶

The final Decision on which this Article will focus came on September 11, 2007, when the Court again addressed a fee-related issue. The September 2007 Decision (as I will refer to it here) came in response to the complaints filed by various public broadcasting entities challenging a decision of State legislators to reduce the

64. 87 BVerfGE 181, 205-06 (1992).

65. 90 BVerfGE at 105-06.

66. 114 BVerfGE 371, 383, 391-96 (2005). The surcharge revenue was directed largely to private broadcasters without any corresponding attempt to secure diversity or balance in their programming or governance, and without safeguards against their possible acquisition of dominant opinion making power in the region or locality. *Id.*

broadcasting fee from what had been recommended by an experts' commission,⁶⁷ although the latent question was to what degree public broadcasting's future activities in an Internet-centered communications world would be funded.⁶⁸ With little explicit reference to online media, however, the Court found the fee reduction unconstitutional because it was inadequately justified, and essentially a political decision to curtail public broadcasters' activities rather than the result of a dispassionate economic analysis.⁶⁹

In addition to the seven Decisions described above, there are several other decisions that are sometimes included in the canon of broadcasting freedom: (1) the Court's 1996 ruling in the *Deutsche Sportsfernsehen* ("German Sports Television" or DSF) case, in which it reiterated the legislature's duty to prevent "dominant opinion-making power" in broadcasting;⁷⁰ (2) the Court's 1998 *Kurzberichterstattung* ("Short Reporting") case, which established the primacy of the public's information rights over exclusive contractual rights to major sporting and other public events;⁷¹ (3) a further 1998

67. 119 BVerfGE at 196-202. There were three separate constitutional complaints: one made by all nine of the regional broadcasting entities composing ARD, one brought by the Second German Television ("ZDF"), and one brought by Deutschlandradio. *Id.*

68. The Internet is hardly mentioned in the Decision (*see id.* at 217, 219), but this question lurks behind much of what the Court wrote, as described in Section III(K)(1) below. The Constitutional Court did reference "competition among the media," a proxy for the broader discussion: the Minister-Presidents Conference had justified its downward departure from the recommended fee on grounds that: (a) a "stressed economic situation . . . brings with it great challenges and financial belt-tightening for all parts of the population"; (b) there were potential savings in the operation of the public broadcasting entities; and (c) the "general development of tasks within the dual broadcasting system, and in competition among all the media" justified a lower fee (and, by extension, a lower profile for public broadcasting). *Id.* at 193-95. The Minister-Presidents also approved legislation that would require the experts' commissions of the future to consider the "total economic situation, in particular the total financing of the public fisc [*öffentlicher Hand*], as well as any future voluntary commitments" of the public broadcasters to rein in costs.

69. *Id.* ¶¶160-84, ¶¶191-94 (finding the proffered rationale to be based on inaccurate facts, inappropriate assumptions, and faulty logic). The Court did not, however, overturn the Minister-presidents' decision to require the expert commission to consider the country's "total economic situation," and related issues, in the future. *Id.* ¶¶200-10.

70. 95 BVerfGE 163 (1996).

71. 97 BVerfGE 228 (1998). This is sometimes referred to as the "Tenth Decision." *See, e.g.,* http://de.wikipedia.org/wiki/Rundfunkurteil#9._Rundfunk-Urteil:_

decision in the *extra radio* case, in which the Court addressed the limits of a private right to broadcast;⁷² and (4) a number of other speech and press cases that develop important aspects of the broadcasting/information freedom doctrine.⁷³ In addition, some of the Court's seminal press cases have had formative affect on its broadcasting jurisprudence, and to that extent those too are discussed in this writing.⁷⁴

B. The Market Challenge to Broadcasting Freedom

German public broadcasting has been under attack since its inception. The Constitutional Court's 1981 FRAG Decision did little to dampen what was then a "drumbeat" of political and economic pressure aimed at undercutting the "public service concept" on which the German model was based.⁷⁵ In fact, it was commonly understood that the 1981 FRAG Decision gave the "green light" to forces agitating for the privatization of substantial parts of the German broadcasting landscape.⁷⁶

EG-Fernsehrichtlinie. This Wikipedia entry counts thirteen total broadcasting decisions, including this "*Short Reporting*" case and the *extra radio* case, as well as a 2008 Decision addressing the participation of political parties in commercial broadcasting entities. 121 BVerfGE 30 (2008) ("Thirteenth Decision").

72. 97 BVerfGE 298 (1998) (referred to in the Wikipedia entry, *supra* note 71, as the "Eleventh Decision," with the September 2007 Decision characterized as "Twelfth").

73. 90 BVerfGE 27 (1994) (*Parabola Antenna Case*); 91 BVerfGE 125 (1994) (*Courtroom Television I (Honecker)*); 103 BVerfGE 44 (2001) (*Courtroom Television II*); 97 BVerfGE 125 (1998) (*Caroline of Monaco Case I*); 101 BVerfGE 361 (1999) (*Caroline Monaco Case II*).

74. See, e.g., 7 BVerfGE 198 (1958) (the *Lüth* case) (discussed at length in section III(C)(1) *infra*); 20 BVerfGE 162 (1966) (*Spiegel Search Warrant*); 25 BVerfGE 256 (1969) (*Blinckfüer*) *infra* notes 89, 94 and accompanying text; 27 BVerfGE 71 (1969) (*Leipzig Newspaper*), see *infra* notes 298-300 and in sections III(K)(2)(b) and (c) below.

75. Commercial media outlets and conservative politicians have assailed the decentralized German post-war public broadcasting system almost since its birth. See, e.g., Witteman, *supra* note 2, at 170; see also *supra* note 40 (discussion at end of note). German post-war broadcasting was created "with help of the Allies and with reference to the public-service concept of European and particularly British broadcasting," a system based on "independent, community-based, and trustee-based broadcasting." Hoffmann-Riem, *supra* note 59, at 57 (lamenting the erosion of public service concept after the Fourth Decision).

76. Humphreys, *supra* note 21, at 532. While the liberal SPD had resisted cable television "pilot projects" because of their perceived potential to undermine public broadcasting, when the conservative CDU came to power in 1982 it threw open the doors to cable, availing itself of the fact that cable came under the "telecommunications" rather than "broadcasting" rubric of the German

Technological changes have led to further questions, even in the context of the Court's most recent 2007 Decision, as to whether public broadcasting remains necessary in a multi-channel world:

We have to ask ourselves whether the force-feeding [Zwangsalimentierung] of public-law television can continue to be justified. Communication technologies and media markets are undergoing such fast-paced and in some respects revolutionary changes. New technologies have brought an increasing convergence of the electronic media, and as a consequence an enlargement and differentiation of content as well as forms and paths of transmission, as well as new types of program-related services.⁷⁷

The European Union and even the German Cartel Office have been instrumentalized to bring pressure on the public broadcasting status quo.⁷⁸ Public broadcast supporters feared that the focus was moving from the information recipient to the broadcast speaker as entrepreneur, from an objective constitutional norm to a subjective,

Constitution, and thus jurisdiction lay with the Bundespost at the federal level. *Id.* at 531; Witteman, *supra* note 2, at 182-83. The new CDU Bundespost minister Schwarz-Schilling was able to implement and orchestrate large-scale government support for cable and satellite infrastructure. Witteman, *supra* note 2, at 183 n.308 (citing Blüthmann, Gaul, & Hoffmann, *Im Kabel verfangen*, DIE ZEIT, January 27, 1984, at 17 (cable network represents "expensive preparatory work for commercial TV producers")). At the same time, the individual German States (particularly those in CDU/CSU hands, although the SPD ruled States were not immune from this phenomenon) were in a "race to the bottom" to enact laws which would allow and attract private broadcasters to their States. Humphreys, *supra* note 21, at 531 (noting that "[t]he name-of-the-game for many Länder politicians — regardless of political color — became how to attract private media investment to their regions. From this point on, media policy in Germany became increasingly subsumed into what economists call locational policy (the term is *Standortpolitik*)").

77. Kurt Fassbender, *Das jüngste Rundfunkgebührenurteil des BVerfG*, 11 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 1265, 1267 (2007); for U.S. version of this argument, see, e.g., Rachele Chong, *The 31 Flavors of the Net Neutrality Debate: Beware the Trojan Horse*, N.Y.L. SCH. ADVANCED COMM. L. & POL'Y CTR., 12 *passim* (2007) ("head-to-head intermodal competition has resulted in the build-out and improvement of networks").

78. Complaints filed by private broadcasters with the European Commission alleging that public broadcasting fees constituted an illegal government subsidy and market distortion (see, e.g., EC State Aid Decision, *supra* note 18 at 18-19, *inter alia*), and European Community U plans for market-based auctions of broadcasting frequencies. Hubertus Gersdorf, *Rundfunkfrequenzpolitik zwischen Ökonomisierung und Vielfaltsicherung: Zur Reichweite des Rundfunkprivilegs* [Broadcasting Frequency Politics Between Economics and Preservation of Diversity: On the Reach of the Broadcasting Privilege], 2 ZEITSCHRIFT FÜR URHEBER UND MEDIENRECHT [ZUM] 104, 105 (2007); see also further discussion in *infra* sections III(K)(3)(b), (c) and (d).

individual right, and from speech as part of opinion-building to speech as commercial enterprise.⁷⁹ Viewers were increasingly viewed as consumers rather than citizens.⁸⁰ Commercial broadcasters argued that broadcasting freedom as a constitutional norm could be supplanted by the regulation of broadcasting as an economic activity, i.e., by *ex post facto* antitrust enforcement and related market-power regulation.⁸¹ These developments have been characterized as a pan-European “paradigm shift,” a loss of faith in the public service television ideal, driven by technological developments and internationalization of the media marketplace.⁸²

The Court’s broadcasting jurisprudence has emerged as a sort of counterpoint to these tendencies, although not completely immune to shifts in the political and economic landscape.⁸³

79. Hoffmann-Riem, *supra* note 59, at 57-58, 60, 63 n.6, and *passim* (citing HANS H. KLEIN, *DIE RUNDFUNKFREIHEIT* (1978)); *see also* discussion in *infra* sections III(C)(2) and (3) of objective vs. subjective rights.

80. HUMPHREYS, *MASS MEDIA AND MEDIA POLICY*, *supra* note 43, at 160 (“rivaling of the public-service doctrine by notions of ‘consumer sovereignty’ – the viewer as consumer rather than as citizen – and the primacy of the ‘free market’ . . . [and] following on from this, a ‘commodification’ of broadcasting”).

81. Hoffmann-Riem, *Rundfunkrecht und Wirtschaftsrecht*, *supra* note 59, at 57, *passim*; *see also* a broader-based and English-language version of this essay, Hoffmann-Riem, *Law, Politics and the New Media: Trends in Broadcasting Regulation*, in *THE POLITICS OF THE COMMUNICATIONS REVOLUTION IN WESTERN EUROPE* 125, 126ff (Kenneth Dyson & Peter Humphreys, eds., 1986), noting a trend throughout Europe, following the U.S. trajectory “from the trustee to the market model . . . from a cultural towards an economic legitimization of the broadcasting system . . . [and] from freedom of communication to freedom of broadcasting entrepreneurship.” Hoffmann-Riem sees further similarities between Germany and the United States in this regard:

In just such a way, the US Federal Communications Commission (FCC) legitimized its policy of deregulation, which has taken place without any change of the Communications Act and its requirements for the common good (public interest, convenience, necessity). Recent West European legislation too – for example, the new media laws of the *Länder* (states) in the Federal Republic – emphasizes the commitments of the trustee model, while assuming that they can also be adequately fulfilled in the market.

Id. at 128.

82. *Id.* at 126 ff; *see also* Ruck, *supra* note 23, at 219 *passim* (seeing a “crumbling” of the “public service concept” in the 1980s, i.e., loss of the “consensus that the broadcasting mass media should above all serve to inform, educate and entertain listeners and viewers”); Graham, *Öffentlich-rechtlicher Rundfunk in der Demokratie*, 2 *MEDIA PERSPEKTIVEN* 95, 97 (2004) (noting the crisis of legitimization for public service broadcasting generally, and specifically for the BBC).

83. *See* sections III(C) through (J) below; *cf.* Hoffmann-Riem, *supra* note 59, at 62 (citing Wolfgang Hoffmann-Riem, *Rundfunkverfassung als Richterrecht* [Broadcasting

Meanwhile, German legal scholars have divided themselves into opposing economic and political camps. The libertarians emphasize the subjective, individual right of businesses to enter the broadcasting market, and envision diversity through the "external" plurality of the marketplace.⁸⁴ The "democrats," on the other hand, stress the public role of broadcasting in building democratic consensus, are wary of market failure, and are protective of the rights of broadcasting recipients as well as broadcast speakers.⁸⁵

This battle has entered a new phase as German public broadcasting institutions follow their public onto the Internet, establish Internet websites, and make their programming available for cell phone reception. Commercial broadcasters and publishers have pushed back against this unwelcome competition, which they believe has deprived them not only of "eyeballs" but of advertising revenue.⁸⁶ By late 2003, pressures were building to limit the role of public broadcasting, as evidenced in a speech by a leading Social Democrat Ministerpresident entitled "Risk More Competition – Media Between Market and State," and then in a whitepaper issued by this politician with two of his Christian Democrat colleagues under the title "Broadcasting Structural Reform," calling for staff cuts, program consolidation, and abandonment of public broadcasters' plans to enter the digital broadcast market as competitors on a regional level, *inter alia*.⁸⁷

Constitution as Judges' Law], in DAS RINGEN UM DEN MEDIENSTAATSVERTRAG DER LÄNDER 37 (Peter Glotz & Reinhold Kopp eds., 1987)) ("In that regard, the Federal Constitutional Court has fought a heroic battle to preserve the orientation of broadcasting around the common good, while at the same time making clear how little autonomy judge-made law really has and how much judge-made law mirrors economic and political power relationships.").

84. See, in place of many, e.g., Udo Fink, *Wem dient die Rundfunkfreiheit?* [Whom Does Broadcasting Freedom Serve?] 19 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 805 (1992); Degenhart, *infra* note 325.

85. See, in place of many e.g., WOLFGANG HECKER, 'MEDIENMACHT' UND REZIPIENTENFREIHEIT [MEDIA POWER' AND RECIPIENT FREEDOM] 26 *passim* (1987) (contrasting "reasoning culture" and "consuming culture"); HOFFMANN-RIEM, *supra* note 17, *passim*.

86. See discussion in *infra* section III(K)(3)(b).

87. 119 BVerfGE at 186 (citing the referenced speech and whitepaper); see also Editorial, *So sollen ARD und ZDF sparen* [This is How ARD and ZDF Can Save], HAMBURGER ABENDBLATT, Nov. 12, 2003; Hahn, *Achtet die Gerichte*, RHEINISCHER MERKUR, Sept. 27, 2007.

C. *Defending Broadcast Freedom: Institutional Freedom, Objective Law, and the “Radiating Effect” of Constitutional Rights on Private Law Relationships*

1. *The Underlying Constitutional Concepts*

In working through the issues relating to a “dual” broadcasting system in which public service and private broadcasters coexist, the Court has been guided by a trio of inter-related ideas about constitutional rights that are relatively unknown in this country:⁸⁸ institutional freedom; objective law; and *Drittwirkung* or the “radiating effect” of constitutional law on private-law relationships.⁸⁹ Together they provide the theoretical underpinning for the special constitutional status accorded broadcasters in Germany. They relate to rights or values not necessarily tied to a specific individual, but which are inherent in the constitutional order as a whole.⁹⁰ As applied to speech, they protect the *process* of communication rather than the individual speaker.

The constitutional protection afforded broadcasting under Article 5 “does not exhaust itself in the defense against state influence.”⁹¹ Beyond this defensive protection, the “basic right [of broadcasting freedom] demands much more a positive [legal] order, which guarantees the diversity of themes and opinions that play a

88. But see Quint, *supra* note 16, at 258-67; Donald Krommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 858 ff (1991); E.M. BARENDT, FREEDOM OF SPEECH, 60, 63, 111-12 (2d ed. 2005).

89. A good discussion of these principles is found in KOMMERS, *supra* note 2, at 362-69. “[W]hile basic rights apply *directly* to state action, they [also] apply *indirectly* to substantive private law” – such as the Civil Code. *Id.* at 49; see also Witteman, *supra* note 2, at 155-56 (further discussion of objective norms, as developed in the *Spiegel*, *Blinckfüer*, and *Lüth* cases).

90. Different formulations of the objective law concept are found in the Constitutional Court’s decisions. As to broadcasting, see, e.g., Third Decision, 57 BVerfGE at 319-20 (“freedom of opinion [is] an objective principle of the total legal order, whereby subjective- and objective-law elements condition and support each other In this sense, broadcasting freedom is primarily the freedom of opinion-building, [a] serving freedom in its subjective- and objective-law elements” [“*Meinungsfreiheit als objektives Prinzip der Gesamtrechtsordnung, wobei subjektiv- und objektivrechtliche Elemente einander bedingen und stützen*”), citing the *Lüth* decision, 7 BVerfGE 198, as discussed below); Fifth Decision, BVerfGE 74, 297 (323) (same, quoting Third Decision); Sixth Decision, BVerfGE 83, 238 (321) (“organizational forms, which no longer serve objective broadcasting freedom, but rather subjective editorial freedom, cannot serve as a basis for the preference decisions [of the States’ independent media authorities]”).

91. 87 BVerfGE at 197-98.

role in society will be taken up and passed along."⁹² The trio of constitutional concepts discussed in this chapter shapes this positive order.

The idea of institutional freedom was developed in press cases and later applied to broadcasting; it protects not just the act of speaking, but the *process* of communication.⁹³ It covers all aspects of the operation of a publishing or broadcasting entity, both those that occur before the act of broadcasting (news gathering, access to sources), and those that occur after (or concurrent with) the speech act (transmission and distribution).⁹⁴

Objective law norms or values are integral and necessary to the constitutional system as a whole, are independent in many respects of any particular individual, and operate in the broadcasting context as a guarantee that the institution of broadcasting will in fact freely function. Objective norms create a *duty* on the part of the lawmaker to protect those constitutional values and rights through legislation and/or enforcement.⁹⁵ Contrast this with rights under the U.S.

92. 90 BVerfGE at 88 ("*Das Grundrecht verlangt vielmehr eine positive Ordnung, welche sicherstellt . . .*"); see also 87 BVerfGE at 198.

93. See, e.g., 12 BVerfGE at 261 (with broadcasting, "the institutional freedom is no less important than it is for the press. This is explicitly stated in Article 5, where sentence 2 of paragraph 1 guarantees the 'freedom of reporting through broadcasting and film' in the same sentence as the freedom of the press"); 31 BVerfGE at 326 ("Art. 5 ¶1 S 2 of the Basic Law guarantees the institutional freedom of broadcasting"); see also *id.* at 338 (dissenting opinion, concurring in nature of institutional freedom: "the institutional freedom needs a carrier, that is a technically and economically capable institution, to fulfill the [constitutional] guarantee . . . in the realm of the possible"; compare Witteman, *supra* note 2, at 155).

94. *Spiegel Search Warrant* case, 20 BVerfGE at 175-76 (institutional freedom of the press implies obligations on the part of public officials to provide information: "The autonomy of the press guaranteed by Article 5 reaches from the gathering of information through the transmission of reports and editorials. Included in press freedom, therefore, is a certain protection of the trust relationship between press and private informants," as well as "free access to a career in the press, [and] the duty of public officials to provide information"); *Blinckfüer* case, 25 BVerfGE at 256 ff (private boycott declared to be violative of objective, institutional press freedom), discussed in Witteman, *supra* note 2; First Decision, 12 BVerfGE at 225-27 (Federal government required to make transmission capacity available); see also Fourth Decision, 73 BVerfGE at 180 (Article 5 protects the "'free press' as institution, in other words its existence and ability to function"); 20 BVerfGE at 176 (The Court in *Spiegel* also suggested that the institutional freedom of the press could ground a "duty of the state to ward off the dangers to a free press that might grow out of the creation of opinion monopolies [*Meinungsmonopolen*]," a subject developed further in section III(J) *infra*).

95. See, e.g., 7 BVerfGE at 205-08; 74 BVerfGE at 323 (both discussed below).

Constitution, which create no duty and typically only protect the individual *from* the state.⁹⁶

To some extent, the radiating effect of a constitutional right is an aspect of objective law. Both are tenets of constitutional law that go beyond traditional constitutional concerns with state-state or state-individual relationships, and articulate substantive standards which sometimes must be taken into account in the resolution of individual disputes - whether sounding in property, tort or contract law.⁹⁷ Such a radiating effect is usually precluded in United States by the doctrine of state action, which limits constitutional rights to those situations where state action can be found, i.e., where the state or some party clothed with state authority has acted or threatened to act,⁹⁸ and usually prohibits the reach of constitutional concerns into relationships between and among private individuals.

Like institutional freedom, the concepts of objective values and radiating effect come out of the Constitutional Court's early jurisprudence in press and speech cases, particularly the seminal *Lüth* case where these related concepts were first articulated. In a factual situation similar to *New York Times v. Sullivan*,⁹⁹ the Constitutional Court's *Lüth* decision overruled a lower court finding

96. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973) (First Amendment "is a restraint on government action, not that of private persons."). This is not to say that rights *requiring* government to act are unknown under U.S. law. Compare SUNSTEIN, *supra* note 8, at 46-48 ("Negative Rights, Positive Rights"), 48 n.37 ("We can understand a positive right as one that requires for its existence some act by government."). Prof. Sunstein argues that some speech and property rights may, in fact, require the government to act, such as the "hostile crowd" cases where police may be required to protect a speaker, or cases where government is called on to enforce contract or property rights. *Id.* at nn. 36-40 and accompanying text.

97. BARENDT, *supra* note 88, at 62 ("[constitutional] rights, in this case freedom of expression, create a system of values which must influence all spheres of law and shape the development of private law. Further, private law itself forms part of the 'general laws' which must be interpreted and applied in conformity with basic constitutional rights.").

98. In *New York Times v. Sullivan*, the Court found "state action" in the state court's threatened enforcement of a money judgment for libel. 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press . . .").

99. Both cases grew out of a perceived disparagement of an individual (alleged defamation of an Alabama sheriff, a call to boycott an ex-Nazi, respectively), and an attempt to recover damages for same. State action did not figure in *Lüth* as it did in *New York Times* (see preceding footnote), German objective law concepts having rendered a finding of state action unnecessary.

of liability, holding that a social and democratic "system of values" was incorporated into the Basic Law, and "must apply as a constitutional axiom throughout the whole system," i.e., in both public and private law:¹⁰⁰

... [T]he Basic Law is not a values neutral document [citations omitted]. Its section on basic rights establishes an objective order of values This value system, which centers on the dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law [public and private]. Legislation, public administration, and adjudication all receive direction and impulse from this objective value system. Thus it clearly also influences the development of private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.¹⁰¹

In this case, the constitutional claims effectively trumped the Civil Code.¹⁰² Professor Kommers describes the *Lüth* court's approach this way:

The Constitution [Basic Law] incorporates the basic value decisions of its founders, the most basic of which is their choice of a free democratic basic order These basic values are objective because they are said to have an independent reality under the Constitution, imposing on all organs of government an affirmative duty to see that they are realized in practice.¹⁰³

100. 7 BVerfGE at 205 (translation partly from KOMMERS, *supra* note 2, at 363, and partly by the author).

101. 7 BVerfGE at 205. The *Lüth* court went on to state that:

The influence of the constitutional values system affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* — in the broad sense of the term — that is, rules which for reasons of the general welfare are also binding on private legal relationships and are removed from the dominion of private intent.

Id. at 206.

102. Kommers says of *Lüth*, "The court ruled that while basic rights apply *directly* to state action, they [also] apply *indirectly* to substantive private law." KOMMERS, *supra* note 2, at 49 (emphasis in original).

