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Contested Sovereignties: States, Media Platforms, Peoples, and the Regulation of Media Content and Big Data in the Networked Society

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Abstract: This article examines the legal and normative foundations of media content regulation in the borderless networked society. We explore the extent to which internet undertakings should be subject to state regulation, in light of Canada's ongoing debates and legislative reform. We bring a cross-disciplinary perspective (from the subject fields of law; communications studies, in particular McLuhan's now classic probes; international relations; and technology studies) to enable both policy and language analysis. We apply the concept of sovereignty to states (national cultural and digital sovereignty), media platforms (transnational sovereignty), and citizens (autonomy and personal data sovereignty) to examine the competing dynamics and interests that need to be considered and mediated. While there is growing awareness of the tensions between state and transnational media platform powers, the relationship between media content regulation and the collection of viewers' personal data is relatively less explored. We analyse how future media content regulation needs to fully account for personal data extraction practices by transnational platforms and other media content undertakings. We posit national cultural sovereignty—a constant unfinished process and framework connecting the local to the global—as the enduring force and justification of media content regulation in Canada. The exercise of state sovereignty may be applied not so much to secure strict territorial borders and centralized power over citizens but to act as a mediating power to promote and protect citizens' individual and collective interests, locally and globally.

Keywords: media content regulation; sovereignty; transnational digital platforms; broadcasting regulation; McLuhan; Canada; personal data; privacy; technological neutrality; net neutrality; discoverability

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1. Introduction

Canada, like other countries, faces regulatory challenges posed by an increasingly networked environment in which everything is connected and in which power increasingly resides in global corporate agencies and online platforms. Legislative reform is underway in response to such globalized platforms and how they affect communications and broadcasting within our borders. A recent government-commissioned report speaks of upholding core values associated with national sovereignty and citizen rights: supporting our democratic values that allow for both inclusivity and diversity, realizing the promise of advanced technologies to benefit Canada's economy, and building a culture that embraces a connected life for all citizens, in a trusted and equitable environment.[1]

Yet, the question of revising and implementing an effective regulatory framework in the new environment remains open. Issues of state sovereignty are now intertwined with issues of personal data and subject sovereignty, whereby the consumer and communicative choices of citizens—"behavioral surplus" associated with content viewing and social media habits—are constantly tracked. Various corporate apps and options fight for the attention of users, and seek to influence and dictate their choices through a highly diversified range of content offerings dominated by global platform operators. Citizens used to this free-market range and often oblivious to the traps of surveillance and data capture are poised to resent government interventions, and certainly platform operators protest against any regulatory moves on the part of governments as protectionist impositions.

Another challenge to revising communications law and policy is that borders between different legal regimes that have traditionally operated in relatively distinct spheres (i.e., telecommunications, broadcasting, competition, privacy, consumer protection) are quickly dissolving. These regimes are being called to the task of addressing the multi-layered and interrelated challenges of the networked society. Yet, in a climate of technological acceleration, new policies meant to respond to current conditions and challenges might no sooner be passed than outmoded.

This article investigates the normative and legal foundations upon which states, transnational media platforms, and citizens can or should assert their power or autonomy, or require protection, with respect to media content. We resort to the concept of sovereignty as an organizing principle, to help identify the source of legitimacy of various actors' powers and interests and their competing dynamics, locally and globally.

From a Canadian perspective, what powers and levers does the state have in the borderless networked society? What role should it (not) play to ensure its citizens access

[1] (Government of Canada 2020a), at 10 (Report issued pursuant to a Broadcasting and Telecommunications Legislative Review undertaken in 2018) [Communications Future Report].

to quality, diverse, representative news, cultural, and other content, that reflects and connects them locally and globally? Rather than providing a detailed prescription, our goal is to propose a framework of reference to navigate and mediate between competing sovereignties.

We ask how media and communications studies—in particular McLuhan's now classic probes, that raise questions about the locus and ends of media influence and control—may help in reframing the regulatory challenges of media content regulation in Canada. In particular, we are interested in his insights about the space in which state regulation is justified and should be (re)claimed, and his speculations about how policy should be less an agency of governance than a tool to promote citizens' interests. Despite his caution-inducing predictions about the dissolution of *boundaried* space, nation-based governance and localized legal authority, he reckons the need for oversight. Can codes and policy be generated to mobilize regulatory practices in the spirit of responding to regional needs, and in the letter of expressing humanist interests in a way that is flexible and adaptive? How can McLuhan and other communication theories provide insights about the interrelation between state, transnational digital platforms, and personal (data) sovereignty? About privacy, public and private spheres of interest?

