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Introduction: To Have Or Not To Have-Must-Carry Rules

New York Law School

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How would we wish television content to be: entertaining, informative and educational – diverse, pluralistic, European and/or national – trustworthy, interesting, and topical? Attributes to describe television content that viewers like to receive are as numerous as people are different. And still we seem to share the belief that some core substance exists: content with superior relevance to viewers, a nucleus that should be available to all of us, and content that matters because it caters for public interests. But how can one guarantee that such universal content is offered to all viewers?

One way is to ensure that the complex system built around broadcasting is benevolent toward public interests. It is for this purpose, among others, that legislators look critically at media concentration fearing that the accumulation of content controlling power in the hands of a few might also endanger the possibility of receiving this very nucleus of television content. It is for the same reason that fair and non-discriminatory conditions to access media outlets are a major concern. And it is that struggle to guarantee the availability of core content that gives impulses to regulatory intervention aimed at promoting equal competition.

Must-carry rules are one string in the regulators' bow regarding their efforts to ensure that all viewers may enjoy a certain basic content package. The establishment of new distribution platforms for television content (mainly cable) seemed to call this aim into question. It was feared that without legislative intervention incoming platform operators might refuse to carry certain programs or, alternatively, might use exclusivity contracts to take certain programs away from traditional carriers. Under either scenario, the viewers' choice of platform would have become synonymous with their choice of content, and the idea of universal content would have died.

In the Universal Service Directive, the EC legislature offers must-carry rules as a tool for safeguarding some universal content. It allows Member States to award those channels offering content in furtherance of public interest goals the right to be carried on all networks. Broadcasters fulfilling public service missions are the natural beneficiaries of this rule. The US Congress, in contrast, conferred must-carry status upon all local channels irrespective of what content they broadcast. The US solution builds on the idea that preserving a wide spectrum of television broadcasters enhances the country's democratic basis and thus fosters automatically the policy goals that Europe seeks to achieve by direct promotion of specific content.

The comparison and analysis of the two different approaches and their historical backgrounds are the first crucial steps in approaching must-carry rules and possible justifications for having them. The next step consists of answering the question whether or not today's technological progress has rendered must-carry rules obsolete. This question poses a major challenge because we must deal with a rapidly developing and extremely complicated and complex market in terms of technology – in addition to this, there remain many unsolved questions of an almost philosophical nature such as how to define pluralism and public interest. However, asking whether or not we still need must-carry rules brings up also more practical issues such as the potential of must-carry obligations for distorting competition, compatibility and interoperability of networks and services, the role of access regulation and must-offer obligations, the availability of content, sector specific versus horizontal regulation, etc. Finally, in a third step we need to reflect on how to design must-carry rules, if we ought still to have them.

All three steps were taken at the occasion of a workshop jointly organized by the European Audiovisual Observatory and the Institute for Information Law (IViR) of the University of Amsterdam on April 9, 2005. This publication results from this workshop. It owes its existence to the excellent discussion among the participants chaired by Nico van Eijk and summarized by himself and Sabina Gorini. It reflects the commitment and expertise of Thomas Roukens, Rob Frieden, and Peggy Valcke who, for this publication, put their oral workshop presentations onto paper. Sabina Gorini and Mara Rossini supplied the Glossary to facilitate the reading. Mara Rossini, on behalf of IViR, edited the original English versions of the texts.

The original work was published in 2005 in the IRIS Special-series of the European Audiovisual Observatory. It is thanks to the Media Law & Policy student staff members working under the supervision of Professor Michael Botein that the piece has now been turned into the third joint annual publication with the Media Center at New York Law School. As before, this cooperation has been a mutually fruitful activity.

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