103. *Id.* at 47. Prof. Kommers describes how critics of the "objective values" jurisprudence of the Constitutional Court decry this "interpretive strategy" as "an ingenious — some critics would say disingenuous — judicial methodology." *Id.* at 86 (citing CLARENCE MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN INTEGRATION* 159 (1971) (objective law theory "harbors the illusions of determinate norms in the fact of unarticulated value premises and of judicial neutrality aloof

The Constitutional Court has found that other sections of the Basic Law also generate an objective law component, leading to a government duty to act, including Section 12's right to freely choose career, workplace and education, and Section 1's right to human dignity.¹⁰⁴ The idea of objective law, however, finds particular application in the area of free speech and public opinion-building. The German Court quotes Justice Cardozo on this point:

The basic right of freedom of opinion is the most immediate expression of the human personality in society and, as such, one of the noblest of human rights It is absolutely basic to a liberal-democratic constitutional order because it alone makes possible the constant intellectual exchange and contest among opinions that form the lifeblood of such an order; [indeed] *it is "the matrix, the indispensable condition of nearly every other form of freedom."*¹⁰⁵

The Constitutional Court has transplanted this concept of an objective order of values, and an objective law, into its broadcasting cases:

Inasmuch as Article 5, paragraph 1 of the Basic Law guarantees freedom of expression, freedom of publication, and freedom of information as human rights, it at the same time safeguards a process of communication. Article 5 grounds subjective rights; in this regard it also enshrines [*normiert*] these communicative freedoms as an objective principle in the total legal order, whereby subjective and objective law elements penetrate and protect each other.¹⁰⁶

from the creative search for normative content.")); *see also* KOMMERS, *supra* note 2, at 47 ("From some jurisprudential perspectives this theory allows the court to engage in open-ended decision making while appearing to be text-bound."); Fink, *supra* note 84, at 811 ("the discernment of such values is only accessible to the personal intuition and therefore not rationally re-producible One can see that in the case of broadcasting freedom quite clearly, which in the jurisprudence of the [Constitutional Court] is laid out pursuant to the personal ideas of the judges about how broadcasting can be structured and guaranteed in a way useful to society and the state."). *Compare* CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 79 (2001) ("What is operating here is a set of aspirations about democracy — about deliberative democracy in fact — and a judgment about the need for constitutional law to protect those aspirations.").

104. *See, e.g.*, 33 BVerfGE 303 (1972) (Article 12 case on educational opportunity).

105. 7 BVerfGE at 208 (quoting (in English) *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) (emphasis added)), German-English translation from KOMMERS, *supra* note 2, at 364-65.

106. Fifth Decision, 74 BVerfGE at 323; *see also* Third Decision, 57 BVerfGE at 319-

2. *Objective vs. Subjective Rights*

The hard question here, one the Constitutional Court has not answered definitively, is whether there is a private, subjective right to open and run a broadcasting business. As a threshold matter, it must be noted that even the statement of this question betrays an American bias, conflating speech rights with what Germans refer to as "entrepreneurial rights" — concepts usually, but not always, kept separate in the German discourse.¹⁰⁷

The Fourth Decision opened the door to the possibility of a private right to speak by broadcast when it expressed concern that imposing internally pluralistic governing boards on private broadcasters might rob them of the "basic element of private-autonomous shaping and decisionmaking, the actual substance of the private-law form."¹⁰⁸

20 (same), Sixth Decision, 83 BVerfGE 295-96 (same), and similar language in *extra radio* case discussed below, 97 BVerfGE at 298. The subjective/objective dichotomy is also found in press cases such as the *Spiegel Search Warrant* case, 20 BVerfGE at 175:

[Freedom of the press] secures most immediately . . . a subjective constitutional right for those persons and businesses active in the press operation . . . [I]n certain contexts it gives these parties a privileged legal position, so that the determination also has an objective-legal side. It guarantees the institution of a "free press." The state is, independent of the subjective rights [*Berechtigungen*] of any individual, required to consider the postulate of press freedom throughout its area of authority, anywhere the law touches the press.

107. See, e.g., 57 BVerfGE at 330 (presence and influence of "societally relevant forces" in public broadcasting governance bodies important to "assure — in accordance with the idea behind this model — that broadcasting will not be made to serve only one particular direction or interest — above all, the entrepreneurial interest of the broadcast carrier company — at the expense of those concerns protected by freedom of broadcasting"); 73 BVerfGE at 187 (contrasting interests of the broadcast entrepreneur or *Rundfunkunternehmer* with the requirements of broadcasting freedom, in the context of frequency allocation); but see Hoffmann-Riem, *Rundfunkrecht und Wirtschaftsrecht*, *supra* note 59, at 60 ("in the course of time, however, the broadcasting communicator's freedom is understood ever more as the broadcaster's entrepreneurial freedom").

108. 73 BVerfGE at 171. Here, the Court may have been thinking about the dissenting minority in the Court's Second Decision, which suggested there was some contradiction between the public broadcasting entity's function as a "carrier" and its editorial autonomy. "It follows that the carrier for the realization of public tasks is not actually the master of his own house, and still less the professionals inside the institution." 31 BVerfGE at 338-39; see also Witteman, *supra* note 2, at 152. On the other hand, public-law broadcasters are not that different than other public-law agencies in lacking a "subjective" protection or standing under the Basic Law. See, e.g., 75 BVerfGE 192, 193 ff (1987) (public-law credit union has no constitutional

The Court's Sixth broadcasting Decision, however, appeared to push the door half-way shut on an individual right, stating that "as a serving freedom, broadcasting freedom does not primarily guarantee the interests of the broadcaster, but rather the interests of free individual and public opinion building."¹⁰⁹ The Sixth Decision suggested that broadcasting freedom does not necessarily create an individual cause of action for the public-law broadcasting councils that run public service broadcasting institutions, but that these serve as "trustees" for the general public (*Allgemeinheit*).¹¹⁰ Six years later, however, the Court referred to the broadcasting entities themselves as "carriers" of this constitutional right, but added that the broadcasting freedom mandate went beyond the individual carrier to a "legal order that guarantees that broadcasting performs its constitutional duties."¹¹¹

At least one writer has seen a dichotomy between the subjective rights of sentence 1 of Article 5, paragraph 1 of the Basic Law (right to speak, to inform oneself), and the object rights or "shaping laws" (*Ausgestaltungsgesetze*) found in sentence 2.¹¹² This author notes a counter-position, which sees the sentence 2 laws and rights as merely the outgrowth of the subjective, defensive rights found in sentence 1.¹¹³

standing); 78 BVerfGE 101, 102 ff (1988) (public-law broadcasting agency cannot invoke equality clause of Basic Law); 83 BVerfGE at 312 (Sixth Broadcasting Decision) (public-law broadcaster cannot subjectively invoke press-freedom clause of Basic Law); see also Bethge, *Grundrechtsschutz für Medienpolizei*, 9 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 557 N.2, 558 (1995) (discussing the still unsettled question of constitutional standing of the public-law Independent Media Authorities discussed in section III(I) below, and comparing them to other public-law entities, including religious societies and universities).

109. 83 BVerfGE at 315.

110. *Id.* at 333 ("The creation of an oversight board [such as the broadcasting council] . . . should not be read to make this board itself the carrier [or beneficiary] of broadcast freedom . . . the socially composed control boards are much more trustees for the public at large.").

111. 87 BVerfGE at 197-98.

112. Ruck, *supra* note 52, at 545-47 (contrasting these two types of constitutional rights with "limiting laws" (*Schrankengesetzen*) found in Germany's civil codes, such as laws relating to protection of minors), and at 546 (noting enormous investment of time, money, and professional resources necessary to avail one's self of mass media communication systems, thereby grounding the legislator's duty to shape broadcasting so that it fulfills its serving function).

113. *Id.* at 555 ("as a consequence, all independent content is removed from sentence 2"); compare Bethge, *Der Grundrechtstatus privater Rundfunkveranstalter* [The Constitutional Status of Private Broadcasting Producers], 1 NJW 1, 3 (1997)

In 1998, the question of subjective versus objective rights surfaced again in the *extra radio* case, which involved the relative distribution of broadcasting freedom among the Bavarian State Agency for New Media ("BLM") and *extra radio*, a private provider of broadcast programming. [E]*xtra radio* complained that the BLM had unconstitutionally interfered with its broadcasting freedom by: (1) requiring *extra radio* to combine its partial program with another partial program, *Radio Euroherz*, to create a "full program"; and (2) then revoking *extra radio's* license when it was unable to reach agreement with *Radio Euroherz*.¹¹⁴ The Bavarian Constitutional Court rejected the complaint, finding that the public-law oversight agency, the BLM, was the sole "carrier" of broadcasting freedom in Bavaria, particularly in light of a Bavarian constitutional amendment limiting private broadcasting.¹¹⁵

The Federal Constitutional Court reversed, finding that the Bavarian Court had failed to consider whether the individual producer (not necessarily the owner of *extra radio*) might have enforceable rights under the Basic Law:

Broadcasting freedom is at its core programming freedom. It guarantees that broadcasting [institutions] can decide, free from external influence, how to carry out their journalistic tasks This basic right therefore protects all natural and juridical persons who produce broadcasting, whether in public-law or private-law form, whether engaged in a commercial or public venture The need for protection against such [external] influences on program-shaping decisions exists there, where such influences are most likely to be found.¹¹⁶

The Court went on to concede that it had not clarified in its previous decisions "whether the objective law duty of the State also

(noting that the Court's treatment of broadcasting freedom as an objective, "serving" freedom leads to the "de-individualization" (*Entindividualisierung*) of the constitutional right).

114. 97 BVerfGE at 302.

115. *Id.* at 303. The Bavarians had adopted by popular vote in 1973 an amendment to the Bavarian state constitution: "broadcasting will be carried out as a matter of public responsibility, and in public-law carriage." *Id.* at 298-99 (quoting Article 111a(2) of the Bavarian Constitution). Although the original referendum intended a complete ban of private broadcasting, in its final version it allowed a system anchored by a public-law Independent Media Authority (IMA), which licenses private broadcasters. See *supra* note 27, regarding IMAs; see further discussion of Bavarian referendum *infra*, note 222 and accompanying text.

116. *Id.* at 310.

corresponds to a subjective-law position of the broadcast producer or applicant.”¹¹⁷ Without going so far as to bestow what an American jurist would regard as standing or a private right of action, the Court makes clear that individual producers as well as the BLM can partake in Article 5’s legal protection. The nuanced interrelationship of rights is described in this passage from *extra radio*:

The objective law duty of the legislator serves also to protect the constitutional position of the broadcast producer operating within the framework created by the legislature; the goal of such a constitutional protection would be endangered if the affected parties had no possibility of asserting that a violation of that duty had occurred Just as a licensed broadcast producer can rely on his legal status to invoke the protection of broadcasting freedom . . . so too can an applicant [for a broadcasting license] assert that freedom as it relates to constitutionally protected selection and licensing rules.

Although the BLM itself is insulated from the state and pluralistically constituted, it faces the applicant as an instrument of public power, and in that regard is itself constitutionally bound. The fact that the BLM . . . itself could possibly enjoy the protection of this constitutional right does not speak to the contrary . . . there is nothing unusual about the necessity of balancing the rights of multiple carriers of one and the same constitutional right.¹¹⁸

117. *Id.* at 313 (“In den genannten Entscheidungen sind diese Anforderungen allerdings als objektivrechtliche Verpflichtungen des Rundfunkgesetzgebers entwickelt worden, während kein Anlaß bestand zu klären, ob der objektivrechtlichen Pflicht des Staates auch eine subjektivrechtliche Position der Rundfunkveranstalter oder -bewerber entspricht.”).

118. *Id.* at 313-14. Because the underlying legal dispute had become moot over time, the question of the precise scope of the producer’s subjective broadcasting rights, as well as any specific defects in BLM’s procedure, were left unresolved by the Constitutional Court’s decision. *Id.* at 315 ff. While some commentators have suggested that “more was left open than decided” with this decision (Stettner, *Das bayerische alternative Rundfunkmodell nach dem ‘extra-radio’ Beschluss des Bundesverfassungsgerichts*, 2 KOMMUNIKATION & RECHT (K&R), 355, 362 (1999)), the Constitutional Court may have chosen the better part of wisdom in correcting some basic theoretical errors of the Bavarian court, without opening the door to unfettered entrepreneurial rights. The Court appeared to be balancing — and indeed used the word *Ausgleich*, translated here as balance, to describe its process — the direct institutional interests of the BLM against the subjective interests of the individual producer. Compare 57 BVerfGE at 321 (Third Decision, translated, *supra* note 62 and accompanying text) (broadcasting as the point where “different constitutional rights positions meet”).

A sort of interdependence of subjective rights and objective norms emerges. The Court in *Lüth* pointed out that the Basic Law is to be interpreted in terms of its overall structural unity, and that the rights recognized in the Basic Law create an "objective order of values . . . that has its middle point in the human personality freely developing itself within the social community."¹¹⁹

3. *The Constitutional Duty of the Legislature*

An "objective order of values" is meaningless if it is not translated into action. The Constitutional Court has understood that the guarantee of broadcasting freedom "requires a *positive [legal] order* that secures the diversity of existing opinion in its fullest possible breadth and completeness. . . . How the legislature will accomplish this task is — within these constitutional parameters — its own decision."¹²⁰

Objective values impose a "positive obligation on the state" to create the conditions under which the constitutional freedoms can be meaningfully exercised."¹²¹ For example, in the 1972 educational training case cited above, the Court extrapolated from Section 12 of the Basic Law, which protects the "right to freely choose career, workplace, and educational or training path," a duty of the government to provide sufficient educational and training possibilities to make this choice real. "Without the factual prerequisites [for career preparation], the freedom to make such choices would be an empty promise [*wertlos*]."¹²² Other German constitutional rights said to create duties because of their broad

119. 7 BVerfGE at 205. See KOMMERS, *supra*, note 2, at 35-37 (Kommers identifies some of the values embedded in the German post-war Basic Law: *Parteienstaat* (popular sovereignty through political parties competing in free and equal elections); *Sozialstaat* (commitment to provide social justice and basic needs of all Germans); *Rechtsstaat* (rule of law); and *Streitbare Demokratie* (which he translates as "militant democracy")).

120. 74 BVerfGE at 324 (emphasis added); see also 87 BVerfGE at 198 (obligation of the legislature to insure adequate financing for public law broadcasters); 90 BVerfGE at 88-90.

121. KOMMERS, *supra*, note 2, at 47 ("Every basic right in the Constitution — for example, freedom of speech, press, religion, occupation — has a corresponding value. A basic right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the legal order."). Thus, says Kommers, "while basic rights apply *directly* to state action, they [also] apply *indirectly* to substantive private law" such as interpretations of the Civil Code. *Id.*

122. 33 BVerfGE at 330-31.

social implications are the freedom of research and teaching (*Freiheit von Forschung u. Lehre*) found in paragraph 3 of Article 5, and the rights of parents (*Erziehungsrecht*) found in Article 6 of the Basic Law (which, like broadcasting, is characterized as a “serving” freedom, and obligates the parent to act as trustee for the child).¹²³

While institutional freedom and the radiating effect of constitutional rights inform broadcasting freedom,¹²⁴ it is the objective law’s legislative mandate that makes broadcasting freedom the effective lynchpin of the German public service broadcasting system today.

Broadcasting fulfills an essential “transfer function,”¹²⁵ and a related, equally important “integration function,”¹²⁶ in society. The Court sees this “transfer function” in danger of “capture”

123. Fink, *supra* note 84, at 805, notes 4-5 and accompanying text, citing 59 BVerfG 360 (377).

124. Institutional freedom and particularly the radiating effect of constitutional rights may have application to the network neutrality debate, discussed in section III(K)(2)(c) below. Institutional freedom is also important to securing adequate financing for public law television, also as discussed in section III(H) below.

125. 90 BVerfGE at 87. The use here of “transfer function,” as well as the Court’s reference elsewhere to broadcasters as *Träger*, suggest reference to a common carrier telecommunications platform. *Träger* is, in fact, susceptible to two interpretations, depending on context: either “legally responsible agency,” or “carrier” in what we would understand as a common carrier category. The Constitutional Court uses *Träger* in both senses, sometimes referring to an infrastructure component (“carrier”), other times to the legal entity that carries the programs (“agency”). See, e.g., 73 BVerfG at 145 (carriage: “preference for broadcast applicants, which demonstrate a broad and diverse carriage”); *Id.* at 165 (carriage: referring to broadcasting council as the organ of a “neutralized broadcast carrier”) (“*neutralisierten Trägers der Veranstaltungen*”); 83 BVerfG at 246-47 (agency: “The state legislator saw broadcasting in private carriage [responsibility] as the fulfillment of a public service.”); *Id.* at 325-26 (agency: “The end-effect of this attempt [to prevent dominant opinion-making power] is the division of the broadcasting institution into two agencies, one a production cooperative responsible for the journalistic side, and the other a corporate entity responsible for the economic and technical side of the operation.”). When discussing the legal entity, it is usually in terms of whether that entity has standing to assert broadcasting freedom. See, e.g., 83 BVerfGE at 315. (“broadcasting freedom does not empower its holder [*Träger*] to limitless uses”).

126. The institutional freedom accorded the press and broadcasting rests on a notion of these undertakings not just as economic enterprises, but also as social spaces where various forms of public opinion building occur. These media “transmit a certain picture of reality, . . . place certain themes on the agenda for discussion, as part of an integration process whereby lifestyles, worldviews [*Lebenseinstellungen*], values, and public conduct find a relationship to each other.” *Caroline of Monaco II*, 101 BVerfGE at 390, cited with approval in 103 BVerfG at 74.

[*Indienstnahme*] by both state *and* private forces.¹²⁷ The legislature must therefore guarantee that program "selection, content and shape" should occur as much as possible pursuant to journalistic criteria (*publizistische Kriterien*), rather than political or commercial criteria which might distort or "narrow" the communication of information and opinion to the listener or viewer.¹²⁸ Such a "positive order" entails provision of the "material, organizational, and procedural" prerequisites for this constitutionally required transfer function.¹²⁹ As described below, the devil is in the details.

D. State as Censor: Insulation of Both Public and Private Broadcasters from State Influence

A threshold requirement of any system of free speech is freedom from state censorship. As conceived under the broadcasting freedom clause, free speech entails a much broader freedom from state *influence*. The Constitutional Court has tasked state legislators with insulating all broadcasting, be it public or private, as much as possible from state influence, including the influence of the very legislators to whom this task is addressed. This becomes particularly tricky when the legislature deals with the questions of financing, licensing and other discretionary decisions related to broadcasting; one solution has been to move these decisions out of the state governmental apparatus and into autonomous, self-governing public institutions like the broadcasting councils and Independent Media Authorities described above.

The Court's First Decision on broadcasting drew an initial line

127. 90 BVerfGE at 88 ("*Indienstnahmen des Rundfunks drohen nicht nur von seiten des Staates, sondern auch von gesellschaftlichen Mächten*" ["capture of broadcasting is a threat not only from the side of the state, but also from forces in society"]). Thus, the Basic Law's guarantee of broadcasting freedom is essentially a guarantee that "the diversity of themes and opinions that play a role in society are grasped and transmitted by the broadcasting system." *Id.*

128. *Id.* at 87; *see also id.* at 89 (legislative duty to protect the essential journalistic function from "extra-journalistic interests of third parties").

129. *See Id.* at 88 (citing 57 BVerfG at 320); 83 BVerfG at 296 ("*materielle, organisatorische, und prozedurale Regelungen*"). While government supplies the prerequisites, it does not directly fund public broadcasting, relying instead on broadcasting fees paid by each owner of a radio or television set. Several judges on the Constitutional Court have stated that government funding would create an unconstitutional dependency relationship. *See* BVerfG 31, 229 (344) (Geiger, Rinck and Wand, dissenting). And, while never explicitly adopted, this rationale underlies the Court's support for fee financing. *See* Witteman, *supra* note 2, at n. 31 and accompanying text.

in the sand, ruling that broadcasting's constitutionally mandated freedom from state influence was violated by Chancellor Adenauer's plans for a national television network owned jointly by the federal government, the several States, and others.¹³⁰ Even if state ownership was out, however, licensing issues remained problematic. The Court's Fourth Decision struck down licensing provisions applicable to private broadcasters because they gave the state executive board too much discretion, and too much potential influence over broadcast programming: "[S]tate authorities may not have discretionary powers which . . . could influence decisions regarding the access of private parties to broadcasting media."¹³¹ As an alternative, the Court suggested an internally pluralistic public-law body, similar to the broadcasting councils of public law stations, with power to make licensing decisions.¹³² This has in fact become the model for state licensing decisions, as described in section III(I) below.

The Eighth Decision marks the Court's fullest attempt to wrestle with the paradox that the state that guarantees a "positive order," and the legislature that shapes that order, are the very state and legislature that have historically posed the greatest threat to broadcasting freedom.¹³³ The state, as well as legislators and political parties, will be tempted to "instrumentalize" the broadcasting function for their own purposes.

This [constitutional] protection relates not only to the manifest dangers of immediate direction or censorship of broadcasting. It also includes the more subtle means of indirect influence, with which a state body can obtain influence on programming or pressure those working in the broadcasting institutions. The state has such means because it is precisely the state which, in the

130. 12 BVerfGE at 263; *see also* WESEL, *supra* note 9, at 121 ff. ("[T]he next day's newspapers reported: government television is unconstitutional.").

131. 73 BVerfGE at 183.

132. *Id.* at 187; *see also* discussion of Independent Media Authorities, *supra* note 27.

133. 90 BVerfGE at 88 ("As necessary as the state is as guarantor of a comprehensively understood broadcast freedom, the representatives of the state are susceptible to using broadcast freedom for their own interests."). Although organized under private law, political parties are considered so close to the state decision-making process as to justify further constitutional safeguards. The Constitutional Court has ruled that their ownership or participation in commercial broadcasting entities may be prohibited to the extent it would allow the political parties to determine broadcast shape or content. 121 BVerfGE at 51-67 (a 2008 ruling which is the Court's latest broadcast-related Decision as of this writing).

interest of the constitutional values in Article 5, paragraph 1 of the Basic Law, organizes, licenses, provides transmission capacity, oversees, and in some sense finances broadcasting. The inevitable resulting opportunities to influence the journalistic activities of broadcasters must therefore be excluded as much as possible.

For this reason, the Constitutional Court has held that the state agencies can have no discretion in the licensing of private broadcasters Such discretion can itself act as a means of pressure and create a "self-censorship" of the broadcast entity.¹³⁴

The Court held that protecting the "constitutional communication rights" from infringement by the state remains "even today the most important application" of those rights.¹³⁵

In light of its finding that broadcasting freedom is essentially "program freedom," i.e., a protection of the journalistic enterprise from external forces, the Court found that even in its oversight functions ("organizing, licensing, provision of transmission facilities, oversight, and financing") the state needs to be kept at a distance from both private and public programmers, a principal it had referred to in earlier decisions as *Staatsferne* or "distance from the state."¹³⁶ Keeping the state and the politicians who run it at this safe distance has proven particularly bedeviling when it comes to financing public broadcasting, as demonstrated in the Court's more recent broadcasting Decisions, four of which are almost wholly concerned with this problem (see section III(H) below).

E. Market as Censor: Criticism of the Marketplace, and Insulation of Public Broadcasters from Market Influence

It is the German Constitutional Court's consistently expressed belief that the market by itself, and by definition, cannot provide for a democratic media that sets its communications jurisprudence apart from that of the United States. In its Fourth Decision, the Constitutional Court put the case this way:

Private programming is not adequate to the task of providing comprehensive information in full measure to the public . . . it does not communicate information across the full breadth of

134. 90 BVerfGE at 88-89.

135. *Id.* at 88, 87-89.

136. *Id.* at 88-89; see also 73 BVerfGE at 190 ("Decisive [for Article 5 considerations] is much more a consideration of distance from the state [*Staatsferne*] and nonpartisanship.").

opinions and cultural currents in society.¹³⁷

The Court has looked beyond spectrum scarcity to a more generalized observation about the flattening affect of advertising on program content:¹³⁸

Independent of [the scarcity rationale], one cannot expect from private broadcasters a broad array of programming, because the private broadcaster is dependent on income from business advertising. Such advertising income increases only when the private program reaches sufficiently high viewership. Broadcasters thus stand before the economic necessity of providing the most broadly attractive programs, designed to maximize listener and viewer numbers, and to do so at the lowest possible costs.¹³⁹

Given the advertiser-driven model of commercial television, the Court finds that programs intended for small audiences may not be commercially viable, although they are important to the ecology of public opinion:

Programs that are of interest for a small number of viewers and that often — as for instance in the case of difficult cultural broadcasts — require a large cost expenditure, will as a rule retreat or be fully missing [from a private broadcasting landscape], although they are necessary to the complete array of information without which opinion building in a constitutional sense is impossible.¹⁴⁰

Despite the hint of elitism (“difficult cultural broadcasts”), this passage underlines the Court’s oft-stated belief that the marketplace is incapable of supplying those serious, difficult, and/or critical works which, although perhaps without mass appeal, are unquestionably important to the process of public opinion building. This value judgment, one of the mainstays of German broadcasting jurisprudence, has engendered sharp criticism both in Germany, and in this country.¹⁴¹

137. 73 BVerfGE at 155; *see also* Witteman, *supra* note 2, at 174-75 (quoting 57 BVerfGE at 322-23).