By *media content*, we refer to curated or commissioned audio, audiovisual content that is intended to inform, enlighten or entertain, and that is made available to the public by means of telecommunication. This essentially refers to *programs* under traditional broadcasting legislation made available through technologically neutral means.[2] While some of the analysis provided in this article may find application to alphanumeric news and user-generated content, they are not the primary focus here and as such are not included in our reference to *media content*.[3] Unless specifically stated otherwise, we refer to *regulation* as state regulation, understanding that there exist other forms of non-state, private sector, international regulation, as well as non-written forms of rules and procedures such as software code and protocols that effectively act as regulation.[4]

We bring a cross-disciplinary perspective (from the subject fields of law, communications, international relations, and technology studies) to enable both policy and language analysis. Our methodological approach is mixed. We rely on rhetorical and discursive analysis, as well as legal doctrinal analysis, to examine current laws, policy and academic debates. We focus on regulatory questions in a Canadian context, understanding that there are similar struggles taking place in other nations as well as mounting pressures for unified transnational action to counter platform hegemony.

While there is growing awareness of the tensions between state and transnational media platform powers, the relationship between media content regulation and the collection of viewers' personal data is relatively less explored. One main thesis of this article is that any future media content regulation needs to fully account for the impact of personal data collection practices by digital media content platforms. We contend that national cultural sovereignty is an enduring justification of media content regulation in Canada, the exercise of state power being subject to technological neutrality, territorial application of laws, and human rights. Succumbing to the rhetoric of the *free internet*, and to the *inevitability* of transnational digital platforms' political, economic, and network forces, may harm more than serve citizens' and states' interests. We posit national cultural sovereignty, connecting the local to the global, as a constant unfinished process and framework, to nurture and protect democratic institutions and cultural expression in a way that reflects Canadian identity, shared values in their uniqueness and plurality, and that respects individual rights

[2] See *Broadcasting Act*, S.C. 1991, c. 11, s. 2(1) "program". See also Communications Future Report, *supra* note 1 at 122 (recommending modifications to the *Broadcasting Act* definition of program to make it more technologically neutral and to include alphanumeric news (while subjecting the latter to different regulatory regime)).

[3] See below Section 4.3 "Personal (Data) Sovereignty", briefly situating user-generated content within media content regulation debates.

[4] (Hamilton and Robinson 2019) at 16 (defining regulation as "established rules and procedures applied by governments and other political and administrative authorities to all kinds of expressive activities" citing Denis McQuail, Media Regulation (University of Leicester, Department of Media and Communication, Leicester, UK, 2010) at para. 1. online: https://www2.le.ac.uk/projects/oer/oers/media-and-communication/oers/ms7501/mod2unit11/mod2unit11cg.pdf (accessed on 3 June 2021).

and freedoms. Moreover, traditional notions of statehood and territory need to adjust to the reality of new connectivities and interdependence.

2. The Networked Society

Throughout this article, we situate the ongoing challenges of media content regulation within the context of the *networked society*, arguing that successful regulation to localize the space to occupy within it depends on understanding its main characteristics and effects. There is no shortage of attributes to describe the *networked society*: invisible, ubiquitous, "always on", ecosystem connecting the physical brick and mortar world to virtual networks of data, unprecedented extraction and processing of (personal) data through powerful algorithms, *borderlessness*, the prevalence of private ordering and non-negotiated standard terms and conditions imposed by firms on consumers. This space has enabled the rise of powerful transnational digital (media) platforms,[5] where from an individual perspective, the lines between private and public, the commercial and the citizenry are increasingly blurred, porous, and exposed, empowering consumers with new opportunities, while at the same time making them increasingly vulnerable.

Zuboff describes the networked society as follows: "The everywhere, always-on instrumentation, datafication, connection, communication, computation of all things, animate and inanimate, and all processes, natural, human, physiological, chemical, machine, administrative, vehicular, financial. Real world activity is continuously rendered from phones, cars, streets, homes, shops, bodies, trees, buildings, airports, and cities back to the digital realm, where it finds new life as data ready for transformation into predictions [. . .]".[6] Zuboff's description of the networked society closely replicates McLuhan's presentation of the world as a global village. In these connected environments, it is as if space has imploded, with our "world contracted to village size".[7] We no longer live as private individuals, but have access to others and information at an "everything-all-at- once" speed. In our "here comes everybody" parade, we no longer discriminate between experts and others because everyone is connected and a positive or liberatory outcome is our feeling empowered by having access to information and information sharing.[8] Responding to the principle of instant connectivity, our social habits, along with organizational patterns, change to form "the new world of the global village"—one without former firm borders in place and without reassuring centre-margins structure; we are "suddenly experiencing an instantaneous reassembling of all . . . mechanized bits into an organized whole".[9] Such accelerating technological developments transform the Earth into a human-made environment, and while there are advantages to such innovations—perhaps most evident in areas like knowledge sharing, leisure and health—the cost is that humans must protect vitality and creativity by controlling what they unleashed.