138. *See infra* notes 158-64 and accompanying text (frequency scarcity as rationale for broadcast regulation). In 1986, the Court elaborated on the “extraordinary high cost of television programming,” and the resulting “small number of broadcasters” active in Germany. 73 BVerfGE at 154-55.

139. 73 BVerfGE at 155.

140. *Id.* at 155-56.

141. Thomas Oppermann, *Rundfunkgebuehr — Rundfunkordnung —*

Ironically, even the conservative political parties in Germany agree with the underlying empirical observation. In arguing against a species of fairness obligations which the North Rhine Westphalia law imposed on private broadcasters (obligations to cover "controversial themes of general significance," and present a broad diversity of opinion), the Christian Democratic Union/Christian Social Union ("CDU/CSU") and the Free Democratic Party ("FDP") argued that it was commercially *impossible* to provide full and objective news coverage in an advertising-driven broadcasting environment, and that private broadcasters should therefore be relieved of diversity and fairness obligations:

Private broadcasters, because of their dependence on financing through advertising are, in fact, not in a position to fulfill these requirements. To the contrary, they must concentrate much more on entertainment broadcasts attractive to the masses in order to survive.¹⁴²

The Court agreed with petitioners in its Sixth Decision, but drew a different conclusion: while the public interest obligations of commercial broadcasters could be lightened as long as there was a compensating non-commercial "pillar" in the broadcasting system (i.e., as long as there was a functioning public broadcast system), commercial broadcasters could not entirely be excused from such obligations.¹⁴³

The Court's later Decisions returned repeatedly to the theme of market failure. In its Seventh Decision in the *Hessian Broadcasting* case, the Court found that private, advertising-driven broadcasters had shown themselves to be incapable of delivering the constitutionally mandated diversity "in full measure."¹⁴⁴ In its

Rundfunkideologie, Zum Rundfunkgebührenurteil des BVerfG vom 22.2.1994, 1994 JZ 499, 500-01 (["The serving-institutional version of broadcast freedom] is based . . . on a far from doubtless primacy of sentence 2 over the "Ur-freedoms" of sentence 1. "); Widmaier, *supra* note 14, at 77, 107, 151 (German "values focus" constitutes an "elitist fallacy" and amounts to "governmentally created ethics of human interaction.").

142. 83 BVerfGE at 279 (discussing complainants' argument).

143. *Id.* at 316.

144. 87 BVerfGE at 199 (citing a 1991 publication of the Independent Media Authority for North Rhine-Westphalia, *Produktionsquoten privater Fernsehprogramme in der Bundesrepublik Deutschland* [Production Quotas of Private Television programming in the Federal Republic of Germany]). This study analyzed actual program content of the private broadcasters over a two-week period, determining that between 70-96% of their programming was primarily entertainment with little or no information

Eighth or *Cable Penny* Decision, the Court rejected the contention that people who want private programming only should not have to pay a fee to support public broadcasting. It found that the

present deficits of private broadcasting in its breadth of content and thematic diversity can only be acceptable as long as public law broadcasting remains to a full extent functional. It is therefore justified to impose the broadcasting fee without regard to a listener/viewer's pattern of use.¹⁴⁵

A primarily fee-based system "allows the public broadcaster to be independent from ratings and advertising obligations in offering a program to the public that corresponds to the constitutional demands of a diversity of content and opinion"; the only prerequisite for imposition of the fee is that the user have a device capable of receiving a signal.¹⁴⁶

The second Bavarian Fee Decision developed the Court's critique of the marketplace, citing further empirical research on how the pursuit of market-share limits broadcast programming.¹⁴⁷ "Program-limiting and diversity-reducing pressures observable in privately financed broadcasting" are particularly pernicious "when there is a smaller number of likely viewers due to the type of programming or the small size of the broadcast area."¹⁴⁸ The second Bavarian Fee Decision held that even in a future digital world with greatly expanded transmission capacity there could be no assurance that minority or regional programming would be economically viable.¹⁴⁹

The Court's September 2007 Decision continued in this vein, measuring the market's shortcomings against the ideal of broadcasting where "journalistic goals stand in the foreground," and "broadcast programming captures the diversity of information, experience, values and behaviors in society."¹⁵⁰ The Court cited studies in media economics to support its view that "broadcasting

value; and that very few of the private broadcasters actually developed their own programming (as opposed to, say, purchasing U.S. product). *Produktionsquoten*, at 38, 49, 52, *passim*.)

145. 90 BVerfGE at 90-91.

146. *Id.*

147. 114 BVerfGE at 388.

148. *Id.*

149. *Id.*

150. 119 BVerfGE at 215-16.

has . . . in comparison to other goods, special economic characteristics," and its finding that a completely market-driven system "threatens the goal of substantive diversity which is especially important for a functioning democracy."¹⁵¹ The Decision described advertising-financed broadcasting as inevitably leading to a search for the largest possible audience, with a host of negative results: "standardization" of product; "erosion of public television's identity"; "one-sided reporting"; and the possibility that broadcasting would be "co-opted for extra-journalistic purposes, be they of a political or economic nature."¹⁵²

The pressures of economic competition and the ever-more difficult editorial effort to obtain the attention of the viewer often lead for example to reality-distorting presentations, the preference for the sensational, and the tendency to take from the reported subject only the peculiar, the scandalous.¹⁵³

The Court suggests that the problems with advertising as a revenue base for the information industry are exacerbated by the increasing concentration in commercial broadcasting:

Other entities, such as investment funds with significant participation by international finance-investors, have become increasingly active in the broadcast area. Telecommunications companies are becoming active as the operators of the platforms for broadcast programming. The process of horizontal and

151. *Id.* (citing JURGEN HEINRICH, *MEDIENÖKONOMIE* 24 ff (Vol. 2, 1999)); WOLFGANG SCHULZ ET AL., *PERSPEKTIVEN DER GEWÄHRLEISTUNG FREIER ÖFFENTLICHER KOMMUNIKATION* 107 ff (2002). Heinrich references Ronald Coase's 1974 essay, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PAPERS & PROC. 384 (1974), but suggests that the two marketplaces are not co-extensive, or even substantially similar. Traditional economic categories such as use-value and trade-value do not fully capture the value of an idea or a media production in creating a public sphere, contributing to diversity of opinion, and (hopefully) enabling a search for truth and shared social values. HEINRICH, *supra*, at 46. Heinrich also suggests that viewer sovereignty is undermined by the fact that advertisers are more important customers for the broadcasting enterprise than are viewers, and it is the advertisers — rather than viewers or journalists — who determine the breadth and targets of any given programming. *Id.* at 44. Schulz, Held and Kops, on the other hand, start with the "methodological individualism" of Hayek's *ROAD TO SERFDOM*, and the "invisible hand" of Adam Smith, and focus more on market failure in the traditional sense, due to the scale of modern broadcasting or communications services, and the resulting ownership concentration in those markets. SCHULZ ET AL., *supra*, at 107, 114-15 ("the model of atomized competition assumes many individual offerors and offerees . . .").

152. 119 BverfGE at 215-16, 219-20.

153. *Id.* at 215-16.

vertical integration in the media markets marches on. The production and transmission of broadcast programming is often just a link in a multi-media production and marketing chain.¹⁵⁴

Given these perceived defects in the commercial broadcasting marketplace, the Constitutional Court returns to the *quid pro quo* posited in its earlier decisions: The failure of private markets to provide the full “diversity of information, experience, values and behaviors in society” is only acceptable when the legislature provides for an adequately financed and politically insulated public broadcasting information and opinion service.¹⁵⁵

F. Reaffirmation of Broadcasting Freedom in a “Dual Broadcasting” Landscape

In recognizing the status quo, that its previous decisions had taken hold and that private and public broadcasters were existing (or in short order were going to exist) side by side, the Constitutional Court’s Fourth Decision acknowledged for the first time what it called a “dual broadcasting order” (*duale Rundfunkordnung*), a system in which public non-commercial providers and commercial broadcasters coexisted.¹⁵⁶ Even as it moved into this *terra incognita*, however, the Court restated its previous rulings, tying the constitutional guarantee of “freedom of reporting by broadcast” to broadcasting’s central role in a modern democracy: “Broadcasting freedom serves the same purpose as the other guarantees of Article 5 paragraph 1: it protects free individual and public opinion-building.”¹⁵⁷

Before the Court could resolve how these concepts related to the new mixed landscape, it had to address whether a constitutional category for broadcasting separate and apart from general speech

154. *Id.* 216-17 (citations omitted).

155. *Id.* at 218 (“[O]nly when public-law broadcasting is successful at this task [fulfilling its ‘classic mission’ of opinion- and will-building], and can survive in the journalistic competition with private broadcasters, is the dual system in its present form, in which less strict demands are placed on privately financed programs than on the public-law programming, consistent with Article 5.”).

156. 73 BVerfGE at 118. The first words of the first of the Court’s headnotes announce this new order: “In the dual order of broadcasting, as it is presently found in the majority of German States on the basis of their media laws, the basic provision of information and opinion is the province of the public-law broadcasters”

157. *Id.* at 152.

rights was still necessary and useful in a multi-channel world, indeed whether a distinction between broadcasting and the press was still lawful. The proliferation of new broadcasters arguably undercut the rationale that a frequency shortage (*Frequenzmangel*) or "special situation" (*Sondersituation*) required legislative action to preserve broadcasting freedom.¹⁵⁸ The opening paragraphs of the Court's Fourth Decision squarely addressed this issue:

In [the Court's early broadcasting] Decisions, the Court accorded importance to the "special situation" of broadcasting in comparison with that of the press. The "special situation" arose from the scarcity of available frequencies and the extraordinarily high financial investment required for the production of broadcast programs. This situation has not disappeared in recent years; it has however changed.¹⁵⁹

Because the Constitutional Court regularly considers the "concrete factual situation of [contemporary] life" in its application of constitutional standards to an evolving society,¹⁶⁰ the Court examined the factual particulars of the then-current situation: (1) it acknowledged the existence of the "new media," cable and satellite television, but noted that there are still substantial segments of society which obtained their broadcast signal over "terrestrial frequencies," and that there remained a shortage of such frequencies; (2) it noted that an extraordinary high investment remained a barrier to entry, regardless of the technology chosen; not everyone who wanted to broadcast could do so; and (3) it worried about the effect of a new "European broadcast market" (brought on by satellite technology) on the constitutionally required balance in domestic programming.¹⁶¹

Against this background, the Constitutional Court recast broadcasting's special situation in terms of market failure,¹⁶² and also of the inherent "ubiquity, actuality, and suggestivity" of the medium,¹⁶³ thus effectively positioning broadcast freedom for the

158. Witteman, *supra* note 2, at 156-57.

159. 73 BVerfGE at 121.

160. *Id.* at 154.

161. *Id.* at 121-24, 154-55.

162. 73 BVerfGE at 118 *passim*; see also preceding section.

163. 90 BVerfGE at 87; 114 BVerfGE at 387-88 ("*Breitenwirkung, Aktualität und Suggestivkraft*"). This argument was in the air and implicit in the Court's first decisions. See also Witteman, *supra* note 2, at 174 (citing early expressions of broadcasting's unique immediacy at 31 BVerfGE at 338 (dissent), and 57 BVerfGE at

information age. The Court did three things to move the process along. It articulated the *quid pro quo* for the dismantling of public service broadcasting's monopoly ("If the legislature decides for a dual system, then it must secure all the prerequisites for the delivery of [the basic service] in every regard, including financial."¹⁶⁴); it defined more closely what "basic service" on the public-law track was to look like (the Court christened this service *Grundversorgung*, as discussed in the next section); and it set out minimum parameters for German broadcasting as a whole, including both its public and private "pillars." This "dual system" has to satisfy these criteria:

- it has to deliver a total package of domestic programming that corresponds in an essential way to the existing diversity in German society;
- it has to be free from control by any person, entity, or collection of private parties or social groups; and
- it has to promote the ability of all relevant social groups to express themselves through the broadcasting medium.¹⁶⁵

As in past decisions, the Fourth Decision gave the State legislatures discretion to decide how these criteria are to be met. The legislature can choose to impose an "internally pluralistic" governance structure ("*'binnenpluralistische' Struktur der Veranstalter*") on the broadcasting entities, in which the influence of the socially relevant groups is felt internally, through the broadcasting council, board of directors or other organ of the broadcasting entity.¹⁶⁶ Alternatively, the legislature could choose a more market-oriented "externally pluralistic" model, which achieves diversity through a variety of different broadcasting entities.¹⁶⁷ In either case, the lawgiver retained the duty to provide a legal structure insuring diversity and balance.¹⁶⁸ As we will see, the system that emerged over time was one that used the internally

320.

164. 87 BVerfGE at 199 (citing 73 BVerfGE at 158; 83 BVerfGE at 298.

165. 73 BVerfGE at 153.

166. *Id.* at 153.

167. *Id.* at 152.

168. *Id.* Although to American eyes the Court's Fourth Decision seems a ringing endorsement of the primacy of public service broadcasting, some German commentators saw in it the final opening of the floodgates to forces favoring privatization, were subjecting public television to death by a thousand cuts. See, e.g., Hoffmann-Riem, *Rundfunkrecht und Wirtschaftsrecht*, *supra* note 59.

pluralistic model for public broadcasting, and relied on a regulated market competition (external pluralism) to produce diversity in the commercial sector.

In its Fifth Decision, the Court expanded on the notion of a dual broadcast system, positing a "competition" between public and private law broadcasters, through which diversity of opinion as a whole would be strengthened.¹⁶⁹ The Court, however, made clear that it meant a journalistic competition, a competition of information and opinion, rather than a market competition. The Court rejected as irrelevant the state's argument that its broadcasting law was merely an attempt to create equal market chances for private broadcasters, stating that "market chances belong to the realm of economics, not of freedom of opinion."¹⁷⁰

In other words, when it comes to a collision of economic and speech freedoms, speech freedom wins.¹⁷¹ The Court thus implicitly rejects the concept that a free economic marketplace will produce a free speech and information marketplace, and that economic enforcement tools such as antitrust laws can alone create or protect a diverse information offering. At best, antitrust enforcement is seen as supplemental to the *ex ante* provisions of a positive broadcasting order in guarding against one-sided opinion-making power in broadcasting.¹⁷²

The state legislatures responded to the Court's admonishments by creating and ratifying first an Inter-State Treaty for Media in 1987, and then the Inter-State Treaty for Broadcasting in 1991.¹⁷³ Both provided for the continued existence of public law television, as well as the licensing of private broadcasters – not by a state

169. 74 BVerfGE at 333.

170. *Id.* at 335 ("Marktchancen können eine Frage wirtschaftlicher, nicht aber der Meinungsfreiheit sein.").

171. The Court's September 2007 decision called for an "uncoupling" of public broadcasting from the economic market ("*Abkoppelung vom ökonomischen Markt*"). 119 BVerfGE 181, *passim*; see also *infra* text accompanying note 215.

172. 73 BVerfGE at 173-74 (stating that despite availability of *ex post facto* anti-competitive enforcement, legislature remains responsible for *ex ante* prevention of dominant opinion power or *Meinungsmacht* by any commercial operator or group of same); see also discussion below in section III(J) regarding antitrust enforcement and related topics.

173. See Inter-State Treaty, *supra* note 25. This Treaty was preceded by the Inter-State Treaty for Media (*Medienstaatsvertrag zur Neuordnung des Rundfunkwesens*), which remained in effect from 1987 until 1991 when a new treaty was required to incorporate broadcasting in the former East Germany.

agency but by an independent administrative board which was an internally pluralistic public law entity much like the public-law broadcasters themselves.¹⁷⁴ Although the Court has talked tough about the continuing “trustee” responsibilities of private broadcasters, the regulation of private broadcasters has in fact proven to be rather light, except in the antitrust area where the German authorities have been more rigorous.¹⁷⁵ The result is a “dual system in which public-law and private programmers compete with one another,” although operating with different agendas and goals.¹⁷⁶

G. An Existence Guarantee for Public Broadcasting – the Allocation to Public Law Stations of the Duty to Provide a Basic Information Service

In its Fourth Decision, the Constitutional Court for the first time used a term that would echo down through its succeeding broadcast decisions: *Grundversorgung*, translated here as “the basic provision of information and opinion” or “basic information service,” a function the Court assigned to public broadcasters as a constitutional mandate under Article 5 of the Basic Law:

In this [dual] system, the basic provision of information and opinion is the unavoidable concern of public-law broadcasting institutions, which are in a position to provide this service because

174. *Supra* notes 19 and 27. See also *infra* discussion of regulation of commercial broadcasters by Independent Media Authorities in section III(I).

175. *Id.*; see also *infra* discussion in section III(J) regarding application of antitrust law (*Kartellrecht*) to broadcasting.

176. 83 BVerfGE at 316; see also HOFFMANN-RIEM, *supra* note 17, at 315:

([The] dual broadcasting system builds on the different structures of private market-driven broadcasting on the one hand and public law broadcasting on the other. The combination of these two worlds promotes broadcasting freedom, in that these structures anchor different program orientations and compensate for the disadvantages of one system with the advantages of the other. (Some refer to this as the idea of structural diversification). The most important structural difference is that between market-orientation (*Privatwirtschaftlichkeit*) and community-orientation (*Gemeinwirtschaftlichkeit*). These columns compete with each other, but this is a journalistic and not an economic competition.

Id. at Thesis 2, translated and edited by the author; see also 114 BVerfGE at 387-88 (“In the dual order, with its juxtaposition of public-law and private-market broadcasting, broadcasting freedom is served, in that differently structured broadcasting producers make possible different program orientations which as a whole contribute to the breadth and diversity of the program offering.”).

their terrestrial programs reach almost the entire population, and because they are not reliant in the way private broadcasters are on high ratings, and can thus provide a comprehensive program offering.¹⁷⁷

German legal scholars trace the use of *Grundversorgung* to a 1975 treatise on television and radio, which used the term as an amalgam of Basic Law principles of democracy and social state, and imagined a sort of continual broadcasting program, available to all citizens, constantly measuring social conditions against the mandates and goals set out in the Basic Law.¹⁷⁸ In intervening years, the term has been given different accents by different commentators. Some saw it as referring to a temporary task of the public law stations during the transition to an externally pluralistic broadcasting market, lasting only until cable television or satellite technologies provided a sufficiently large number of frequencies to "establish that diversity in private broadcasting necessary to make effective the principles of plurality and equal access" (*Chancengerechtigkeit*).¹⁷⁹ Others saw it as continuing even in an externally pluralistic market, as a "*Kontrastprogramm*," offering a cultured and refined alternative to the mass programming of the private stations.¹⁸⁰ Since its adoption in 1986, the German Court has portrayed *Grundversorgung* as an essential input into the process of "formation of opinion and political will," as well as the creation of a national cultural identity.¹⁸¹ For example, in the Fourth Decision:

The task [of *Grundversorgung* or a basic information service] includes the essential functions for broadcasting within a democratic order as well as for the cultural life of the country. As privately produced and European programming becomes

177. 73 BVerfGE at 157.

178. Christian Starck, "*Grundversorgung*" und *Rundfunkfreiheit* 51 NJW 3527 (1992) (citing HERMANN, FERNSEHEN UND HÖRFUNK IN DER VERFASSUNG DER BUNDESREPUBLIK DEUTSCHLAND 322, 332, 346, 378 (1975)).

179. Starck, *supra* note 178 (citing H. H. KLEIN, *supra* note 79, at 79 *et seq.*).

180. *Id.* (citing and quoting BULLINGER, KOMMUNIKATIONSFREIHEIT IM STRUKTURWANDEL DER TELEKOMMUNIKATION 94 *et seq.* (1980)).

181. 73 BVerfGE at 157-58. Because so many strands of meaning are united in the word *Grundversorgung*, it is a difficult word to translate. On one level it means basic supply, or basic service. But, as the Court points out, this does not mean minimal supply or service. It is more in the sense of an essential supply or service, and of an undistorted neutral clearinghouse. For present purposes, then, it should be understood as referring to an essential and neutral clearinghouse and supplier of a full spectrum of information and opinions.

widespread, it is important to guarantee fulfillment of . . . a cultural responsibility along with broadcasting's role for opinion- and political will-building, entertainment, and ongoing news coverage.¹⁸²

The Fifth Decision added three essential attributes for this essential information and opinion service (a distillate of the requirements for the overall dual broadcasting system, as described above): (1) programs for all in the audience; (2) that "inform in a comprehensive way"; and (3) "protect diversity of opinion."¹⁸³

The Court has also defined *Grundversorgung* in terms of what it is *not*: it is not a *minimum* provision of information and opinion, nor is it a free-pass to commercial broadcasters, absolving them of any duties to cover a diversity of opinion and viewpoints, or a limit to which public broadcasters are confined; nor should it be construed as a "dividing line between the duties of public and private law broadcasters, in such a way that there are programs or broadcasts that belong to the basic service, and thus to public broadcasters, and everything else is the province of private broadcasters"¹⁸⁴; nor does it occur "only in news programs, political commentary, or series about the problems of the past, the present or the future, but also in radio and television plays, musical offerings, and entertainment broadcasts."¹⁸⁵

While not a free pass to private broadcasters, the constitutionally required information and opinion service is primarily identified with public law broadcasters, and indeed has become a guarantee of the existence and development of public law broadcasting. The Fourth Decision held that "in view of its function as a basic information and opinion service," public law broadcasting had to be guaranteed "the technical, organizational, personnel, and financial requirements" necessary to provide that service.¹⁸⁶ The

182. *Id.*

183. 74 BVerfGE at 325.

184. *Id.* at 325-26. The Court's Seventh Decision elaborated further: "Basic service means neither a minimum provision [of information and opinion] nor is it limited to the informational and educational part of the program." 87 BVerfGE at 199 (citing 73 BVerfGE at 158 (role of broadcasting in building of public opinion and political will)), 74 BVerfGE at 324-25 (emphasizing importance of balanced diversity).

185. 73 BVerfGE at 152.

186. 73 BVerfGE at 158; *see also* 74 BVerfGE at 324-25 (assigning the "ineluctable 'basic service'" to public law stations).

Sixth Decision found this “general existence and development guarantee” (*allgemeine Bestands- und Entwicklungsgarantie*) for public television to be “constitutionally mandated, as long as private broadcasters are incapable of fulfilling the classic role and duty of broadcasting.”¹⁸⁷ Some commentators see the “as long as” clause as surplussage because “no one seriously suggests subjecting private broadcasters to stricter requirements, [as] such measures could well mean the demise and disappearance of private broadcasters.”¹⁸⁸

The Court noted that the term “*Grundversorgung* is tied solely to the *function* that broadcasting plays in the communication process protected by Article 5,” and that the role of public broadcasters is therefore “substantively and temporally open and dynamic.”¹⁸⁹ This definitional openness has particular ramifications for the future of broadcasting freedom in the online world, as discussed in section III(K).

The definition of *Grundversorgung* has also become implicated in proceedings instituted by the European Commission examining whether Germany’s broadcast fees amount to an unfair and illegal subsidy of German public broadcasting. Although beyond the scope of this article, the issue becomes whether the fees are spent on *bona fide* public services, making them exempt from European Community rules against government subsidies that unfairly advantage one country’s industries over another’s.¹⁹⁰

187. 83 BVerfGE at 299 (“*Gegen eine solche Garantie . . . bestehen keine verfassungsrechtlichen Bedenken. Sie ist im Gegenteil im dualen Rundfunksystem verfassungsrechtlich geboten, solange die privaten Veranstalter den klassischen Rundfunkauftrag . . . nicht in vollem Umfang erfüllen.*”). Parties to the fifth Decision had bandied about the concept of an existence guarantee — ARD in favor; the Federal Government and the State of Baden-Wurtenburg against, *see* 74 BVerfGE at 311, 312, 316 — but the Sixth Decision marked the first time the Court had adopted the phrase as its own. *See also* September 2007 Decision, 119 BVerfGE at 218 *et seq.* (tying the “existence and development guarantee” to a reliable, de-politicized funding stream).

188. MAUNZ-DUERIG-HERZOG, GRUNDGESETZ KOMMENTAR 79, Art. 5 (2005) (“Constitutionally, there are two ways in which the relationship between public and private broadcasters can be structured: either the [duty of providing a] basic information and opinion service remains with the former, or the latter are subject to stricter requirements.”). The author of this part of the KOMMENTAR is the Hon. Roman Herzog, who signed the Sixth Decision as a Justice of the Constitutional Court in 1991.

189. 83 BVerfGE at 299 (emphasis added).

190. *See, e.g.,* European Commission, Decision of 24 April 2007, *supra* note 18, ¶¶216-18. The Commission is the administrative arm for the European Community or Union; the nomenclature of Community and Union is not always consistent, and

H. Financing of Public Law Television

From the beginning, the Constitutional Court realized that public broadcasting would need a sound financial footing, insulated from both political manipulation and market pressures, in order to fulfill its constitutional mandate. To this end, the Court has favored financing through listener/viewer fees:

The financing of public-law broadcasting through fee-revenue should enable its thorough uncoupling from the economic marketplace, and thereby assure that the [public service] broadcasting program orients itself towards journalistic [and not economic] goals, particularly the goal of diversity, independent from viewer quotas and advertising contracts.¹⁹¹

“Financing primarily from advertising,” the Court has held, would not be suitable to the task of public broadcasting because it is precisely advertising that creates program- and diversity-limiting pressure, as one can observe in commercial television.¹⁹² The Court is careful to say that it does not fully exclude advertising revenue from the mix of financing (indeed, the two largest public networks do have advertising during a short window every evening), and notes that multiple sources of revenue can contribute to the independence of the public broadcaster from any specific source of revenue. Still, “the legislature is not required by the Constitution to allow advertising in public broadcasting,” and indeed there is a growing chorus calling for a complete ban on advertising in German public television.¹⁹³

With its second Bavarian Fee Decision, the Court turned its

depends also in part on whether the Treaty of Lisbon is finally adopted by the Europeans, all topics beyond the scope of this article.

191. 119 BVerfGE at 219.

192. 87 BVerfGE at 199.

193. *Id.* at 200. The Court ruled that the legislature can either limit advertising as to time, duration or frequency, or eliminate it altogether “in favor of program planning that is free from ratings or popularity concerns, and orients itself toward the recipient who is solely interested in programming selected from a journalistic [as opposed to a standpoint.” *Id.* Voices from across the political spectrum – including the leftist Linkspartei, the centrist FDP, and the social-democratic SPD – agree that advertising-free public broadcasting would “increase the credibility of the public law broadcaster and allow it to more clearly distinguish itself from commercial broadcasters.” Auch die FDP fordert Werbeverzicht von ARD und ZDF, 2008:4 *epd medien* [epd] at 8-9 (January 16, 2008) (EPD is the acronym for Evangelische Presse Dienst or Lutheran Press Service, which publishes a weekly newsletter on media).

attention from sources to permissible uses of the broadcast fee. The State of Bavaria's Independent Media Authority had authorized a surcharge on all cable television subscribers in order to subsidize small regional programs. The complainant (*Beschwerdeführer*) before the Constitutional Court alleged that his broadcasting fees were being misused to subsidize privately produced local and regional programming. The Court agreed that insufficient mechanisms were in place to insure that publicly funded programming was indeed public service broadcasting.¹⁹⁴

Once it clarified the source and purposes of public fee financing, the obvious next question was amount. The Court has admitted that "an exact determination of what is financially necessary to guarantee the function of public broadcasting causes [it] substantial difficulty."¹⁹⁵ The best the Court could do was to hold that total revenues must be enough to fund a constitutionally sufficient information and opinion service.¹⁹⁶

These threshold principles were subsequently incorporated as amendments to the Inter-State Treaty on Broadcasting.

Public service broadcasting shall be funded in such a way that it is able to meet its constitutional and statutory responsibilities; in particular the funding shall be sufficient to safeguard the existence and development of public service broadcasting.¹⁹⁷

Public service broadcasting shall finance itself through television and radio license fees, income from television and radio advertising and other income; the main source of income shall be the television and radio license fee.¹⁹⁸

194. 114 BVerfGE at 392 ff (Bavarian Media Law failed to insure "that programs of the subsidized producers . . . would express the existing diversity of opinion in an evenly weighted manner."). The Court's primary holding was that the mandatory fee worked an unconstitutional intrusion on the subscriber's freedom of contract under Article 2 of the Basic Law, one that was not justified under Article 5 broadcasting freedom in light of the absence of any requirement for balanced or diverse programming for those who obtained the subsidies, or internally pluralistic governance obligation, or safeguards against dominant opinion power in the small markets where the beneficiaries of this program operated. See further discussion of this case at note 66 *supra* and accompanying text.

195. 73 BVerfGE at 203.

196. The Constitutional Court here recapitulated its jurisprudence of *Grundversorgung* within the dual broadcasting system. 87 BVerfGE at 197-204; for *Grundversorgung*, see discussion in section III(G) above.

197. Inter-State Treaty, *supra* note 25, Article 12(1).

198. *Id.*, Article 13(1).

The thorniest questions regarding financing are who decides the amount of the fee, and how the procedure for such a decision is shaped. In its Seventh Decision, the Court held that the situation-specific decisions as to what a constitutionally adequate basic information service would entail, and what level of revenue would be necessary for such a service, lie in the first instance with the broadcasting entity itself, although this did not mean a blank check for the public broadcaster.¹⁹⁹ After the broadcaster determined its needs according to what it believed “necessary in terms of [programming] content and form, as well as time and scope” to provide a basic information and opinion service, the state legislature would act as a check and balance, determining what level of payment the viewing public could reasonably tolerate.²⁰⁰

The Eighth Decision found that this process still left too much discretion in the hands of the legislature. In the *Cable Penny* case, a new element was thus introduced into the process: a non-state panel of experts inserted between the broadcasting institutions and the state legislatures called the KEF, or Commission on the Determination of the Financial Need of Broadcasters.²⁰¹ The crux of the Eighth Decision was about how to make this panel into an effective, neutral, and politically insulated arbiter of the financial needs of the public broadcasting institutions.

While ultimately rejecting the challenge to the “cable penny” part of the broadcasting fee,²⁰² the Court nevertheless found that the

199. While upholding the public broadcaster’s primacy in defining its own needs, the court ultimately ruled against this public broadcaster, as it had failed to convince the court of its rationale for further revenue. 87 BVerfGE at 182-83, 204.

200. The court noted that broadcasting entities have the same “self-assertive and expansion interests” as all institutions do. *Id.* at 201-02. Still, the broadcaster’s programming autonomy, “directed against any utilization [cooptation] of broadcasting for non-journalistic goals,” must be protected. *Id.* at 201. Essentially, the court requires the legislator to balance the programming autonomy of the broadcasting entity against the financial interests of the fee-paying viewer.

201. Bodies bearing the designation of KEF (*Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten*) and vaguely dedicated to the task of arriving at an appropriate broadcast fee had been on the scene since at least 1975 but were apparently so insignificant in their ultimate effect that they were not even mentioned in the court’s Seventh Decision. *Compare* 90 BVerfGE at 63.

202. 90 BVerfGE at 105-06 (finding that the cable-related part of the fee was sufficiently related to the basic public purposes for which it was imposed, even if the “testing of new transmission techniques and program forms” could create an opening for private television). *See also supra* note 65 and accompanying text. The court’s second Bavarian Fee Decision, described above, rejected as unconstitutional

existing process did not pass constitutional muster because it was overly exposed to political pressure and insufficiently bound by objective criteria.²⁰³ The Court set some markers for future fee decisions: (1) "General media-political decisions must be separated from decisions as to the broadcasting fee"²⁰⁴; (2) a definition of what specifically is required for the fulfillment of public broadcasting's function under current law cannot be imposed from the outside, but is properly within the discretion of broadcasters²⁰⁵; and (3) the procedure must protect the economic interests of viewers.²⁰⁶

These criteria amounted to a "procedural protection of constitutional rights" ("*prozeduraler Grundrechtsschutz*") in broadcasting.²⁰⁷ Although the state legislators (i.e., the Conference of Minister-Presidents) had rested their fee decision on the findings of a form of KEF, the Court found this KEF was little more than an instrumentality of the legislators.²⁰⁸ The States were free to disregard the KEF's suggestions, and make a "purely political" decision as to what the fee should be.²⁰⁹ The entire process lacked the "high grade of objectivity . . . [and] sufficiently definite substantive criteria for the fee decision."²¹⁰ In particular, the law failed to provide any specifics for the "composition, tasks, and procedures" of the KEF, and failed to give the KEF's

a similar surcharge allegedly benefitting private broadcasters, although in the second Bavarian Fee Decision case the surcharge was paid directly to the private broadcasters. See *supra* note 66 and accompanying text.

203. 90 BVerfGE at 96 ("*[D]en Grundrechtsschutz in den Prozeß der Entscheidungsfindung vorzuverlagern.*" ["Constitutional protection must be built into the process of decisionmaking."]), 98 ("The fee decision process . . . was not subject to sufficiently specific substantive or procedural limitations."). Notwithstanding these frailties, the court allowed the fee to stand because it was time limited, and striking it might have had a more far-reaching, negative affect on *Grundversorgung*. *Id.* at 105.

204. *Id.* at 94.

205. *Id.* at 95.

206. *Id.* at 94-95.

207. *Id.* at 96-97.

208. *Id.* at 98 ("*bloßes Hilfsinstrument*").

209. *Id.* at 98, 100.

210. *Id.* Although factors such as "competitiveness" of public television (a strange term, given the court's critique of the marketplace), its new technological possibilities, its historic and current expenditures, as well as its current level of advertising revenue were all properly embedded in the law, the process still needed an objective arbiter. *Id.* at 99.

recommendations any weight in the final process.²¹¹ As a result of the Eighth Decision, the German States adopted amendments to the Inter-State Broadcasting Treaty that more clearly define the fee setting mechanism and the role of the KEF.²¹²

The issue of the tripartite relationship between public broadcaster, the KEF, and the State legislature, however, raised its head again in the September 2007 Decision.²¹³ Again, the Court was stalwart in its defense of a clear, objective and neutral process for setting a fee that would provide sufficient revenue for effective public-service broadcasting without over-taxing broadcast recipients.

In this politically charged case, both SPD and CDU joined forces to defend the state legislators' Conference of Minister-Presidents against allegations by the public broadcasters that the process had been overly politicized.²¹⁴ The Court sided with the broadcasters, and found that the Minister-Presidents had exceeded their authority by setting the fee at .28 € cents below the KEF's recommendation. Because the Minister-Presidents (and the State legislatures that ratified their agreement) had failed to go beyond platitudes and generalities in justifying this downward departure from the KEF recommendation, the Court rejected the legislature's justifications as irrelevant, improper, and/or false.²¹⁵ The Court agreed that

211. The court essentially held that the fee-setting procedure could only be constitutionalized if "the tasks, composition, and procedure of the body [were] legally regulated and the independence of its members legally secured." *Id.* at 100-03.

212. The process now occurs in three steps: First, the broadcasting institution itself determines its need and conveys that to the KEF. Inter-State Broadcasting Treaty, *supra* note 25 at art. 14(1). Then the KEF analyzes the need pursuant to clearly stated criteria and makes a recommendation to the legislature. *Id.* And finally, the legislature votes to accept or reject the recommendation, but solely on the basis of whether the proposed fee represents a reasonable burden for the viewer. *Id.*

213. 119 BVerfGE at 182 (The "procedure for setting a broadcasting fee was reformed and placed on a legal basis by the [Eighth Decision and] Judgment of the Federal Constitutional Court on February 22, 1994.").

214. *Id.* at 202-03.

215. The court underlined its point that politics, rather than a neutral assessment of need, drove the legislators' decision, by providing a detailed history of the negotiations (at least those on the public record) between the political parties and between the political parties and the broadcasters with regard to the amount of the fee. In these discussions, commercial broadcasters presented themselves as if on the brink of insolvency while demanding a more restricted role for their public-law colleagues, and politicians echoed these assertions. *Id.* at 186 ("[I]t does not seem to

legislators could consider a “generally stressed economic situation,” but only if its impact on ratepayers were in some way quantified (by, for example, consideration of factors such as average income and expenses of ratepayers, or necessity of across-the-board cuts in public services).²¹⁶ Other factors, such as potential savings through voluntary measures by the public broadcasters and a switch to digital technology, had either already been considered by KEF or were unfounded.²¹⁷

The Court’s deepest concern, however, was directed at the Minister-Presidents’ coded assertion that increased competition in the media sector — “current developments in the dual broadcasting system and in the competition among media” — justified a reduction in the fee. “This rationale does not describe how current developments . . . justify a departure from the KEF’s assessment of need, and whether media politics play a role in this assessment.”²¹⁸ Thus, the Court’s bottom line: If the legislature wants to reform or change the structure of competition between public service and commercial broadcasters, it has to do so by separate legislation that stands on its own, and not by using the broadcast fee as a means to play media politics.²¹⁹

Reaction to the September 2007 Decision ranged from wonder at the Court’s consistency over forty-five years of broadcast jurisprudence to skepticism at a perceived denial of reality.²²⁰ This

make sense to raise [public broadcasting] fees at a time when private broadcast producers find themselves in the worst economic crisis of the post-war era.”).

216. *Id.* at 231.

217. The court was especially acid in its dismissal of the legislators’ claim that changes in exemptions to the broadcast fee would bring more revenue to the stations, when in fact a KEF study had shown just the opposite. *Id.* at 235-36. See generally *id.* at 230-37.

218. *Id.* at 239.

219. *Id.* at 239-40 (“The members of State governments and parliaments are in no way constitutionally hindered from advocating media-political structure reforms and proceeding with their legal or other implementation; nor does broadcasting freedom hinder them from considering the subsequent financial consequences of such reforms. It is however incompatible with broadcasting freedom to consider such consequences of planned structural reform in the fee decision itself, without first passing into law the fundamental framework for such a reform.”).

220. Stephan Ory, *Gebührenurteil 2.0 – Ein Update aus Karlsruhe*, 5 ARCHIV FÜR PRESSERECHT (renamed ZEITSCHRIFT FÜR MEDIEN-UND KOMMUNIKATIONSRECHT) (AfP) 401, 404 (2007) (suggesting “a development and existence guarantee for new content, new formats, new genres, as well as new forms of transmission”; and that, “even on new transmission paths,” public-law entities may have a role in securing

again reflects the split between social-democratic and market-oriented views of broadcasting's role in society, a split that runs through media thinking on both sides of the Atlantic but finds a flashpoint in the German fee issue.

Historically, there has been a high degree of support among Germans for public broadcasting, and consequently for the broadcasting fee that makes it possible (which is not to say that the average German never grumbles about the amount of the fee).²²¹ In the early 1970s, 87% of Bavarian electorate voted, in reaction to a proposal to partially privatize Bavarian television, for a constitutional amendment which was originally intended to completely ban commercial broadcasting.²²² This broad support is

"free individual- and public-opinion building"). See also *infra* discussion at Parts III(K)(2), (3). But see Darnstädt & Hipp, *Dreißig Jahre zurück*, *supra* note 28, at 126 (observing that the decision is a step "thirty years back"); Fassbender, *Das jüngste Rundfunkgebührenurteil*, *supra* note 77 (observing that *Der Spiegel*, itself a media competitor, may not be entirely neutral in its observations).

221. Darnstädt & Hipp, *Dreißig Jahre zurück*, *supra* note 28, at 127. Forty percent of survey respondents felt that the current €17 fee was "reasonable" ("angemessen"), while fifty-eight percent felt it was "too high." *Id.* More tellingly, perhaps, sixty-three percent of respondents said that they found public television to be "essential" or "indispensable" ("unverzichtbar"). *Id.*

222. BAUSCH, *RUNDFUNKPOLITIK NACH 1945*, *supra* note 1, at 629-37. Bausch recounts how a broad-based citizens' coalition, including labor organizations, the Bavarian Catholic Bishops' Conference, and the Free Democrat and Social Democrat parties, spoke out against the proposal to allow private broadcasting. A proposed referendum would have completely banned private broadcasting, but CSU-head Franz Josef Strauß reformulated the proposal as it eventually went to the voters: "Broadcasting will be carried out as a public responsibility and by public-law carriers." *Id.* See *supra* note 115 and accompanying text (recounting that this formulation has resulted in a system much like that found in other parts of Germany, where a public-law Independent Media Agency is understood as the "carrier" of the broadcasting program and in turn licenses that authority to private broadcasters on a time-limited basis). See also HESSE, *supra* note 40, at 21-22 (regarding the Bavarian referendum); Sabine Rittner, *Staatsfunk oder Kabelkommerz*, 30 *TENDENZ* 30, 30-31 (2004) ("[P]ublic-law carriage' allows for more than public-law broadcasting." (quoting HESSE, *supra* note 40, at 21-22)). Rittner recounts how, in 1972,

the 'State Citizens' Committee for Broadcasting Freedom' collected over a million signatures for a referendum against the planned change in the broadcasting law [which would have given political parties and private interests more influence over Bavarian broadcasting]. Christian Ude [later mayor of Munich] described the Citizens' Committee's project as a fight "against the transformation of public-law broadcasting into state broadcasting, as well as a fight against the imminent privatization of public broadcasting."

Rittner, *supra*, at 30-31.

less remarkable in a European frame, given the near-universality of public service broadcasting, supported by broadcasting fees, throughout Europe.²²³

I. Commercial Broadcasters: Licensing, (Re)Transmission, Oversight, and Residual Duties of Balance and Diversity

Given the constitutional commitment to public broadcasting, indeed the "existence and development guarantee" accorded it by the Court, the question arose whether there remained any need to impose public interest obligations on commercial broadcasters. In the Fourth Decision, and consistently thereafter, the Court's answer has been that broadcasting freedom applies to public and private broadcasters alike, i.e., to the *system as a whole*, and the totality of available programming.²²⁴ How, then, would German lawmakers regulate private broadcasting to prevent it from overwhelming the public-law stations and their primary mandate to "serve" broadcasting freedom?

In the early 1980s, the individual German States enacted a series of laws to open broadcasting to private investment, while applying (or at least paying lip-service to) the standards of pluralism and balanced diversity in the private broadcasting marketplace. It was one of these laws, the Lower Saxony Broadcasting Law (*Landesrundfunkgesetz* or *LRG*), which the Constitutional Court addressed in its Fourth Decision. Although the Court characterized this law as a "transition model," i.e., as a licensing and oversight scheme for private broadcasters which would only be necessary until market conditions allowed for full "external pluralism,"²²⁵ it

223. See, e.g., BARENDT, *supra* note 8, at 69-74.

224. 73 BVerfGE at 157 ("[C]onstitutionally guaranteed broadcasting freedom applies to the entire broadcasting system . . . [which] must in its totality correspond to the constitutional requirements within the framework of the possible."). See also 57 BVerfGE at 324; 83 BVerfGE at 296 *passim*. This follows from the requirement under article 5 that a "positive order" be established to protect broadcasting as a forum for the "broadest and most complete" diversity of opinion. 57 BVerfGE at 320; 73 BVerfGE at 163. See also HOFFMANN-RIEM, *supra* note 17, at 49 *passim*.

225. 73 BVerfGE at 160 (finding that the law would provide for a "continuous and ordered development of broadcasting in private hands step-by-step from the production of a small number of television programs to the condition whereby an external [market] diversity is maintained over time"). The court here uses the term "external diversity" ("*externe Vielfalt*"). Elsewhere it has adopted the term "external pluralism" ("*Außenpluralismus*") to draw the contrast between market-driven diversity on the one hand and diversity institutionally anchored in the broadcasting councils and Independent Media Authorities (i.e., internal pluralism or

seized the opportunity to clarify how the constitutional guarantee of broadcasting freedom would play out in this new dual broadcasting world. In an eighty-seven-page, unanimous opinion, the Court delved in detail into a multitude of licensing and oversight provisions directed at commercial broadcasters.

The Court generally approved the LRG's regulatory scheme, which gave to an independent, non-profit, pluralistically constituted public-law oversight entity — later referred to as a *Landesmedienanstalt* or Independent Media Authority — the task of enforcing regulations designed to insure diversity within the private marketplace, and to avoid any accretion of what the Court called dominant opinion power (*vorherrschende Meinungsmacht*).²²⁶

Even though an adequately functioning public broadcasting system made it possible for private broadcasters to operate in a more relaxed regulatory environment,²²⁷ the Court upheld the Lower Saxony law requiring that private broadcasters observe "basic standards of balanced diversity," meaning that all opinions, especially minority opinions, should "have the possibility" of being expressed.²²⁸ At the same time, the Court was careful to preserve as much as possible the operational freedom of commercial broadcasters, declaring unconstitutional several clauses so overbroad as to chill the broadcasters' speech.²²⁹

Binnenpluralismus) on the other. See, e.g., 73 BVerfGE at 153; Thomas Vesting, *Fortbestand des Dualen Systems?*, 2000 K&R 161, 162 (A legislator has "choice of models, particularly the combination of public agency and market models, i.e., of internal vs. external pluralism (as well as mixed forms)."). See also *supra* notes 21 and 126 and accompanying text.

226. 73 BVerfGE at 165 ("The Lower Saxony Broadcasting Law . . . directs oversight functions to a legally autonomous organizational entity, independent of the state. The Independent Media Authority is a legally competent agency of public law. It exercises its authority within a legal framework . . ."). See also *supra* note 27 (regarding the role and translation of *Landesmedienanstalt* as Independent Media Authority). For more on dominant opinion-making power, see *infra* Part III(J)(1).

227. 73 BVerfGE at 159 (holding that the constitution does not place the same high demands on private broadcasters). The Sixth Decision similarly held that requirements of balance, breadth, and diversity could not place such "high burdens" on private broadcasters that it would endanger their economic existence. 83 BVerfGE at 317.

228. *Id.* at 168 (finding that the "*Grundstandard*" of balanced diversity is difficult to measure and thus represents only a goal towards which the oversight commissions should strive, and concluding that the LRG's "concretization" of that goal or standard was sufficiently specific to pass constitutional muster).

229. For example, the court found that LRG § 15, sentence 3 — requiring that

The Court has also addressed market entry and licensing provisions for commercial broadcasters, finding *inter alia* that some aspects of the Lower Saxony licensing scheme were insufficiently free of state control, i.e., that the law left too much discretion in a state licensing authority. The Court's Fourth Decision in effect told the legislature to move this discretion away from the state and into an independent agency (i.e., Independent Media Authorities).²³⁰ Later decisions endorsed this strategy: fact-finding and judgments related to market entry and licensing would be left to independent, non-governmental oversight bodies, while the state's discretion and influence was to be strictly limited in these matters.²³¹

"every program . . . must in itself satisfy the requirements of [balance and diversity], unless such balance is secured in connection with other programs" — was unconstitutionally vague. 73 BVerfGE at 163-64. The court noted, "The law does not state or define when that is the case [that balance is secured through other programs]. It is not clear how an individual private program producer [or broadcaster] is supposed to know with sufficient certainty that all or some of the programs available to a specific listener- or viewer-group provide sufficient balance for the producer's program." *Id.* This uncertainty was unconstitutional because it created a potentially chilling effect on speech. *Id.* The court pointed to an analogous law in Schleswig-Holstein that established a *presumption* of balance when there were at least four commercial "full-programs" operating alongside the public service broadcasters, as a possible solution. *Id.* at 164.

230. 73 BVerfGE at 182-87. See also *supra* notes 27 and 226 and accompanying text regarding Independent Media Authorities. The discussion in the Fourth Decision is quite complicated as it involves two similarly named agencies: the State Licensing Board (*Erlaubnisbehörde*) and the State's Broadcasting Authority (*Landesrundfunkausschuß*) (translated here as Independent Media Authority to avoid confusion). The State Licensing Board was a part of the State bureaucracy; the Broadcasting Authority (later Media Authority) was an independent body. See *supra* notes 25-27 and accompanying text. The primary problem in the LRG law as drafted was that it put too much discretion in the State agency and not enough in the independent agency. LRG, *supra* note 225 § 5, ¶ 4, for instance, was deemed unconstitutional because it required State Board to determine whether "facts justify the assumption that petitioner's broadcast activity will violate the law," the kind of evaluative judgment that should be made by the independent agency and not the State Board. 73 BVerfGE at 184. "The influence given to the State Licensing Board on the access of private producers does not exclude the possibility that disfavored or disagreeable producers will not only be disciplined for their transgressions after the fact, but will be prevented *ex ante* from speaking at all." *Id.*

231. 90 BVerfGE at 89-90 ("[T]he State parliament may not have any influence on the content or form of any [particular] broadcast producer's programming beyond shaping the legal requirements for broadcast diversity."). Thus, any decisions which touch on commercial program content (such as protection of minors) would be moved away from the state, i.e., to a non-profit, internally pluralistic public law body (much like the internally pluralistic governing boards of public broadcasters). The legislature's role would stop once it has set up the structures for public-service broadcasting; it would have no influence on the content or form of programming.

The Sixth Decision affirmed the Court's approach to commercial broadcasting, ruling on public interest obligations in the North Rhine Westphalia state broadcasting law that applied to private-law broadcasters.²³² Again the Court held that all broadcasters shared in the fundamental task of furthering ("serving") individual and public opinion building, independent of any legislative choice between public and private broadcasting models, and therefore the notion of "model consistency" (or "model distinctions," i.e., that commercial broadcasters should have no public interest obligations placed on them) urged by petitioners was not applicable. The legislature could mix and match as required to satisfy the requirements of Article 5.²³³

Up to this point, we have focused on the application of constitutional norms at the level of the broadcasting *entity* – insulated governance structures and financing for public broadcasters, and licensing obligations and fairness rules for commercial broadcasters. These *entities* were treated as "*factors*" in public opinion-building. The Court's focus, however, has also extended to the *medium*, i.e., the *infrastructure*, particularly in cases where the number of potential broadcasters outstripped the available frequency or capacity available (frequency shortage redux²³⁴). The Court has in effect extended Article 5 broadcasting freedom from the actor who speaks to the medium that carries the speech, echoing the Constitutional Court's oft-repeated formula that broadcasting is both a "factor" and a "medium" of public opinion-building.²³⁵

Id. at 89.

232. At issue, *inter alia*, were provisions of that law which required private broadcasters to "fulfill a public function," to provide "education" and "advice" as well as entertainment, to cover public events, and – similar to our Fairness Doctrine – to cover "controversial themes of general significance" and to give room in its programming for the expression of a "diversity of opinions as broad and complete as possible." 83 BVerfGE at 249 (citing §§ 11 and 12(3) of the North Rhine Westphalia law). See also *id.* at 278-79 (relating to the CDU/CSU and FDP challenge).

233. *Id.* at 316 ("The shaping freedom of the legislator does not exhaust itself in the choice of one model over another, with some concomitant mandate of consistency. To the contrary, the legislator can combine models as he sees fit, as long as he does not lose sight of the goals of Article 5, paragraph 1 of the Basic Law.").

234. Compare *supra* notes 158-64 and accompanying text (relating to the alleged disappearance of the frequency shortage, or broadcasting's "special situation").

235. See, e.g., 83 BVerfGE at 296 (citing 12 BVerfGE at 260).

The extension of Article 5 protections to infrastructure dates back to the First Decision in 1961, in which the Court declared that transmission facilities “serve” broadcast freedom, and established a primacy of state broadcasting law over federal telecommunications law.²³⁶ In the Fourth Decision, the Court empowered the Independent Media Authority to allow cable retransmission of foreign programming, noting that such carriage may even have been required by the guarantee, derived from Article 5 information freedom, of access to “generally accessible” programming otherwise receivable by antennae.²³⁷ In the Sixth Decision, the Court decided that Article 5 broadcasting freedom required the allocation of transmission capacity (primarily broadcast frequencies) between public and private broadcasters be defined by clearly detailed law and procedure, leaving little discretion in the hands of government officials.²³⁸

Given the constitutional primacy of broadcasting content, the network owner becomes a sort of common carrier in a retransmission system the Germans sometimes characterize as “must-carry.”²³⁹ The Independent Media Authority, rather than the cable operator, would choose among program providers vying for scarce transmission capacity based on a number of factors, including how pluralistically constituted the program provider was, and how much influence editorial staff had on program decisions (i.e.,

236. 12 BVerfGE at 227 *passim*. See also *supra* discussion at notes 31-37 and accompanying text; *infra* discussion at Parts III(K)(3)(c), (d).

237. 73 BVerfGE at 197-98. Thus, retransmission may be required by both the broadcasting and information freedom clauses. See BECK'SCHER KOMMENTAR ZUM RUNDFUNKRECHT 914, ¶ 18 *passim* (Werner Hahn & Thomas Vesting eds., 2008) [hereinafter BECK'SCHER KOMMENTAR] (Karola Wille et al., commenting on § 52) (“The retransmission of broadcasting programs, pursuant to dominant opinion, is informed by the fundamental right of information freedom in Article 5, paragraph 1, sentence 1 of the Basic Law. Generally accessible sources of information . . . include all domestic and foreign broadcasting programs, the reception of which is possible in the Federal Republic of Germany.”). In general, the court found the retransmission requirements at issue to be constitutional, although it notes that the legislature should be supplemented to require relevant, complete, and truthful information to be transmitted, as is required for domestic programming, and to provide a right of rebuttal. 73 BVerfGE at 199, 200. Finally, the court noted that the Lower Saxony legislature should address the possibility, as other States had, that German broadcasters might attempt to avoid the domestic requirements for balance and diversity by presenting themselves as foreign broadcasters. *Id.* at 203.

238. 83 BVerfGE at 322-24.

239. See *infra* notes 350-52 and accompanying text for diverse uses of this term in the United States and Germany.

whether programming decisions were made on marketing or journalistic bases).²⁴⁰ The placement of such discretion in an independent non-state agency was constitutionally permissible, indeed required, when competing claims of commercial broadcasters to the same transmission facilities could not be mediated.²⁴¹ Even conservative critics acknowledge this constitutionalizing of transmission capacity:

The legislator is not free in the shaping of the broadcast order. This order can “only serve the securing of broadcasting freedom.” It especially may not be directed solely from an economic point of view [T]he decision over access to transmission paths . . . must serve solely the shaping of the broadcast order within its constitutional parameters.²⁴²

Until recently, the powers of the Independent Media Authorities to determine cable carriage have been well nigh plenary, extending in some cases to the totality of cable channels available. As one lower court said, approving such a plan,

The legislature’s decision, that the Independent Media Authority is better suited than the cable operator to select the programs to be carried on the cable system in order to affect the [constitutionally] required program diversity, is not problematic.²⁴³

240. 83 BVerfGE at 247, 318 *passim*. See also *id.* at 319 (noting that such statutes were aimed at creating “internal broadcasting freedom” [“innere Rundfunkfreiheit”]).

241. *Id.* at 319-21 (concluding that such a “positive order” was preferable to allowing transmission capacity to be assigned according to the “free play of [market] forces” [“freie(s) Spiel der Kräfte”] (citing 57 BVerfGE at 327)).

242. CRISTOPH ENGEL, KABELFERNSEHEN 24-25 (1990) (quoting 74 BVerfGE at 334). Engel believes, however, that the must-carry and retransmission rules violate this objective constitutional order because transmission decisions are in fact often made not on pristine constitutional grounds but rather on a calculation of what programs bring more economic benefit to the individual State (*Standortpolitik* — see *supra* note 76 and accompanying text) and that the objective order gives short shrift to the subjective constitutional rights of program producers, network operators, and individual recipients. ENGEL, *supra*, at 21-27.

243. Obergerwaltungsgericht Bremen [OVG] [Court of Appeals] Sept. 14, 1999, 2000 K&R 43, 45 (rejecting challenges to the Bremen Independent Media Authority’s retransmission plan covering the totality of the operator’s channel capacity). The lower court noted that the “capacity of cable systems are regularly insufficient” to carry all available cable programming. *Id.* In this case, there were forty-one broadcast programmers who had applied to have their programs carried, and only thirty-three channels available. The Media Authority devised a plan whereby ten of the programs would share time on several of the channels, vindicating the “subjective broadcast freedom of these producers” who would otherwise not be carried. *Id.* at 44. The cable operator apparently asserted no

The German Court's constitutionalization of transmission facilities occurred, for the most part, prior to the 1994 *Post Reform II* (which legislatively and constitutionally authorized the privatization of telecommunications facilities).²⁴⁴ *Post Reform II* fundamentally changed facts on the ground. The Court's September 2007 Decision acknowledged the problematic context which resulted: Private telecommunications companies replaced public entities in many instances as carriers of Germany's broadcasting platform.²⁴⁵ The September 2007 Decision did little to resolve the tensions between private market economics and constitutionally protected

subjective speech or broadcasting rights of its own, as is common in the United States, but instead argued that the Authority's decision amounted to an interference with subscribers' access to information under the information freedom clause of article 5. The court roundly rejected this argument:

The argument of complainant that [information freedom] prohibits any exercise of sovereign [*hoheitlich*] program choice, while at the same time the decision of a commercial enterprise would be unproblematic, because not made by the state, does not do justice to the protections of information freedom.

Id. at 45. The court also rejected challenges based on the property rights and occupational freedom of the cable operator by invoking article 87 of the TKG, which authorized the privatization of telecommunication facilities. *Id.* This did not, the court found, amount to a "fundamental decision" for the allocation of cable capacity according to market principles and on the free movement of services provision of the EC Treaty. *Id.*

Not all lower courts have ruled this way; the allocation of cable transmission capacity has been contentious. See ENGEL, *supra* note 242, at 48; HESSE, *supra* note 40, at 280 (citing a number of cases where Independent Media Authorities have been accused of abuse of discretion in their application of retransmission rules).

244. Thus, what had been an explicit grant of federal-government authority in Basic Law articles 73 and 87 to operate the postal and telecommunications systems became as part of the reform package, with a new article 87f, a command to privatize those systems. Article 87f reads in pertinent part:

Postal and telecommunications services within the meaning of paragraph (1) of this Article shall be provided as a matter of private enterprise by the firms succeeding to the special trust Deutsche Bundespost and by other private providers. Sovereign functions in the area of posts and telecommunications shall be discharged by federal administrative authorities.

Basic Law, *supra* note 2, at art. 87f. In its first paragraph, article 87f requires that the federal government retain regulatory oversight to insure universally available ("*flächendeckend*"), appropriate, and adequate postal and telecommunications services. *Id.*

245. 119 BVerfGE at 216-17 (discussing "telecommunications companies . . . as operators of platforms for broadcast programming"). See also *supra* note 154 and accompanying text for a translation and discussion of this passage.

communications that followed in the wake of *Post Reform II*. In this new environment, retransmission and must-carry rules have become more controversial, engendering the jurisdictional clashes described in sections III(K)(3)(c) and (d) below.

The Court's constitutional framework for commercial and public broadcasting was incorporated in the 1991 Inter-State Treaty on Broadcasting (*Rundfunkstaatsvertrag*, including its nine amendments through 2007).²⁴⁶ Under that law, commercial broadcasters are required to obtain a license from a "competent independent media authority" ("IMA"), the non-profit public-law organizations or *Landesmedienanstalten* in each of the German States (Articles 20-24, 35). Transmission capacity is also reported to the IMAs, which "decide on the use of the transmission capacities for broadcasting purposes," be they traditional broadcast (Article 50), satellite (Article 51) or cable facilities (Article 52).²⁴⁷ The IMA then examines the broadcaster's license application for compliance with the provisions for ensuring plurality of opinion under this Inter-State Treaty, and refers every application to the Commission on Concentration in the Media (KEK, described below) for a market power analysis (Articles 35-38). The IMAs also enforce fairness obligations (Article 25), ownership restrictions (Article 26), third party access (Articles 31, 42), and advertising restrictions (Articles 44-46).

J. Combating Market Failure in Private Broadcasting: Ownership Limits, Antitrust Enforcement, Window Programs, and Open Access

1. Dominant Opinion Power and the Inter-State Treaty

In the foregoing section, a term was introduced that conveys the overlapping concerns about free speech and free markets that

246. See Inter-State Treaty, *supra* note 25, §§ 20-25, 35-38, 50-52. The Ninth Amendment to the Treaty, effective March 1, 2007, renamed it the Inter-State Treaty for Broadcasting and Telemedia, whereby "Telemedia" refers to all electronic transmission services that are not strictly telecommunications under the TKG – for instance, teletext and teleshopping services. *Id.* at art. 2(a). The provisions on licensing are largely the same as in the preceding Treaty. See also *supra* note 27 (regarding Independent Media Authorities).

247. As discussed below, recent amendments to the Treaty have diminished the IMA's plenary power over channel allocation and have given the operator of digital cable services the opportunity to program more channels. See *infra* notes 353-54 and accompanying text (discussing Inter-State Treaty arts. 52(3), (4)).

meet in the Court's broadcasting jurisprudence — "dominant opinion power" or *vorherrschende Meinungsmacht*. The Court's Fourth Decision, after setting out the legislature's duty to create a framework for balanced diversity, also charged legislators with monitoring the broadcasting marketplace to prevent a coming together of economic and journalistic power that could produce this dominant opinion power.²⁴⁸ The Court suggested a two-pronged approach to this problem: first, the legislature must provide the framework necessary to create "the possibility for all opinions, including those of minorities, to find expression in commercial broadcasting"; and second, the legislator must be vigilant to prevent "one-sided, or in large measure unbalanced, influence of individual producers or programs on the development of public opinion, in other words the deterrence of dominant opinion power."²⁴⁹

The Court found that any private party that achieved such dominant opinion power could effectively distort the public debate, push disfavored facts and opinions to the periphery of public discourse, and otherwise truncate the scope of public deliberation and opinion building:

The basic standard of balanced diversity... continues to encompass these essential requirements: the possibility that all opinions and tendencies — including those of minorities — find expression in private broadcasting; and the exclusion of the acutely unbalanced influence that individual broadcasters or programs could have on the development of public opinion; in other words, the prevention of the development of dominant opinion power. If these requirements are not met, then there is in any case a violation of [Basic Law] Article 5(1)(2) In particular, it devolves upon the legislator to counter such [market] concentration tendencies in as timely and effective a manner as

248. 73 BVerfGE at 172, 175 (The "constitutional guarantee of free opinion building also requires that legal precautions be taken against dominant opinion power that might arise from a combination of influence in broadcasting and the press."), 180 (citing *Spiegel Search Warrant*, 20 BVerfGE at 175 *passim*, for the proposition that "the development of opinion monopolies" poses dangers to a free press).

249. 73 BVerfGE at 160. This develops the concept of "opinion power" or *Meinungsmacht* first used by the court in the Third "FRAG" Decision. See 57 BVerfGE at 323-24 ("[P]articularly in a medium with the importance of broadcasting, the possibilities of a concentration of opinion power [*Meinungsmacht*] and the danger of the misuse [of such power] for purposes of one-sided influencing of public opinion, must be accounted for."). As to the first prong, see *supra* Parts III(E)-(G).

possible, because faulty developments are particularly difficult to reverse in this area.²⁵⁰

The Court was especially concerned about the “danger of a double monopoly,” where commercial entities acquired significant market power in both press and broadcasting.²⁵¹ The Court’s Sixth Decision applied these principles to the prevention of dominant opinion-making power in the local and regional media, where it often occurred because of the “monopoly position of local newspaper publishers.”²⁵²

Once again, it was left to the legislatures of the individual German States to implement the Court’s pronouncements. The States developed a number of creative structural mechanisms to prevent the growth of dominant opinion-making power, and to preserve a free (i.e., uncaptured) broadcasting system. The main innovations have been incorporated in a section of the Inter-State Broadcasting Treaty devoted to “Ensuring Plurality of Opinion”²⁵³:

- Adoption of ownership limits based on audience share: no individual or company may control greater than a 30% share of the broadcast audience, or 25% where the individual or company has significant

250. 73 BVerfGE at 160. See also LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 162 (reprint ed. 2002) (2001) (“[N]ever in history of telecommunications has a network voluntarily been opened after being closed.”)

251. 73 BVerfGE at 177 (“*Gefahr eines Doppelmonopols*”). See also Kübler, *Die Konzentration im Medienbereich und ihre Kontrolle*, in MARKTMACHT UND KONZENTRATIONSKONTROLLE AUF DEM FERNSEHMARKT 20 (Klaus Stern & Hanns Prütting eds., 1999) (“[B]ecause these media are generally seen as operating in different markets pursuant to the well-grounded practice of the Federal Cartel Agency, special rules will be needed, which will address conglomerated concentration.”).

252. The court held that,

At a fundamental level, the constitutional principles that apply to local broadcasting are the same that apply nationally: the broadcasting system must be designed to serve the constitutional goal of free individual and public opinion building. In the local area this goal requires the same balanced diversity of opinion within the total offering in the broadcast area. This is the legislator’s concern The legislator must take into account the peculiarities of the local area, among which is often found the monopoly position of the local newspaper publisher, which in turn demands measures to prevent the development of a dominant multi-media opinion power.

83 BVerfGE at 324.

253. Inter-State Treaty, *supra* note 25, at §§25-34.

market power in related media;²⁵⁴

- Creation of the Commission on Concentration in the Media (*Kommission zur Ermittlung der Konzentration im Medienbereich*), or KEK (not to be confused with the KEF which has jurisdiction over financing), a board of economists and legal scholars to enforce these limits²⁵⁵;
- Provision to the KEK (through the associated State independent media authorities) of wide-ranging investigative tools, including subpoena and search powers, mechanisms for ongoing determination of audience share, and reporting requirements on change in shareholder relationships (including mergers and acquisitions)²⁵⁶;
- Creation of regional "window" programs within the two nationwide networks with the largest audience share²⁵⁷;

254. *Id.* at § 26(2). This section provides:

If the programs attributable to one company achieve an average annual audience share of 30 per cent it shall be assumed that it has a controlling influence. The same shall apply to a company with a 25 per cent broadcast audience share where the company holds a dominant position in a related media market, or where an overall assessment of its activities in television and in related media markets concludes that the influence obtained as a result of those activities is equivalent to that of a company with a viewer rating of 30 per cent. In calculating the relevant audience share pursuant to sentence 2, two per cent credit will be given to those high audience-share broadcasters who provide "window programs" pursuant to §25(4) [of this Treaty], and a further 3 per cent credit to those who provide broadcast time for unaffiliated third-parties pursuant to §26(5).

Id. at § 26(2). The Treaty also sets out fairly detailed criteria about when and how audience shares will be counted and when affiliate-audience shares will be attributed to a principal. *Id.* at §§ 27, 28. These provisions played a major role in the media authorities' decision in the *Singer/ProSiebenSat.1* case described in *infra* Part J(2).

255. Inter-State Treaty, *supra* note 25, §§ 26(4), 35(2)(1)(1).

256. *Id.* § 22(1) (relating to the power to examine witnesses and inspect documents). See also *id.* §§ 22(2)-(8) (setting forth related powers), 23 (relating to annual reporting requirements), 27 (relating to determination of audience share), 29 (relating to reporting of ownership changes).

257. *Id.* § 25(4) ("In the two largest [commercial] television full-programs there shall be . . . window programs reflecting . . . the political, economic, social and cultural life of the individual State The window program producer shall not be an affiliate of main program producer.").

- Provision of broadcast time for unaffiliated third parties within private broadcasting programs²⁵⁸;
- Creation of advisory program councils to promote diverse programming, which despite the moniker “advisory” were in fact given powers approaching those of internally-pluralistic public broadcasting councils²⁵⁹; and
- Specific provisions relating to broadcast time for unaffiliated third parties in the case of national elections.²⁶⁰

Early versions of this statutory scheme were derided as little more than “symbolic regulation,”²⁶¹ entirely ineffective to block the increasing concentration of ownership in the media.²⁶² Even the more fleshed out measures described here were criticized by some as a “toothless tiger” and the “capitulation on the part of the policy makers to Germany’s most powerful media concerns Kirch and Bertelsmann.”²⁶³ Part of the criticism was the assertion that the 25/30% audience share limits were ineffective to prevent *de facto* collaboration among the largest broadcasters.²⁶⁴

258. *Id.* §§ 30(1), 31.

259. *Id.* §§ 30(2), 32.

260. *Id.* § 42(2). Some may not consider this to be within the measures adopted specifically in response to the Constitutional Court’s concerns about dominant opinion-making power, but the argument is easily made that the opinion-making powers of the mass media are never more powerful than at election time.

261. Humphreys, *supra* note 21, at 535-36 (citing MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 22-43 (1964)). Humphreys notes that Murray Edelman was an American political scientist who “argued that business regulation was often largely symbolic in function: serving to produce political quiescence,” citing the failure of Federal Trade Commission and U.S. antitrust law “rhetoric” to match the reality of “monopoly, interlocking directorates, and so on.” *Id.*

262. Professor Humphreys describes how the German States first addressed the media concentration issue after the Constitutional Court’s Fourth Decision in 1986. Humphreys, *supra* note 21, at 534-35. These rules, found in the first Inter-State Treaty on Broadcasting in 1987, focused on limiting ownership. *Id.* With the Third Amendment to the State Treaty on Broadcasting in 1996, the law changed to focus on “audience share” more than ownership relations, although ownership was still part of the equation. If a company’s affiliate owned more than twenty-five percent of the stock in a separate media concern, that concern’s audience share would be counted in calculating the company’s overall audience share. *Id.*

263. *Id.* at 545.

264. *Id.* (“[T]he ‘insignificance threshold’ had been raised from 10% to 25% in the final stage of the political negotiations, [which] meant that the mighty Springer press concern’s direct stakes in the major ‘generalist’ channel SAT1 (20%) and the

2. Rejection of the ProSiebenSat. 1/Springer Merger

This criticism was dampened by the parallel and almost simultaneous 2006 decisions of the KEK and the Federal Cartel Office (*Bundeskartellamt*), disallowing the proposed acquisition of Germany's second-largest private broadcaster, ProSiebenSat.1 Media AG, by its largest newspaper publisher, Springer – despite significant political pressure to approve the transaction.²⁶⁵ The Federal Cartel Office based its rejection of the proposed merger entirely on economic grounds, finding that the merger would illegally consolidate the market for broadcast advertising.²⁶⁶ The KEK, by contrast, rested its decision in large part on the rulings of the Constitutional Court regarding “opinion power,” determining that the merger would likely give Springer predominant opinion-making power in Germany, notwithstanding the fact that the post-merger broadcast market share of the proposed entity was estimated at only 22%, below the 25/30% statutory thresholds discussed above.²⁶⁷

Instead, the KEK analyzed the “diagonal or conglomerated” concentration that would result from newspaper/broadcasting

country's principal sports TV channel DSF (24.9%) counted for nothing.”).

265. F.J. Säcker, *Zur Ablehnung des Zusammenschlussvorhabens Axel Springer AG/ProSiebenSat.1 Media AG durch KEK und Bundeskartellamt*, 2006 K&R 49, 50.

266. Bundeskartellamt [Cartel Office] Jan 19, 2006, No. B6-92202-Fa-103/05, slip op. § VI, at 22 *passim* (F.R.G.), available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion06/B6-103-05.pdf?navid=66> (observing that a merger would lead to market dominance in broadcast, newspaper, and magazine advertising).

267. *Beteiligungsveränderungen bei Tochtergesellschaften der ProSiebenSat.1 Media AG* [KEK] Mar. 30, 2007, No. KEK 293-1 bis-5 (F.R.G.), available at <http://www.kek-online.de/cgi-bin/resi/v-ent/index.html> (search 293), or <http://www.kek-online.de/kek/verfahren/kek293prosieben-sat1.pdf> [hereinafter *ProSiebenSat.1*]. Despite the existence of appellate and other remedies, Springer and ProSiebenSat.1 decided to abandon the merger (valued at \$3 billion to \$5 billion) rather than to engage in a protracted legal and political battle. See Andrew Bulkeley, *Saban Group to Keep ProSieben*, DAILY DEAL/THE DEAL, Feb. 14, 2006, available at 2006 WLNR 2322812 (“Axel Springer early this month threw in the towel . . . the KEK Commission on Concentration in the Media in December ruled against the deal on the grounds it would create a dominant opinion broker.”). But see Wolfgang Hess & Christine Jury-Fischer, *Medienkartellrecht*, 2006 AfP 541, 544 n.35 (describing that Springer had indeed let the merger plans drop but continued with a legal challenge in view of potential future merger plans; Springer's appeal was rejected by the State Appellate Court (*Oberlandesgericht*) in Düsseldorf on September 29, 2006).

cross-ownership,²⁶⁸ and concluded that there was sufficient other evidence that a dominant multi-media opinion power would emerge in violation of the general prohibition of Section 26(1) of the Inter-State Broadcasting Treaty.²⁶⁹

In arriving at this conclusion, the KEK reconnected Section 26 with its constitutional roots in the Constitutional Court's proclamation of the inviolability of the public opinion-making process.²⁷⁰ The KEK referenced Constitutional Court Decisions in which dominant opinion power was found: when a "multitude of broadcasters melts down to one or a few large producers"²⁷¹; or

268. Such an analysis had long been in discussion. See Kübler, *supra* note 251, at 7, 15-16 (anticipating the controversy). Professor Kübler is a member of the KEK.

269. *ProSiebenSat.1*, *supra* note 267, at § VI, slip op. at 108. Section 26(1) of the Inter-State Treaty provides, "A company (natural or juridical person or association) may itself or through companies attributable to it broadcast nationwide in the Federal Republic of Germany an unlimited number of television programs, unless it is thereby able to exercise a controlling influence in the manner consistent with the following [presumptions]." In particular, the KEK looked at Springer's twenty-six-percent audience share in the "related media market" of daily newspapers, as well as its significant share in the news magazine and on-line service markets. The KEK found — after discounting for the fact that these related media services had less suggestive power, pervasiveness, or actuality than broadcasting — that Springer's share of these non-broadcasting media markets was equivalent to a twenty-seven-percent share of the broadcasting audience, which when added to *ProSiebenSat.1*'s twenty-two-percent share, would yield a total post-merger audience share of forty-nine percent.

270. The *ProSiebenSat.1* decision stated,

With the factual standard of "dominant opinion power," Section 26, par. 1 of the Inter-State Treaty refers back to a constitutional concept that stems from the constitutional command of opinion diversity in the media. This in turn rests on the special importance of broadcasting as medium and factor in the process of individual and public opinion-building, which is ineluctable [*unverzichtbar*] for the development of the individual personality and the securing of a free democracy [I]n the total offering of commercial programs at least a substantial part of all social groups and ideologies must have the actual chance to speak, so that a marketplace of ideas is created [This mandate also includes] the prevention of one-sided, or in large measure unbalanced, influence of individual producers or programs on the development of public opinion, in other words the deterrence of dominant opinion power.

ProSiebenSat.1, *supra* note 267, section III(2), slip op. at 69 (citing 57 BVerfGE at 319 *passim*; 73 BVerfGE at 152 *passim*; 95 BVerfGE at 172). See also Kübler, *supra* note 251, at 20 ("Control of media concentration . . . protects the political process from a narrowing [and] strengthens the socio-cultural foundations of the democratic order.").

271. *ProSiebenSat.1*, *supra* note 267, section III(3.4), slip op. at 75 ("The same affects can result, when one enterprise dominates one or more broadcasters through

results "from a combination of influences in broadcasting and the press"²⁷²; or when "vertical connections . . . between television producers and network operators, license holders, or owners of program magazines" truncate public discourse in broadcasting.²⁷³

Critics charged that both the KEK and the Cartel Office had misjudged the actual extent of competition in the market,²⁷⁴ that the rejection was bad for business and bad for Germany,²⁷⁵ and that it opened up the possibility of foreign ownership of the broadcasting outlets at issue.²⁷⁶ Supporters voiced satisfaction at the preservation of a "non-monopolized local media" and the prevention of "an emerging Berlusconi-like empire."²⁷⁷

Thus, although the Constitutional Court had warned that broadcasting could not be seen or regulated solely as an economic activity,²⁷⁸ the Court's concern about the ability of private parties to

legal or economic means, or otherwise exercises significant influence on the shaping of their programs," citing 73 BVerfGE at 172).

272. *ProSiebenSat.1*, *supra* note 267, section III(3.4), slip op. at 75 ("[O]pinion power in the area of broadcasting combine[d] with opinion power in the area of the press" poses a danger. (citing 73 BVerfGE at 175, 176)).

273. *ProSiebenSat.1* *supra* note 267, section III(3.4), slip op. at 76 (citing *German Sportstelevision* case, 95 BVerfGE at 173).

274. See Andrew Bulkeley, *Debating German Powerhouses*, DAILY DEAL/THE DEAL, Feb. 10, 2006, available at 2006 WLNR 2322812. See also generally Säcker, *supra* note 265.

275. Bulkeley, *supra* note 274, at para. 6 (quoting CSU-head Edmund Stoiber's statement that the merger "would have certainly been in the interest of Germany as a location for business"). See also Ed Meza, *Can Axel Grease Save \$3 Billion German Deal?* VARIETY, Jan. 23, 2006, at 19, available at 2006 WLNR 1306852.

276. Meza, *supra* note 275 (quoting Roland Koch, premier of the State of Hesse, alluding to the argument that the merger of German firms would fend off foreign control, "In the hands of foreign owners, our particular media culture would be threatened rather than promoted."). Invocation of a threat of foreign media domination, however, was at best ironic in view of the fact that substantial parts of German commercial television were already foreign owned, and offered resold U.S. products. *Id.* *ProSiebenSat.1*'s majority owner at the time of these statements, for example, was an Egyptian-born resident of Los Angeles, and the *ProSieben* channel specialized in re-transmitting American entertainment shows like "Desperate Housewives." *Id.* Cf. *ProSieben Spielfilm & Serie*, http://www.prosieben.de/spielfilm_serie/.

277. Bulkeley, *supra* note 274, at para. 15 (quoting Humboldt University Berlin Economics Professor Michael Burda). See also Deborah Cole, *Critics Fear Conservative Stranglehold on German Media With Springer Deal*, AGENCE FRANCE PRESSE, Aug. 8, 2005, at 1 (quoting early fears by SPD chairwoman for the parliamentary committee for culture and media, Monika Griefahn, who wanted to "avoid a situation like the one in Italy").

278. See generally discussion *supra* at Part III(F).

skew the public debate has in fact led to more robust antitrust enforcement in the media sector, and to something akin to an alloy of antitrust and broadcasting law.²⁷⁹

K. *Extension of Broadcasting and Information Freedom to the Internet?*

As television content and audiences began to migrate to the Internet, it seemed inevitable that the Article 5 issues relating to broadcasting and information freedom would migrate with them.²⁸⁰ This chapter examines the issues raised by this phenomenon.

1. *Broadcasting Freedom Extended to Services Ancillary or Similar to Broadcasting*

Over the last twenty years, the Court has held firm to a functional view of broadcasting freedom, uncoupled from any specific technology. In its Fifth Decision, the Constitutional Court struck down limits on public law broadcasters' involvement with "on-demand" (*auf Abruf*) information services.²⁸¹ The Court held

279. The heightened scrutiny applied in speech markets might be reflected in the relatively low (25-30%) threshold for presumption of market power in the broadcasting sector, as opposed to the 33-35% market share under general German antitrust law. Cf. WOLFGANG SCHULZ & THORSTEN HELD, *DIE ZUKUNFT DER KONTROLLE DER MEINUNGSMACHT* 17-18, available at <http://www.hans-bredow-institut.de/forschung/recht/Medienkonzentrationskontrolle.htm>.

280. See generally Wolfgang Hoffmann-Riem, *Gesetzliche Gewährleistung der Freiheit der Kommunikation im Internet* [Legal Guarantee of Freedom of Communication in Internet], in *INNOVATIONSOFFENE REGULIERUNG DES INTERNET* 53 (Karl-Heinz Ladeur ed., 2003). See also Wolfgang Hoffmann-Riem, *Rundfunk als Public Service, Anmerkungen zur Vergangenheit, Gegenwart und Zukunft öffentlich-rechtlichen Rundfunks* [Broadcasting as Public Service: Notes on the Past, Present, and Future of Public-Law Broadcasting], 54 *MEDIEN & KOMMUNIKATIONSWISSENSCHAFT (M&K)* 95, 103 (2006). In this speech made on the fifty-year anniversary of North German Broadcasting, Wolfgang Hoffmann-Riem said,

For certain functions – for example, for information on social and political events, particularly necessary for a democracy – the traditional media are losing meaning for important population groups. This, however, does not correspond to the spirit of the development guarantee formulated by the Constitutional Court, and the efforts legislatively to limit public-law broadcasting to only peripheral uses and annex services can therefore be seen as a media-political mistake with foreseeable consequences.

Id.

281. 74 BVerfGE at 306, 350, 353 (finding § 45(2) of the State Media Law unconstitutional because it allowed public-law broadcasters to provide on-demand sound- and moving-picture services only "when specially permitted by law or inter-state treaty").

that broadcasting freedom could be extended to "communications services similar to broadcasting":

The term "broadcasting" as used in Article 5, Paragraph 1, Sentence 2 of the Basic Law cannot be fixed in one definition, valid for all time. The content and scope of constitutional terms and determinations depends on their area of application (*Normbereich*); their meaning can change as conditions change If broadcasting is to retain its normative effect in a changing future, then it cannot be linked to outdated technologies To protect free individual and public opinion-building, the above-described [objective] protections of Article 5 must also apply to "communication services similar to broadcasting."²⁸²

In 1991, the Court's Sixth Decision developed this theme, holding that the constitutional guarantee of a basic information service (*Grundversorgung*) and the concept of broadcasting freedom were sufficiently dynamic that they could apply to new forms of broadcasting transmission.²⁸³ *Grundversorgung* is a concept that is "substantively and temporally open and dynamic," tied only to the *function* of broadcasting in society.²⁸⁴ On this basis, the Court rejected petitioners' challenge to a clause of the West German Broadcasting Company ("WDR") law that allowed WDR to develop new services and technologies, holding that "the constitutional definition of broadcasting cannot be conclusively defined. Its content can change as facts change in the social arena protected by Article 5, par. 1, sent. 2,"²⁸⁵ as "new communication services similar to broadcasting . . . overtake the functions of traditional broadcasting."²⁸⁶

The second Bavarian Fee Decision again ruled that the function of broadcasting freedom trumped the technological specifics,

282. *Id.* at 350-51 (citing 74 BVerfGE at 323; 73 BVerfGE at 154). *See also* 83 BVerfGE at 299, 302 ("If broadcasting freedom is to keep its meaning in the face of rapid technological change, then the definition of broadcasting cannot be tied to a specific existing technology. Otherwise the constitutional protection would not extend to areas functionally similar to broadcasting, but accomplished with new means.").

283. 83 BVerfGE at 302 *passim* ("[A]uf neue Uebertragungstechnik angewendet.").

284. *Id.* at 299. For more on *Grundversorgung*, see section III(G) above.

285. *Id.* at 302 (stopping short of explicitly placing the new communication services within the constitutional protection of *Grundversorgung*, or basic service, as "the importance of such new services for opinion building is at this time [1991] relatively small").

286. *Id.* at 302-03.

rejecting the argument that digital television and increased transmission capacities (fiber to the home, satellite television, etc.) would so increase transmission capacity that an explosion of new program offerings, even at the local and regional level, would occur, and thus the market – and not broadcasting-specific legislation – would satisfy Article 5 diversity requirements.²⁸⁷

The latest turn in the development of “broadcasting” as a functional rather than a technical term came in the Court’s September 2007 Decision, which announced in its opening headnote that changes in communication technology do not change the basic requirements of Article 5,²⁸⁸ and hinted throughout that those requirements could well apply to the new technologies. The Court acknowledged that telecommunications providers are playing an increasing role as the “operators of platforms for broadcast programming.”²⁸⁹ It approved *en passant* the imposition of a broadcast fee under certain conditions on “new types of broadcast reception devices, including computers that can play broadcasting programs exclusively from offerings on the Internet.”²⁹⁰ It returned to the *function* of public broadcasting, which remains dynamic and not limited to the “current state of programmatic, financial, and technical development.”²⁹¹ On this logic, the way seems open for the extension of Article 5 broadcasting freedom to new platforms, such as cell phones and Internet-based media, if these can be shown to have taken on the functions of traditional broadcasting in the

287. 114 BVerfGE at 388 (Increased capacity will not insure that local and regional programming, or programming for less demographically desirable consumers, will be “financially tenable and [journalistically] competitive, [or] that [such programming] will lead to journalistic diversity.”).

288. “The requirements posited by the Federal Constitutional Court for the legal organization of broadcasting, to secure broadcast freedom in the sense of Art. 5, par. 1, sentence 2, are not rendered moot by the development of communications technologies and media markets.” 119 BVerfGE at 181, headnote 1. (The Constitutional Court publishes its own headnotes.)

289. *Id.* ¶ 118. See also *infra* discussion at Parts III(K)(c), (d) (regarding the telecommunications/broadcasting divide).

290. 119 BVerfGE at 219 (citing Inter-State Treaty on Broadcasting Fees (*Rundfunkgebührenstaatsvertrag*), § 5, ¶ 3, which provides for imposition of a broadcast fee on computers which are the exclusive device for receiving broadcast programming in any given residence or property). See *infra* discussion at Part III(K)(3)(e).

291. *Id.* ¶ 124 (adding that the “program offerings [of public broadcasting] must remain open for new content, formats and genres as well as transmission forms”).

public discourse.²⁹²

2. Information Freedom and the Internet

The jurisprudence of "information freedom," both in conjunction with broadcasting freedom and as a separate constitutional right, becomes increasingly important as information becomes the coin of the realm. Can information freedom, i.e., a "recipient-oriented protection of mass media communication,"²⁹³ be used as an independent basis to protect opinion-building communication on the Internet?

a. Information Freedom as Part of Broadcasting Freedom

On several occasions, the Constitutional Court has described the relationship between information and broadcasting freedom. In the Third (or FRAG) Broadcasting Decision,²⁹⁴ the Court stated that "[f]reedom of broadcasting serves the same purpose as do all of the guarantees of Article 5: free individual and public opinion building."²⁹⁵ Its Fifth and Sixth Decisions elaborate on this common purpose:

Free opinion building takes place in a process of communication. On the one hand, it requires the freedom to express, distribute and publish opinions; on the other hand, [it requires] the freedom to hear the opinion of others, to inform one's self. Inasmuch as Article 5, paragraph 1 of the Basic Law protects the human rights of freedom of expression, freedom of publication, and freedom of information, it attempts to protect the process of communication.²⁹⁶

292. One notes the continuity of the court's broadcasting freedom jurisprudence, even as cable and satellite transmission technologies supplanted over-the-air broadcasting as a primary means of transmission. See *infra* note 343 (discussing 73 BVerfGE at 121-22). See also 119 BVerfGE at 214-17 (holding that the importance of broadcasting as a transfer point for the "variety of information, experiences, values and behaviors in a society" remains central focus of broadcasting freedom).

293. See also *infra* discussion at Part III(K)(2)(c). See generally SAJUNTZ, *supra* note 3.

294. See generally Witteman, *supra* note 2, at 168-88.

295. 57 BVerfGE at 319, 321 (identifying broadcasting freedom as the point where "different constitutional rights positions meet, and may even collide," and observing that "[t]o the legislator belongs the duty of mediating such collisions"). See also *supra* note 54 and accompanying text.

296. Fifth Decision, 74 BVerfGE at 323. See also Sixth Decision, 83 BVerfGE at 295-96 (using almost identical language); Ninth Decision, 114 BVerfGE at 387

In its 1998 “*Short Reporting*” opinion, requiring that broadcasting of matters of general interest such as championship football games and major cultural and political events not be “privatized,” i.e., that exclusive reporting rights not be sold to private broadcasters so as to exclude reporting by others, the Court offered new language emphasizing the importance of broadcasting’s information-transfer function:

The securing of free informational activities and free information access constitute an important concern of the Basic Law. Television is not the only medium that offers information about events of general importance. It is, however, the only medium that is capable of reporting simultaneously with sound and picture. Because of this appearance of authenticity and eyewitness experience, as well as its comfortable availability, broadcasting has become the medium from which the largest segment of the population fills its information needs.

There is thus a public welfare aspect to the prevention of information monopolies and the securing of a plurality of viewpoints and offerings [Free individual and public opinion-building] can only occur under the conditions of comprehensive and truthful information. Information contributes to education and to the testing of opinions. For that reason, Article 5, paragraph 1, sentence 2 of the Basic Law demands that the informational requirements of opinion-building be satisfied in this leading medium of broadcasting.²⁹⁷

As we shall see, “comprehensive” access to information and opinion takes on new constitutional significance as digital technology reshapes communication.

b. Information Freedom as a Separate and Independent Right

In the seminal 1969 *Leipzig Newspaper Decision*, the Constitutional Court found the government’s attempts to restrict the distribution of newspapers from East Germany to be an unconstitutional infringement on information freedom:

Information freedom stands in the constitutional order as co-equal with freedom of opinion and freedom of the press. It is not merely a component part of the right freely to express and disseminate opinion . . . [but] also itself a prerequisite of the

(same).

297. 97 BVerfGE at 256-57

opinion building which precedes the expression of that opinion. Only comprehensive information, fed by sufficiently broad sources, makes possible the free opinion building and expression of the individual as well as the community.²⁹⁸

The Court provided a short history of information freedom:

Until 1945, German constitutional history did not recognize an autonomous right to inform oneself from public sources without hindrance. This notion of information freedom first found expression after the Second World War in the constitutions of the individual German States [citations omitted], and then finally in the Basic Law. The recognition of such an independent constitutional guarantee was prompted by the National-Socialist practice of government limitations on access to information, state control over opinion, and prohibitions on the reception of foreign radio broadcasts and selected literary and artistic works.²⁹⁹

The Court noted that the United Nations' Universal Declaration of Human Rights of 1948 had also protected the ability to "obtain and receive reporting and ideas through any form of transmission and independent of borders," and that the European Convention on the Protection of Human Rights and Fundamental Freedoms had adopted a similar protection two years later.³⁰⁰

298. 27 BVerfGE at 81 ("*Die Informationsfreiheit steht in der grundgesetzlichen Ordnung gleichwertig neben der Meinungs- und Pressefreiheit . . .*"). (The English translation of this language follows in part the translations cited *supra* note 6.) The court went on to cite the *Spiegel Search Warrant* case, which emphasized the connection between information freedom and the democratic process:

If a citizen is to make a political decision, he must be comprehensively informed, and also know and be able to weigh the opinions that others have developed. The press keeps this constant discussion going; it gathers information, takes positions, and functions as an orienting force in public discussions. Public opinion articulates itself in the press; arguments are clarified in speech and counter-speech, they accrue clear contours and make it easier for the citizen to reach a judgment and decision. In a representative democracy, the press is both a constant connection- and control-organ between the people and their elected representatives in parliament and the government. The press grasps and reports [zusammenfasst] the constantly evolving opinions and demands in society and its constituent groups, puts these up for discussion, and transmits them to the politically accountable state organs, and allows them in this way to base [government] decisions on individual questions of contemporary politics on the opinions actually represented in society.

20 BVerfGE at 174-75.

299. 27 BVerfGE at 80. (The translation is again indebted to the sources cited *supra* note 6.)

300. *Id.* at 82 (citing Universal Declaration of Human Rights art. 19, G.A. Res.

The validation of this subjective right in *Leipzig Newspaper* took the form of an *injunction* against the government's interference with West German citizen access to the East German press, but it created no *positive duty* of the legislature to insure citizen access to that information.

c. Information Freedom as a Guarantor of "Information Justice"?

Can a government role in securing what has been called "information justice" (*Informationsgerechtigkeit*)³⁰¹ be supported by an understanding of information freedom as an objective constitutional value, operating (like broadcasting freedom) as a command to the legislature to guarantee the conditions for a neutral and open electronic information platform?³⁰²

The *Short Reporting* case described above suggests that the Constitutional Court might recognize such an objective right to information freedom. The Court came close to doing so in the *Parabola Antenna* case, where it upheld the *Drittwirkung* or "radiating effect" of the constitutional right of information freedom on the private-law relationship between a renter and a landlord.³⁰³ In that case, the Court sustained the right of a Turkish citizen in Germany to attach a parabola antenna to the exterior of his apartment, notwithstanding an absence of any contractual right to

217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 222).

301. Michael Kloepfer, *Verfassungsrechtliche Grundlagen des Zugangs zu Medien- und Telekommunikationseinrichtungen* [Constitutional Bases for Access to Media and Telecommunications Facilities], in *PROBLEME DES ZUGANGS ZU DEN MEDIEN UND TELEKOMMUNIKATIONSEINRICHTUNGEN* 7, 7 (2003). Professor Kloepfer asserts that,

The Basic Law constitutes the Federal Republic of Germany as a free Information society. Under the directing power of informational justice, the guarantee of a free information flow belongs to the essential core content of an information society . . . free information flow is as a rule also open information flow. The overall concept directs itself not just at the content side (freedom from prejudice, tolerance, taboos), but also towards the opening and keeping open of communication processes. In particular, no one should be excluded from the mass communication channels so important for public opinion building.

Id.

302. See discussion in Part III(C) above, regarding "Institutional Freedom, Objective and Subjective Rights, and Radiating Effect of Communication Freedoms."

303. 90 BVerfGE at 30, 39. See *supra* Part III(C)(1) (discussing the "radiating effect" of a basic right).

do so, the objections of the landlord, and contrary considerations in the Civil Code.³⁰⁴ The Court agreed with the argument that "[t]he constitutional right of information freedom affects the legal relationship between renter and landlord," and must be considered "in the interpretation and application of the Civil Code."³⁰⁵ Such a constitutionally based limitation on the right of a property owner to narrow the flow of information transported to or over his property, to recipients desiring the information, has potentially wide-ranging implications for network neutrality and related open network issues.

In the 2001 *Courtroom Television II* decision, however, one detects a reluctance to push information freedom too far in the objective law direction. The Constitutional Court found that, although news outlets could assert a subjective right of information freedom to support their desire to have cameras in the courtroom, that right could be outweighed by countervailing considerations (such as the accused's interest in a fair and orderly trial).³⁰⁶ The majority opinion cast information freedom as a "defensive right."³⁰⁷ A concurring minority of three justices, however, taking note of the growing importance of the electronic media and a concomitant transformation of the public sphere, would have found that "the legislator is required by objective constitutional law to make possible something more than a [simple] open courtroom, as long as there are not countervailing interests at stake."³⁰⁸

304. *Id.* at 33-34.

305. *Id.* at 30, 38 (holding that the Civil Code required the court to take note of the property owner's objections to the visual blight of such an antenna, and arguing that there was no right in the rental contract to have such an auxiliary source of television since the building was already wired to receive certain channels).

306. 103 BVerfGE at 60-63 (2001) (upholding the lower court's determination that there were compelling legal reasons for, and interest in, excluding recording equipment from the hearing room).

307. *Id.* at 59-60.

308. *Id.* at 72 (Kühling, J., Hohmann-Dennhardt, J., & Hoffmann-Riem, J., concurring) ("*Der Gesetzgeber ist aber kraft objektiven Verfassungsrechts verpflichtet, eine über die Saalöffentlichkeit hinausgehende Medienöffentlichkeit zu ermöglichen, soweit dem keine gegenläufigen Belange entgegenstehen.*"). These Justices cite (in subsection 2) a structural transformation in both in the social sphere as well as in technology in arguing that there may be times when information and broadcasting freedom would compel television access to the courtroom:

In the interim, democracy and the rule of law have developed further Parallel to that, the public sphere itself has undergone a fundamental functional transformation (see Jürgen Habermas, STRUCTURAL

In the *Leipzig Newspaper* case described above, one German commentator sees a further determination of the “material content of information freedom,” tied to some understanding of what “comprehensive information” would be.³⁰⁹ This would go beyond the “defensive quality” of information freedom:

The state’s duty to act directly [in regard to information flow], founded in the objective law elements of the Basic Law, could only be directed at securing or increasing that degree of general accessibility [of information] which reflects the totality of existing information sources.³¹⁰

The notion of an outer perimeter of available information also informs the holding in *Leipzig Newspaper* that an “ability to choose among information” (“*Aspekt des Auswählenkönnens*”) is fundamental to information freedom:

Art. 5(1) . . . protects not only active steps to procure information but also the receipt of information *per se*. The Basic Law seeks to guarantee that the individual is informed as comprehensively as possible. It is also possible that an individual will inform himself from sources that make their way into his field of perception without his active participation: only the possession of [or access to] information enables an independent selection. This aspect of being chosen then becomes a fundamental attribute [*Grundtatbestand*] of every bit of information. If it were not

TRANSFORMATION OF THE PUBLIC SPHERE, 5th ed. 1996). Currently, we can see new and lasting changes, which can be bundled together under the term “information society” (see Federal Ministry of the Economy, *Die Informationsgesellschaft – The Information Economy*, 2d Ed 1997, further citation omitted). New electronic techniques, communication infrastructures, and presentation forms, as well as new media content have arisen. The media have become important companions of almost all citizens. They shape large periods of our everyday life and have lasting effect on the communication among citizens (citations omitted). At the same time, citizens have developed new abilities in their interaction with media

Id.

309. HELGE ROSSEN, *FREIE MEINUNGSBILDUNG DURCH DEN RUNDFUNK* 185 (1988) (“Das Gericht . . . bemüht sich alsbald um die Ermittlung eines eigenständigen materialen Gehaltes der Informationsfreiheit. Im Begriff der ‘umfassenden information’ [27 BVerfGE at 81] . . . [e]s signalisiert schon hiermit einen in der Objektebene außerordentlich weiten Geltungsbereich des Grundrechts.”).

310. *Id.* at 193-94 (first defining the defensive right as “requiring the state not to hinder, disturb or forbid” information acquisition by interested individuals,” and then asserting that “information freedom realizes its democracy-constituting function as an objective law state duty to concern itself with maintaining a measure of general accessibility”).

guaranteed by freedom of information that sources of information reach the individual, then he would also be prevented from actively selecting among them.³¹¹

The correlation of optimal democratic opinion-building and decision-making with the comprehensive availability of information does *not* mean, however, that the state should in any way make substantive decisions as to what constitutes this *totality* of information, as this would be inconsistent with the personal autonomy at the root of information freedom.³¹²

Another German commentator approached the matter by distinguishing between communicative and recipient freedoms:

Article 5 paragraph 1 addresses the role of communicator and of recipient, and protects one-way as well as two-way communication, including the reciprocal [*wechselseitige*] process of communicating. In law, one must distinguish between two different but interrelated poles of constitutional protection, namely the free speech and publication freedom (communicator freedom) as well as the information freedom (recipient freedom).³¹³

This writer then posits an objective dimension to the recipients' freedom:

The objective character of recipient freedom is derived from the combination of the free speech right with constitutional principles such as the legal, social, and democratic nature of the state Although there is no right to receive particular or even "traditionally open information sources," if access to information relevant [to democratic processes] is threatened in a way that [endangers] the fundamental elements of the constitutional order, the programmatic content of this right can be directed to legal and factual measures designed to secure the unconditional minimum of access.³¹⁴

311. 27 BVerfGE at 83 ("*Dieser Aspekt des Auswählenkönnens ist der Grundtatbestand jeder Information.*").

312. See, e.g., ROSSEN, *supra* note 301, at 194 ("The scope and content of what the citizen in his '*status constituens*,' as well as in his '*private sphere*,' determines is necessary for the '*exercise of his personal and political tasks*' is something that he alone should determine." (citing 27 BVerfGE at 81)).

313. Wolfgang Hoffmann-Riem, *Recht der freien Meinungsäußerung*, in KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 422, ¶ 16 (Axel Azzola et al. eds., 1989) [hereinafter Hoffmann-Riem, ALTERNATIVKOMMENTAR].

314. *Id.* at 467, ¶ 98.

While not compelling the state to open up *new* information sources, an objective-law reading of information freedom can still implicate the *architecture* of information choice:

The objective-legal elements of recipient freedom legitimate the combating of one-sided “information power” [T]he state’s protective responsibility is actualized when particular information typically relevant to public opinion-building threatens to become no longer available, for instance through operation of exclusive contracts with sole-source information providers, or through high financial hurdles, partitioning of information spaces, or access filters, all of which run counter to the principle of equal opportunity information access [chancengleicher Informationsaufnahme].³¹⁵

However, the Court has not yet embraced such a broad reading of information freedom.

3. Current “Convergence” Issues in Germany

Convergence describes the fact that broadcasting, film, video, audio, data, and telephony have all discovered a *lingua franca*: Internet protocol (the “IP” in Voice over IP or VoIP, for instance), which guides the transportation of information content over the network conduit in the form of digitized information packets. In Germany, as here, interconnected IP networks, under the rubric of the Internet, and riding in large part on the infrastructure of the legacy telephone networks, are becoming one all-purpose “next generation network” (“NGN”) on which telephony, video, email, data transmission, television and radio are merely applications.

a. General Reevaluation of Broadcasting and Information Freedom in a Multi-Channel, Multi-Media, Digital World

The question of what broadcasting and information freedom mean in this era of multi-channel capacity and ubiquitous digital (“IP”) content has been a central theme in the discussion of German

315. *Id.* at 468, ¶ 100 (“Die staatliche Schutzverantwortung wird aktualisiert, wenn bestimmte, für die Meinungsbildung typischerweise relevante Informationen nicht mehr zugänglich zu sein drohen”). On choice architecture as it relates to electronic communications, see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 167 (1999) (“[A]rchitecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding.”); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 81-100 (2008) (describing elements of “choice architecture”).

media policy over the last ten years. Part of this discussion has been driven by the privatization of the underlying transmission facilities, and part by the European Commission which has demanded further definition of German public broadcasting's mission in response to complaints by commercial competitors.³¹⁶

There is recognition that broadcasting is moving onto the Internet, and thus onto the telecommunications network: "In the middle, namely as carrier . . . stands telecommunication."³¹⁷ The tendency of owners of transmission capacity to prefer affiliated traffic, and extract monopoly rents from all other customers, has been widely noted in Germany:

Network operators can, for example, erect financial hurdles, or use technical standards or access conditions of a technological or contractual variety as filters, or build in structural advantages or disadvantages to the marketing of certain products.³¹⁸

Issues at the nexus of conduit and content, sometimes expressed in the United States under the rubric of network neutrality, lead in Germany to calls for increased antitrust enforcement, and for extension of broadcasting and information freedoms into the online world.³¹⁹

Concerns are not limited to transmission facilities and the "last mile" problem, however.³²⁰ There is also unease that the seemingly

316. As to the European Commission, see *supra* notes 78, 190. As to the privatization of transmission facilities, see *infra* discussion at Parts III(K)(3)(c)-(d).

317. Ingwer Ebsen, *Öffentlich-rechtliche Rahmenbedingungen einer Informationsordnung*, 1997 DVBl 1039, 1040.

318. Wolfgang Hoffman-Riem, *Medienregulierung unter Viel-Kanal-Bedingungen*, in *ÖFFENTLICHKEIT UNTER VIEL-KANAL BEDINGUNGEN* 186-87 (Otfried Jarren & Friedrich Krotz eds., 1998). See also, e.g., Martin Bullinger, *Regulierung unter Viel-Kanal-Bedingungen*, in *ÖFFENTLICHKEIT UNTER VIEL-KANAL BEDINGUNGEN*, *supra*, at 178, 180 (The "owner of the transmission capacity will endeavor to increase its share of Pay-TV value-creation by not transmitting external or third-party [*fremde*] programming to the public, but rather by acquiring programming rights, creating program packages, and offering them based on profitability concerns.").

319. Hoffmann-Riem, *supra* note 318, at 186. See also *id.* at 188 (observing that it is generally those with more economic power who opt for market-based regulation and those with lesser social or economic power who question the sufficiency of market management to deliver communicative equality).

320. See Wolfgang Schulz, *Vertrauensbildung als öffentliche Aufgabe in der Medienkonvergenz?*, in *INFORMATIONELLES VERTRAUEN FÜR DIE INFORMATIONSGESELLSCHAFT* [TRUST IN INFORMATION IN THE INFORMATION SOCIETY] 121, 129 (Dieter Klump et. al. eds., 2008) (referring to the problem as the "dirty last mile").

endless knowledge and information society of the future may be curtailed by software, contractual, copyright, and investment limitations affecting the information and opinion available to the public. "Inasmuch as these factors influence the accretion and use of communicative power, and have an effect on the way that the opinion-building freedom of the recipient is realized, countervailing legal measures may be justified."³²¹ Apprehension is expressed that network-based filter technology might lead to "reality construction according to [the network operator's] own rules, which rules might — under market conditions — have the tendency to distance themselves from the older idea of participation in a democratic discourse."³²²

Along with its utopian possibilities, some see digital technology leading to a fragmentation of the audience. Public opinion building (*öffentliche Meinungsbildung*) presumes a single public (*Öffentlichkeit*), when in fact there are many, increasingly fragmented publics in the new online digital world. The flip-side of convergence is divergence, the fragmentation of the audience, a problem that Cass Sunstein addresses in his book *republic.com*.³²³ In Germany, this situation has led to the call that public broadcasting fill an expanded role as an "integration factor" in knitting these disparate publics into a larger electoral public.³²⁴ Public law broadcasters might become "islands of trust and credibility" on the Internet sea.³²⁵

321. Hoffmann-Riem, *supra* note 318, at 187.

322. *Id.* at 189.

323. CASS R. SUNSTEIN, *REPUBLIC.COM* 30 *passim* (2001); Wolfgang Schulz & Thorsten Held, *Verfassungsrechtliche Rahmenbedingungen einer dienstspezifisch diversierten Informationsordnung*, in *VON DER DUALEN RUNDFUNKORDNUNG ZUR DIENSTSPEZIFISCH DIVERSIFIZIERTEN INFORMATIONSORDNUNG* [FROM THE DUAL BROADCAST ORDER TO A SERVICE-SPECIFIC DIVERSIFIED INFORMATION ORDER] 131 (Manfred Kops et. al. eds., 2001) ("[D]isintegration of the public sphere into partial public spheres . . . is coincident with the diversification of offerings and the individualization of demand.").

324. Schulz & Held, *supra* note 323. See also *supra* note 128 (discussing integration function).

325. Christoph Degenhart, *Funktionsauftrag und "dritte Programmsäule" des öffentlich-rechtlichen Rundfunks*, 2001 K&R 329, 330-31. See also Hoffmann-Riem, *Gesetzliche Gewährleistung*, *supra* note 280, at 82, thesis 9 ("The logic of the Internet is not contradicted when the state helps support those who offer content which otherwise is disadvantaged by the structures of the Internet.").

b. Extension of German Public-Law Broadcasters' Activities onto the Internet and other Digital Platforms, and Ensuing Controversy

German public-law broadcasters have shown particular interest in making their content available online, and in expanding into services such as search, online newspapers, webcasting/IPTV, and even television transmission to wireless phones and other devices,³²⁶ on the theory that as public broadcasters they are uniquely situated to offer "transparency and orientation . . . credibility and dependability" to citizens of the online world.³²⁷

The movement of German public service broadcasters onto the Internet has generated enormous controversy, both at the national and European level, driven primarily by commercial press and broadcasting industry resistance to what it views as publicly financed competition, and further articulated by scholars concerned about the limits of constitutional and statutory authority for such a move.³²⁸

The critics of public broadcasting's Internet presence point to a shift in editorial control brought by the digital transformation, from traditional broadcasting, where the editor had a privileged position, to the Internet where editorial control has largely shifted from the broadcaster/programmer to the computer user:

The [Internet] user has the possibility of determining, by theme and desired depth of information, the content of his or her choosing . . . the danger found in broadcasting of a diversity-narrowing opinion power does not exist with online-services The Internet stands *de facto* and *de jure* open to everyone, and thus constitutes the "perfect example of a functioning system of external pluralism."³²⁹

326. THORSTEN HELD, *RUNDFUNK UND NEUE DIENSTE, ANALYSE IM AUFTRAG DER FRIEDRICH-EBERT STIFTUNG* 5 (2006), available at <http://library.fes.de/pdf-files/stabsabteilung/04290.pdf>.

327. Degenhart, *supra* note 325, at 330-31, 334 (offering "transparency and orientation" to on-line citizens). See also Schulz, *supra* note 320, at 146 n.11 (citing BERNT HOLZNAGEL, *DER SPEZIFISCHE FUNKTIONSAUFTRAG DES ZWEITEN DEUTSCHEN FERNSEHENS* 119 (1999); Carl-Eugen Eberle, *Betätigung des ZDF im Online-Bereich*, 1998 AFP 272)).

328. See, e.g., CHRISTOPH DEGENHART, *ONLINE-ANGEBOTE ÖFFENTLICH-RECHTLICHER RUNDFUNKANSTALTEN* 35 *passim* (1999).

329. See, e.g., Johannes Kreile & Stefan Neuenhahn, *Online-Angebote öffentlich-rechtlicher Rundfunkanstalten*, 1998 K&R 41, 43 (quoting, *inter alia*, Degenhart, *supra* note 325).

In this new many-to-many media environment, these pundits ask where the threat to communications freedom might lay, i.e., what the constitutional justification for the extension of public-law broadcasters' activities to the Internet might be.³³⁰ They wonder how both the frequency shortage, which was the original justification for broadcasting's special situation, and the now asserted "abundance of offerings and possibilities" in cyberspace, could "lead to the exact same result," the constitutional necessity of a complementary role for public broadcasting.³³¹

Such critics take particular umbrage at public broadcasting entities that present themselves as Internet portals, such as Bavarian Broadcasting advertising itself as a "Portal for Bavaria" or West German Broadcasting ("WDR") as a "Portal for North Rhine-Westphalia":

When wdr.de acts as a portal for the North Rhine-Westphalia area, if not for the entire global information market, this means that it is going beyond its own programming, or programming for which it takes responsibility, and acting as a broker for everything on the Internet related in any way to North Rhine-Westphalia By way of hyperlinks, access is provided to the offerings of third parties.³³²

Public broadcasting proponents counter that the "existence and development guarantee" found by the Constitutional Court as an adjunct to *Grundversorgung* empowers public broadcasters to follow the general audience onto whatever the platform *de jour* is.³³³ Audiences now expect multi-media offerings, and to a certain extent there has been a "substitution" of online-services for what was earlier "classic broadcasting."³³⁴ If, for example, a significant portion of the under-thirty population segment were found to obtain its news primarily over the Internet, the functional aspect of broadcasting freedom would be implicated and a legislative duty to reach this "public" would be triggered.³³⁵

330. Degenhart, *supra* note 325, at 335.

331. *Id.*

332. *Id.* at 329.

333. See HELD, *supra* note 326, at 29. See also BECK'SCHER KOMMENTAR, *supra* note 237, at 104 n.43 (Schulz, commenting on § 2) ("[B]roadcasting only occurs when, through the transmission, the public is actually reached.").

334. HELD, *supra* note 326, at 18, 29.

335. *Id.* ("[T]he existence and development guarantee demands that [public] broadcasters be able to take part in this development" of multimedia, Internet

All parties (except perhaps the transmission owners) agree that broadcasters should be able to avail themselves of commonly used transmission facilities — whether they are terrestrial broadcast, satellite, cable, or IP — to reach their public with traditional, fixed-time offerings.³³⁶ Whether the owners of those transmission facilities will allow such use, and on what terms, remains to be seen.³³⁷ Some fear that the plans of the European Commission and the German Federal Network Agency to allocate frequencies and other transmission paths by market mechanisms (such as auctions) could result in transmission becoming a bigger part of public broadcasting budgets, interfering with its constitutional mandate and primacy.³³⁸

The more immediate controversy between public broadcasters and their commercial counterparts seems to have focused on the issue of whether the public entities should be able to create *new* content specifically designed for the Internet, and how and how long public broadcasting content should be available online. In arguing over the scope of online public broadcasting activities, critics turn by way of reference to available legal definitions of broadcasting, particularly those found in the Inter-State Treaty. Article 2(1) formerly provided:

Broadcasting is the production and dissemination for the general public of presentations of all kinds of speech, sound and picture using electronic media ("electromagnetic wavelengths"), with or without the use of a wire connection.³³⁹

offerings.).

336. Degenhart, *supra* note 325, at 337 ("[T]he simple broadening of the technical platform is not at issue . . . [but] Internet-specific offerings [is].").

337. See *supra* note 319 and accompanying text.

338. See *supra* discussion at Parts III(K)(3)(c)-(d). See also Gersdorf, *supra* note 78, at 104, 105 (describing the conflicts unleashed by the Federal Network Agency's consideration of spectrum auctions). Gersdorf states that,

A sharpening of the economic conditions for broadcasting is not in the interests of the individual States responsible for upholding broadcasting's [constitutional guarantee]. Higher transmission costs require higher revenues. For public broadcasters, this will be translated into a fee increase. It is not in the interests of the States to contribute by way of a broadcasting fee increase to the rehabilitation of the Federal budget.

Id.

339. Inter-State Treaty, *supra* note 25, § 2, ¶ 1 ("Rundfunk ist [eine Veranstaltung] . . . unter Benutzung elektromagnetischer Schwingungen ohne Verbindungsleitung oder längs oder mittels eines Leiters"), Compare October-2008 amendment to this article cited at note 346, *infra*.

Opponents of an expanded role for public broadcasters argue that many of the planned Internet offerings of public broadcasting entities are not a “designed construction and distillation [Zusammenfassung] of individual content into a . . . total program,” i.e., not a “dissemination to the general public,” and therefore not broadcasting in either the statutory or constitutional sense.³⁴⁰

For proponents of a robust online role for public broadcasting, this play with statutory definitions is largely irrelevant. They tend to view any electronically transmitted programming intended for the general public as within the opinion-building protection of Article 5 broadcasting freedom.³⁴¹ On this view, the Internet is a game-changer, and those who remain locked into the polarity of categorizing it either as broadcasting or telemedia, a “substitute” or “complement” to traditional broadcasting, “linear” or “non-linear,” are missing the boat.³⁴²

For its part, the Constitutional Court does not seem overly preoccupied with the specifics of various electronic technologies, having extended the protection of Article 5 broadcasting freedom first to FM frequencies, then to “broadband cable networks,” and satellite television almost without comment.³⁴³ The essential characteristics from a constitutional viewpoint seem to be the electronic transmission of program content with sufficient “breadth, actuality and suggestive power” to become a substantial “medium and factor” in the public opinion-building process.³⁴⁴

340. Degenhart, *supra* note 325, at 332. Rather than presenting “diverse information in an editorially selected and shaped program,” the broadcaster as Internet portal becomes more of a conduit for the content of others (even if those “others” may include public broadcasting producers). *Id.*

341. HELD, *supra* note 326, at 17 (“[A]s long as the new services are electronically transmitted and directed to the general public, they satisfy the elements of the constitutional definition of broadcasting.”). Whether such content is transmitted as a complete program which can be received by viewers at specific times is not important; it only matters that it is an electronically transmitted information designed for multiple, unidentified individuals. *Id.*

342. *Id.* at 18 (observing that Internet creates new “possibilities of public and individual opinion-building”). See note 346 and accompanying text for definition of broadcasting in terms of “linear” services.

343. 73 BVerfGE at 121-22 (discussing the availability of FM [“UKW”], “broadband cable networks,” and satellite transmission media, none of which were commercially deployed in 1949 when the Basic Law was drafted). *But see* Degenhart, *supra* note 325, at 331 (“Internet . . . in any event is not broadcasting as originally understood.”).

344. *See* HELD, *supra* note 326, at 17-18 (rejecting the attempts of Degenhart and

The issues attending public broadcasting's role on the Internet, and the related controversy about its funding, were somewhat clarified by the April 2009 adoption of the Twelfth Amendment to the Inter-State Treaty, which carved out a more-defined role for public broadcasters on the Internet. In particular, the definition of broadcasting was amended (additions in italics):

Broadcasting is a *linear information and communication service*; it is the production and dissemination [transmission] *for simultaneous transmission* to the general public of presentations in *moving pictures or sound according to a program schedule* and using electronic media.³⁴⁵

In addition to "linear" broadcasting, public broadcasting entities are allowed to offer "non-linear" Internet services, or "telemedia," consisting of allowing access to their broadcast programming available (in most cases) for seven days after broadcast, and of developing online archives of indefinite duration for "historical and

others to "load up" the constitutional definition of broadcasting by adding superfluous elements to the core concept of a journalistic presentation ("*Darbietung*").

345. Twelfth Amending Treaty, *supra* note 25, art. 2(1) ("*Rundfunk ist ein linearer Informations- und Kommunikationsdienst; er ist die für die Allgemeinheit und zum zeitgleichen Empfang bestimmte Veranstaltung und Verbreitung von Angeboten in Bewegtbild oder Ton entlang eines Sendeplans unter Benutzung elektromagnetischer Schwingungen.*"). For further citation to the Twelfth Amending Treaty, the integrated Inter-State Treaty as of November 2008, and related documents, see *supra* note 25. A new English translation of this article is available at http://www.alm.de/fileadmin/Download/Gesetze/12_RStV-englisch.pdf.

Neither the Twelfth Amending Treaty nor the integrated Inter-State Treaty contains a definition of linear or non-linear communications media. The terms are, however, used in common parlance in discussions of German media policy since they were defined in article 1 of the European Union's December 11, 2007, Directive on Audio-Visual Services:

(e) "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

...

(g) "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.

Council Directive 2007/65/EC, art. 1 ¶ 2(e), (g), 2007 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:EN:NOT>.

cultural” content.³⁴⁶ Such telemedia and other online activities of the public broadcasting entities will be subject to a three-stage test (*3-Stufen Test*) in order to determine whether they are in fact sufficiently related to the public broadcasters’ constitutional mission, a process that gives the stations some flexibility in light of rapidly changing technologies and modes of distribution, while setting bounds on their activities in response to commercial press and broadcaster complaints.³⁴⁷

c. Broadcast Media in a Telecommunications World – Conflict between State and Federal Government

As discussed above, the privatization of broadcast transmission, along with the increasing deregulation of telecommunications driven by the European Union, have set up potential conflicts between State jurisdiction over broadcasting and Federal jurisdiction over transmission,³⁴⁸ and “conflict[s] between the

346. Twelfth Amending Treaty, *supra* note 25, art. 11(d)(2). For distinctions between “linear” and “non-linear” content, see *supra* note 345. The seven-day limitation was in fact controversial. See, e.g., *Weiter Streit über Sieben-Tage Regelung für Abruffernsehen* [Further Battles Around Seven-Day Limitation for Television on Demand], 36 EPD 7, 15 (2008) (noting that ARD-ZDF demanded a longer period, and quoting one public broadcaster as saying, “If we have to throw away our reporting on Olympic protests and Tibet after seven days, we are not operating in the interests of those who pay user fees.”).

347. Twelfth Amending Treaty, *supra* note 25, §§ 11(d)-(e).

348. See *supra* notes 31-37 and accompanying text; Wolfgang Hoffmann-Riem et al., *Anforderungen an die .IKM-Regulierung angesichts der Konvergenz – eine Strukturierung des Problemfelds* [Challenges for the Information-Communication-Media [IKM] Regulation in Light of Convergence – Structuring the Problem], in *GLOBAL @ HOME, JAHRBUCH TELEKOMMUNIKATION UND GESELLSCHAFT* 323, 328 (Herbert Kubicek et al. eds., 2000) (“In capacity management one can see examples of the problems which occur when economically-oriented Federal Law and journalistically-oriented State law meet.”). The authors continue:

The shaping of the transmission network and the distribution of its capacity fall constitutionally – inasmuch as there remains government influence [after deregulation of these markets] – within the jurisdiction of the Federal Government pursuant to its authority over telecommunications under Basic Law, Article 73(7). Because, especially with regard to the allocation of transmission capacity, decisions are made about the types and possibilities of individual and mass communications on the network, there is an interdependence between these areas [of telecommunications and broadcasting]. In the area of broadcasting, the Federal Constitutional Court has introduced the principle of a “serving function” [for telecommunications facilities necessary to broadcasting].

Id. at 328 (citing 57 BVerfGE at 319 *passim*; 12 BVerfGE at 227). See also BERLINER KOMMENTAR, *supra* note 33, § 48 n.8 (Schmits, commenting that jurisdictional issues

economic interests of the network operators and the [constitutional] command of diversity.”³⁴⁹ When the Constitutional Court approved the co-existence of public and private broadcasters in a “dual broadcasting system,” it did so with the understanding that the individual German States would create a legal framework for insuring a balanced and diverse total broadcasting offering, overseen and enforced by Independent Media Authorities in the individual States.³⁵⁰ This framework legislation often includes the retransmission and “must-carry” rules, described above, for cable networks (now the primary form of broadcasting transmission into German households).³⁵¹

Where, however, the United States cable operator is only required to carry local commercial broadcast and non-commercial public and educational stations,³⁵² the German (analog) cable operator was initially required to carry all stations that the Independent Media Authority may find necessary to insure a

at the nexus of content and conduit are “problematic and disputed”).

349. Kloepfer, *supra* note 301, at 19.

350. The court has made it clear that the States’ Independent Media Authorities (as described at *supra* note 27) remain responsible for insuring an overall balance and diversity of programming in the private sector, whether through a retransmission consent regimen or allocation of frequencies and transmission capacity. See 73 BVerfGE at 198-205 (relating to retransmission); 83 BVerfGE at 322-24 (relating to the allocation of terrestrial frequencies). See also 73 BVerfGE at 157 (“[C]onstitutionally guaranteed broadcasting freedom applies to the entire broadcasting system. . . , [which] must in its totality correspond to the constitutional requirements within the framework of the possible.”), 172-74 (discussing further, throughout section III(1) of the court’s decision, the licensing, oversight, and retransmission duties of private broadcasters).

351. Inter-State Treaty, *supra* note 25, §§ 50-52. See also *supra* discussion Part III(1) (discussing the regulation of commercial broadcasting); Kloepfer, *supra* note 301, at 20-23 (describing how state legislatures structure access to terrestrial frequencies, satellite channels, and cable “frequencies” (channels)). The Germans tend to use the word “*Weiterverbreitung*” (“retransmission”) (per Inter-State Treaty article 52) in referring to the obligations of analog cable systems, while reserving the term “must-carry” (in English) for the more limited obligations of digital-network providers (although “must-carry” does not appear in the Inter-State Treaty). See 2000 K&R at 43 (distinguishing between retransmission — the complete *Kabelbelegungsplan* or cable allocation plan of the Bremer authorities — and the more limited “must-carry” concept, which requires only that specified programs be retransmitted); BECK’SCHKE KOMMENTAR, *supra* note 237, at 925-29 (Wille et al., commenting on § 52). In a sense, retransmission and must-carry are two species of the same regimen and will be so treated here, as they are in U.S. discourse. See *infra* note 352.

352. See 47 U.S.C. §§ 534, 535; 47 C.F.R. §§ 76.56-76.64. See also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994), *aff’d after remand*, 520 U.S. 180 (1997).

pluralistic and diverse total media offering.³⁵³ With the advent of digital cable, the cable operator has been granted the first opportunity to create a diverse and balanced total program, with the Independent Media Authority retaining oversight and enforcement authority should the cable operator fail in this task.³⁵⁴ This softer regulation of retransmission is premised on the hitherto untested theory that there will be sufficient channels and/or transmission capacity to accommodate all interested broadcasters.

Regardless of this relaxation, an underlying and unresolved contradiction remains between the Independent Media Authorities with jurisdiction over broadcasting structure and content, and the Federal Network Agency with jurisdiction over telecommunications, including cable and other broadband transport services.

[Public] tasks are now performed by private service providers, who are subject to the laws of commercial economics In cable networks, the principles of commercial economics embedded in the telecommunication law stand against the constitutional serving function of telecommunications under [jurisprudence of] broadcasting freedom. This raises the question, in whom and to what degree regulatory jurisdiction for cable lies, in light of cable's use for broadcasting transmission.³⁵⁵

353. Inter-State Treaty, *supra* note 25, § 52(1) ("State law regulations regarding analog cable allocation are permitted, to the extent they are necessary to achieve clearly defined goals of general interest. In particular, they may be directed at the securing of a pluralistic and diverse media order.").

354. Digital cable providers obtain this initial discretion to fulfill constitutional goals but must submit their planned cable offerings to the States' Independent Media Authorities several months prior to any changes. Inter-State Treaty, *supra* note 25, §§ 52(4)-(5). Under this system, cable operators are required to dedicate at least a third of their digital transmission capacity to a "diverse program offering." *Id.* § 52(4). A further one-third of their programming is reserved for (1) public-law broadcasters, including public broadcasting "bouquets"; (2) any private program carrying a "regional window"; and (3) the equivalent of at least one analog channel to carry state-licensed regional and local programming as well as public access channels, and — to the extent there is remaining carriage capacity — all other channels designated by the State. *Id.* A final one-third is left wholly to the discretion of the operator. *Id.* § 52(3)(1-3).

355. BECK'SCHER KOMMENTAR, *supra* note 237, at 916 n.21 (Wille et al., commenting on § 52 (citing 12 BVerfGE at 227)); Klaus Stern, *Postreform zwischen Privatisierung und Infrastrukturgewährleistung*, 1997 DVBl. 309, 309 *passim*. See also TKG, *supra* note 33, § 3(27) (providing that "telecommunication networks" include fixed and mobile telephony, cable, broadcast, optical fiber, satellite networks, powerlines, and other devices capable of transmitting electronic signals).

This jurisdictional quandary is deepened because the Federal Telecommunications Law ("TKG") and the Inter-State Treaty on Broadcasting make only passing reference to each other. For instance, section 59(9) of the TKG provides that "[i]f interests of the individual States in the transmission of broadcasting are implicated, then consensus [on the allocation of frequencies] is to be sought with the individual States on the basis of the applicable [state] broadcasting laws," without explaining how that consensus will come to pass. Similarly, section 52 of the Inter-State Treaty on Broadcasting charges state agencies with enforcing mandatory carriage of programs to achieve the constitutional goals of a pluralistic media structure, while providing that "compensation and tariffs are to be shaped in the framework of the [Federal] Telecommunications Law in such a way that regional and local offerings can be transmitted under appropriate and equal-opportunity conditions."³⁵⁶ The TKG, however, has no provisions relating to compensation and tariff conditions for "must-carry" channels (nor does the Inter-State Treaty).³⁵⁷

With the coming of digital cable, the attempts of *Deutsche Telekom* and other telecommunications providers to provide IP television over traditional telephone wirelines as well as wireless handsets, and the growth of "non-linear" Internet television content (available by streaming or download), it is no longer clear to many German jurists how the "must-carry" provisions will apply.³⁵⁸

356. The closest that the TKG comes to rate regulation for "must-carry" is at TKG § 27, which provides that the Federal Network Authority must inform the responsible State Independent Media Authority of any rate regulation proceedings instituted because the owners of transmission facilities were alleged to exercise "significant market power" (*beträchtliche Marktmacht*). TKG, *supra* note 33, § 27; *see also* following footnote. Interviews with Independent Media Authority personnel indicate that such proceedings are rare, if not non-existent. Interviews with Personnel at IMAs in Hamburg Schleswig-Holstein and elsewhere (May and June, 2008).

357. TKG § 30 provides that there will be no *ex ante* rate regulation unless it can be shown that a telecommunication provider has significant market power. TKG, *supra* note 33, § 30. TKG § 27(3) provides for increased information exchange between the IMAs and the Federal Network Agency, and also for application by the IMAs to the Network Agency for review of rates charged by the communications providers for must-carry stations. TKG, *supra* note 33, § 27(3). Compare 47 U.S.C. § 535(h) (U.S. cable operators must carry local broadcast channels for free, unless the broadcaster refuses consent).

358. *See Hoffmann-Riem et al., supra* note 348, at 328-29:

In the area of cable networks, disputes exist as to the extent of the regulatory regime of the TKG and with that the jurisdiction of the Federal

The federal/state tension becomes more complicated still when one adds a third gravitational pole, the European Union ("EU"). Under the European Community Treaty, Germany is required to conform its telecommunications laws to EU directives. As a result, there is great concern that the Federal Network Agency will follow the lead of the EU in auctioning off newly available spectrum to the highest bidder.³⁵⁹ This results in what one commentator has called a "further jurisdictional displacement 'from the bottom to the top'" in broadcast-related telecommunications jurisdiction, "from the German States to the Federal Government, and from there to the EU."³⁶⁰

There are constitutional values on all sides, as both European integration and the privatization of telecommunications infrastructure have been written into the Basic Law, although perhaps not in the same privileged position as broadcasting

Regulatory Authority for Telephone and Post [now Federal Network Agency]. The States ask the question, "When do [State] broadcasting-law channel-assignment rules apply?" The State broadcast laws regulate the allocation of television cable networks. [But] in view of digitalization and convergence, it is asserted to be no longer clear what constitutes a television cable network. The possibility that networks previously used only for broadcast transmission can now provide other services, and vice versa that other networks will now stand ready to transmit broadcast programming, requires further clarification of the points of contact [between broadcasting and telecommunications law].

Related questions arise as to whether conditional access systems, application-programming interfaces, and set-top boxes might be used to block, narrow, or channel access to constitutionally protected programming are addressed in the "free access" ("*Zugangsfreiheit*") provisions of the Inter-State Treaty. See Inter-State Treaty, *supra* note 25, § 32b.

359. Gersdorf, *supra* note 78, at 104. The TKG sets up a regime, administered by the Federal Network Agency, for the allocation of radio frequencies, including those necessary for broadcasting, and specifies that the Agency shall work within the European Directives. TKG, *supra* note 33, §§ 52-65. See also Karola Wille, *Rechtsprobleme im Zusammenhang mit der Überarbeitung des Rechtsrahmens für die elektronische Kommunikation (TK-Review) durch die Europäische Kommission – aus Sicht des öffentlich-rechtlichen Rundfunks* [Legal Problems in Connection with the Revision of the Legal Framework for Electronic Communication of the European Union – from the Point of View of Public Broadcasting], 2 ZUM 89, 92 (2007) (describing increasing costs of terrestrial frequencies and the European Commission's insistence that broadcast frequencies be allocated pursuant to market rules – potentially eliminating the privileged place that broadcasting, particularly public broadcasting, has had under the German system).

360. Kloepper, *supra* note 302, at 11 ("*Kompetenzverlagerungen 'von unten nach oben' (von den Ländern zum Bund, aber auch vom Bund zur EU.)*"). See also BERLINER KOMMENTAR, *supra* note 33, at 25-188 (Klotz & Nettesheim, commenting on the "European Framework").

freedom.³⁶¹ On the other hand, both the constitutional principle of “federal friendly conduct” and statutory telecommunications law bind the Federal Network Agency to a process of consultation, coordination and consensus with the States regarding frequency planning and allocation.³⁶² Indeed, the Telecommunications Law as a whole is still understood to play a serving role *vis a vis* broadcasting.³⁶³ The States, in turn, are bound to the constitutional principle of broadcasting freedom, which requires that “the allocation of scarce frequencies not be left to the ‘free play of [market] forces,’” as explained in sections III(E) and (I) above. The primacy of constitutional communication freedoms in this welter of conflicting jurisdictions and policies has yet to be fully clarified.

d. Separation of Conduit and Content: a German Network Neutrality Problem?

In the retransmission must-carry conflicts described above, triggered by the slow dissolution of the once clear separation between conduit and content under German law, one glimpses an incipient version of the network neutrality debate in the United States. Until recently, the Germans have not had such a debate.³⁶⁴ There are several possible reasons for this. The German government has continued to have a 40% share in the underlying telephone network, even after this formerly state-owned communications

361. Basic Law, *supra* note 2, at arts. 23 (relating to cooperation with the European Union), 87(2) (relating to the privatization of telecommunications facilities). See also *id.* at art. 87(1) (leaving the Federal *Bund* responsible for insuring “universal, appropriate, and sufficient” telecommunications services).

362. 31 BVerfGE at 318, 354-55 (*Bundestreue, bundesfreundlichen Verhaltens*); TKG, *supra* note 33, § 55(10) (relating to frequency allocation in consultation with German States); Gersdorf, *supra* note 78, at 105 *passim*.

363. BERLINER KOMMENTAR, *supra* note 32, at 1196, ¶ 30 (Wegman, commenting on TKG § 52 to the effect that, pursuant to Constitutional Court rulings, telecommunications has a “serving” function *vis a vis* broadcasting).

364. Axel Witzki, *Telekommunikation am Scheideweg*, 6 FUNKSCHAU 26 (2007) (“The net neutrality theme as imported from the USA . . . has met with little interest here . . .”). A number of recent conferences in Germany, however, have explored the subject. See Archive of Conference Papers from *Chancengleichheit für Content auf Netzwerken und Plattformen?* [Equal Opportunity for Content on Networks and Platforms?], Seminar of the Hans Bredow Institut & Alcatel-Lucent Foundation, June 4, 2008, <http://www.hans-bredow-institut.de/de/veranstaltungskonferenz/chancengleichheit-fuer-content-auf-netzwerken-plattformen>; Archive of Conference Papers from *Network Neutrality, Implications for Europe*, WIK Consulting Group, Dec. 3-4, 2007, http://www.wik.org/content/nnc/program_nnc_final.htm.

monopoly was sold to *Deutsche Telekom AG*.³⁶⁵ Broadband network operators operate under a structural separation of content from conduit, and are required to provide interconnection to all other network operators.³⁶⁶ Those deemed to have market power may be further required to observe non-discrimination,³⁶⁷ transparency,³⁶⁸ and unbundling requirements.³⁶⁹ As a result, the “European fixed broadband marketplace is far more robustly and diversely competitive than that of the U.S.”³⁷⁰ Moreover, the German Telecommunications Law defines telecommunications quite broadly, theoretically extending the law’s reach to just about every form of electronic transmission imaginable: broadband and digital, as well as satellite and television transmission.³⁷¹

365. See *supra* note 35 and accompanying text. The terrestrial broadcast and cable transmission facilities that were part of that spin-off have now been sold by DTAG to wholly private entities, in some instances with majority participation by investment funds. BERLINER KOMMENTAR, *supra* note 35.

366. TKG, *supra* note 33, §§ 7, 16.

367. *Id.* § 19.

368. *Id.* § 20 (providing that a network operator found to have market power can be required to publish all information regarding technical specifications, network characteristics, user requirements, and accounting practices, so as to allow efficient interconnection and access to the operator’s network).

369. *Id.* at § 21. The Federal Network Agency (as described in *supra* note 33) enforces the non-discrimination and access provisions of the Telecommunications law (as well as laws pertaining to energy and railroad networks). *Id.* § 116. See BERLINER KOMMENTAR, *supra* note 33, at 1823-44, n.56 (opining, without further discussion, that the dangers of “regulatory capture” have been largely avoided by a cross-industry approach). Whether and how the Federal Network Agency, charged with the enforcement of this statute, has been more successful than the FCC in enforcing the unbundled-network-element (“UNE”) provisions of the 1996 Telecommunications Act is an interesting question, necessarily beyond the scope of this study, although it appears that the German authorities have been given sufficient statutory tools to accomplish their regulatory goals. See, e.g., TKG, *supra* note 33, §§ 19-20. Much of the progress they have made, however, has been given up in the “regulatory holiday” granted to DTAG. See *id.* § 3(c).

370. J. Scott Marcus, *Network Neutrality: The Roots of the Debate in the United States*, 43 INTERECONOMIES 30, 37 (2008) (adding that “European regulators already have a substantial palette of tools to apply to any problems that might emerge”). Marcus also notes that the German legal system recognizes a “complementary applicability of competition law — which is not a realistic option in the US.” *Id.* (citing *Trinko v. Bell Atlantic*, 540 U.S. 398 (2004)).

371. TKG, *supra* note 33, § 3(27) (defining “telecommunication network” as the “totality of transmission systems and, where applicable, distribution and router devices as well as other resources, which make possible the transmission of signals over cable, broadcast, optical and other electro-magnetic equipment, including satellite networks, wireline and mobile terrestrial networks, power line distribution inasmuch as it is used for signal transmission, networks for radio and television as

A second reason for optimism about the future of a neutral network in Germany may be the legacy of broadcast and information freedom which is the subject of this work. The Constitutional Court has explicitly extended these constitutional protections to the underlying network, as reflected in the provisions of the Inter-State Treaty relating to transmission and set-top boxes discussed above.³⁷²

Nevertheless, the forces set in motion by the telecommunications market "liberalization" embodied in the *Post Reform II* in 1994, as well as technological convergence, are creating tensions along the faultlines between conduit and content, telecommunications and broadcasting, and private property and public service. The "serving" function of telecommunications is placed in jeopardy, as network owners assert their rights to economically exploit frequency rights expensively purchased at auction, pitting property rights against broadcasting freedom, threatening the once privileged place of broadcasting, and public broadcasting in particular.³⁷³

Retransmission and "must-carry" issues are particular flashpoints on the front between commercial infrastructure and constitutionally protected programming content.³⁷⁴ Newly

well as cable networks, all independent of the transmitted content").

372. See Inter-State Treaty, *supra* note 25, §§ 50-53. See also *supra* Part III(I) and *supra* notes 353-55 (discussing Inter-State Treaty §§ 50-52); 90 BVerfGE at 93 (observing that both adequate financing and provision of transmission capacity are "foundational requirements for the use or exercise of broadcasting freedom" as it relates to the allocation of transmission capacity within the ambit of broadcasting freedom (citing 73 BVerfGE at 182 *passim*; 83 BVerfGE at 322)).

373. Gersdorf, *supra* note 78, at 104 (finding that plans to "throw all frequencies in one bowl" and make them available to users at market rates "means nothing other than the loss of the privileged special regulation of broadcast frequencies"); Wille, *supra* note 360, at 89 *passim*. See also Claus Grewenig, *Rechtsprobleme im Zusammenhang mit der Überarbeitung des Rechtsrahmens für die elektronische Kommunikation (TK-Review) durch die Europäische Kommission – aus Sicht des privaten Rundfunks* [Legal Problems in Connection with the Revision of the Legal Framework . . . – from Point of View of Private Broadcasters], 2 ZUM 96 (2007). Compare 12 BVerfGE at 238-40 (relating to broadcasting's priority access to transmission facilities).

374. This clash between conduit and content is described by Wolfgang Hoffmann-Riem:

Further problems of access present themselves in the wake of these technological and economic developments. Of particular interest are the presently observable attempts of infrastructure enterprises such as cable companies to exchange their old role as neutral "public carrier" for one of a multi-media business. Even *Deutsche Telekom* senses that this is a [new]

privatized cable and other telecommunications operators oppose the “serving” function assigned to technical transmission facilities by the Constitutional Court.³⁷⁵ In this environment, a new element has entered the calculus of lawmakers: the asserted contract and property rights of network owners.³⁷⁶ This sets up conflicts not only between cable owner/operators and public interest carriage requirements, but also between cable owner/operators and unaffiliated commercial program producers who hope to have their programming carried by the network on reasonable terms and

field of business. The traditional principle of German telecommunication and media law, concerning the separation of responsibility for content and for the network, seems no longer to have purchase.

Hoffmann-Riem, *supra* note 280, at 54.

375. See discussion at *supra* Parts III(I)-(J). See also Kloepper, *supra* note 301, at 18 (noting a “fundamental paradigm change, in that the economic activity of the (by now) privatized operators of transmission paths is now accompanied by the economic freedoms of the Basic Law”); Gersdorf, *supra* note 78, at 106 (observing that it is “well-established that the basic right of broadcasting freedom is a ‘serving freedom,’” and noting the growing “polarity between structures and ordering principles of telecommunications and broadcasting law”); BECK’SCHER KOMMENTAR, *supra* note 237, at 914-15 (citing must-carry litigation in *OVG Bremen*, 2000 ZUM 250, 252; *OVG Berlin*, 20 OVG 212, 215). There have also been complaints at the European Commission that German must-carry rules violate § 49 of the European Community Treaty regarding free trade, a subject that is beyond the scope of this article.

376. BECK’SCHER KOMMENTAR, *supra* note 237, at 915-16 nn.19-20 (Wille et al., commenting on § 52):

Private [cable] net operators can claim the protection of the economic rights in the Constitution (Articles 12 and 14 of the Basic Law). The legal [must-carry] rules limit the potential uses of the system by the cable operator in such a way, that the operator cannot decide which programs will be fed into and carried on the network The legislator must balance the interests of the property owner and the public interest

Article 12(1) of the Basic Law provides in relevant part that “[a]ll Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training.” Basic Law, *supra* note 2, at art. 12(1). Article 14(1) provides in relevant part that “Property and the right of inheritance shall be guaranteed.” *Id.* at art. 14(1). Article 14(2), however, provides that “Property entails obligations. Its use shall also serve the public good.” *Id.* at art. 14(2).

Some German network owners are beginning to take a page from the playbook of their U.S. counterparts, arguing their own speech rights instead of, or in addition to, their property rights. Cf. ENGEL, *supra* note 242, at 26-27 (asserting that the speech rights of cable operators had not yet been examined, and arguing that their editorial function is actualized when they make choices about which programs to retransmit). Compare *City of Los Angeles v. Preferred Comm’ns*, 476 U.S. 488, 494-95 (1986) (finding that a cable owner’s putative First Amendment rights trumped a municipality’s attempt to extract public interest undertakings).

conditions.³⁷⁷

In the wireless market, mobile telephone carriers similarly resist plans of the Independent Media Authorities to set aside certain frequencies for broadcasting content onto cell phones, plans that would allow for public (and commercial) broadcasters to reach their audiences over wireless telephone devices.³⁷⁸

The push of private network operators for vertical integration is accompanied by what some Germans refer to as a change from a "transport" to a "marketing" model.³⁷⁹ In this situation, it is not

377. Some observers report tension between cable operators and program producers, such as the ongoing negotiations of Premiere, the leading purveyor of entertainment television (largely U.S. reruns) and a provider of unaffiliated program "bouquets" to cable-network operators. Cf. Press Release, Kabel Deutschland and Premier to Continue Their Partnership 1 (May 7, 2008), *available at* http://www.kabeldeutschland.com/uploads/tx_kdginews/080507_IR_Release_Premiere_contract.pdf. According to interviews with Independent Media Authority personnel, however, cable operators in recent years have resisted this purely leased transport role and began negotiating with Premiere to take over marketing and client relationships with Premiere's customers, as well as to exert further control over Premiere's "bouquet." Interview with Personnel at Medienanstalt Hamburg & Schleswig-Holstein, in Hamburg, Germany (May 30, 2008).

The Independent Media Authorities believe that multiple, diverse program platforms are essential to the constitutional goals of diversity and equal access, and that it is therefore critical to protect unaffiliated platform operators. Section 53 of the Inter-State Treaty, which requires that the cable operator insure that the "technology deployed [on its system] makes possible a diverse offering," Inter-State Treaty, *supra* note 25, § 53, has not — in the opinion of some — been adequately enforced. Interview with Personnel at Medienanstalt Hamburg & Schleswig-Holstein, in Hamburg, Germany (May 30, 2008). Some Independent Media Authorities also have regulations that require the cable operator to carry affiliated and unaffiliated programming on equal or comparable terms. See, e.g., Indep. Media Auth. for Hamburg & Schleswig Holstein, Regulations Relating to Free Access to Digital Services Pursuant to Inter-State Treaty § 53, at ¶ 14 (authorizing IMA to require cable systems with "significant market power" to carry competing platforms), *available at* http://www.ma-hsh.de/cms/upload/downloads/Rechtsvorschriften/2.5_Zugangsfreiheit.pdf. Diversity could also be promoted by enforcement of TKG §§ 19 and 21, which apply access requirements and discrimination prohibitions to market-dominant transport systems. TKG, *supra* note 33, §§ 19, 21.

378. The Media Authorities had together proposed a pilot project for the extension of a package of public and private broadcast offerings onto mobile telephones and to set aside specific frequencies in the "L-Band" for the project. The project was challenged before the Administrative Court in Stuttgart, which rejected the challenge. Carl-Eugen Eberle, *Neue Verbreitungswege, neue Angebote – die Sicht des öffentlich-rechtlichen Rundfunks*, 6 ZUM 439, 441 (2007) (observing that large wireless phone companies, such as Vodafone, T-Mobile and O2, "were not prepared to accept the parameters of the public service broadcasters relating to the project").

379. See, e.g., Karl-Heinz Ladeur, *Rechtsproblem der Regulierung der Entgelte, der*

surprising that the Constitutional Court's focus is increasingly turned to the underlying transport as an essential predicate of broadcasting freedom.³⁸⁰ The assumption among most German jurists seems to be that constitutional mandates of broadcasting and information freedom will trump the market-approach of the TKG and the asserted property rights of network owners.³⁸¹

IV. Conclusion

This article has attempted to present some of the constitutional principles and operational realities of a broadcasting and media system different than ours in the United States. Although surrounded (almost by definition, it seems) by controversy and criticism, the German discourse illustrates how media issues are foregrounded and constitutionalized under the Basic Law. Here is a framework through which our own choices on media questions, from public broadcasting to network management, can be measured, described, and understood.

Paketbündelung und der Vertragsgestaltung im digitalen Kabelfernsehen, 1 ZUM 1, 4 (2005) (describing a "change of 'business model'" from transport [*Weiterleitung*] to marketing). See also discussion *supra* Part III(K)(3)(c) (regarding the deterioration of the historical German separation between broadcast conduit and content).

380. See, e.g., 119 BVerfGE at 216-17 (dangers to broadcasting freedom posed by the "engagement of telecommunications companies as operators of platforms for broadcast programming" and the "process of horizontal and vertical integration of media markets").

381. BERLINER KOMMENTAR, *supra* note 33, at 1149, § 48, n.10 ("Telecommunications serves broadcasting and its journalistic function; telecommunications [law] therefore has a subordinate importance."). See also Hoffmann-Riem et al., *supra* note 348, at 328 ("According to widely-held opinion, the concept that communications regulation does not limit the media-political discretion of the States has not yet firmly established itself within regulatory constructions of the Telecommunications Law. Clarity is needed in the area of frequency distribution . . . in order that the interests of the States and of the carriers of broadcast freedom be considered.").

* * *