3. Canadian Media Content Regulation Space

The regulatory space that Canada occupies with respect to media content is as revealing as the sovereignty it has refrained from exercising in recent decades. This section surveys how media content is regulated in Canada, its origins, and how the internet space has been largely left unregulated, increasingly leading to a two-tier system. It also presents the current silos of regulation and queries the extent to which they are still justified in the present media space.

Historically, the underlying premises and objectives of Canadian media content regulation have been to preserve and promote national cultural sovereignty, such as through the protection of Canadian content against US powerful industries, and to distinguish Canada

[5] See discussion below in Section 4.2 "Transnational Digital Platform Sovereignty".
[6] (Zuboff 2019, p. 202).
[7] (McLuhan [1964] 2003, p. 395), [*Understanding Media*].
[8] (McLuhan and Fiore 1968, p. 23).
[9] *Understanding Media*, *supra* note 7 at 130.

from Europe.[10] The new *Broadcasting Act* and the creation of the Canadian Radio-Television Commission (CRTC) in 1968 conferred extensive regulatory powers, with the last major revisions to the Act having taken place in 1991. Media content regulation in Canada has often been referred to as the "grand bargain" between the broadcasting industry and federal government. In exchange for protecting the Canadian broadcasting system from foreign competition through a requirement of Canadian ownership and control, the *Broadcasting Act* sets out minimum Canadian content requirements and standards, and funding obligations for the creation of Canadian content. These have been an integral part of Canadian cultural policy serving the needs, aspirations, and interests of Canadians.[11] The public broadcaster CBC/SRC has been a pillar in implementing Canada's media content policy.[12]

The main laws governing communications in Canada are the *Broadcasting Act*,[13] *Telecommunications Act*,[14] and *Radiocommunication Act*.[15] The CRTC[16] and Innovation, Science and Economic Development Canada (ISED) are conferred various powers including the implementation of policy objectives set under those acts.[17] The *Broadcasting Act* regulates audio and audiovisual content transmitted in Canada, the *Telecommunications Act* governs all other communications including activities related to the operation of physical communications networks, while the *Radiocommunication Act* governs the allocation of radio or spectrum licences, and other communication-related technical aspects.[18] In addition, the personal data protection regime (*Personal Information Protection and Electronic Documents Act* (*PIPEDA*) and other applicable laws)[19] is increasingly relevant to the regulation of media content, given the intensification of collection of personal data as viewers engage with media content online.

The legal silos created by the laws governing communications in Canada are increasingly porous and intertwined. *Media convergence* coupled with the intensification of personal data collection are leading to a *legal regimes' convergence*.[20] Internet broadcasters (e.g., Netflix), as well as traditional public and private broadcasters (CBC/SRC, e.g., CTV), increasingly transmit their media content through services regulated by the *Telecommunications Act*. The consumption of media content via online platforms, or through traditional over-the-air broadcasting with online connections, enables the tracking and collection of a broad range of viewers' personal data. While recent communications policy reports and commentators acknowledge these *legal regimes' convergence*,[21] ongoing

[10] (Charland 1986, p. 206; Golick and Speer 2019), at 7 ("A combination of the rise of Canadian nationalism in and around the centenary in 1967, attendant concerns about the dominance of American culture and popular opposition to the Vietnam War, and the cultural and political influences of the Quiet Revolution in Quebec contributed to a growing emphasis on "cultural sovereignty" and the "development of Canadian expression" [. . .] These sentiments shaped [. . .] Canadian content (CanCon) requirements in conjunction with the establishment of the CRTC"); (Grant 2018), (summarizing the four key features of Canadian Broadcasting System, i.e., (i) Canadian ownership and control (ii) that the system should safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; (iii) creation and presentation of Canadian programming (iv) the importance of the role of CBC).

[11] Golick and Speer, *supra* note 10 at 7.

[12] Grant, *supra* note 10.

[13] *Supra* note 2.

[14] S.C. 1993, c. 38.

[15] R.S.C., 1985, c. R-2.

[16] Established under the *Canadian Radio-television and Telecommunications* Commission Act, R.S.C., 1985, c. C-22.

[17] The CRTC has various powers under the *Telecommunications Act*, *supra* note 14 and *Broadcasting Act*, *supra* note 2; the *Radiocommunication Act*, *supra* note 15, confers powers to the Minister of Industry.

[18] For a detailed analysis of the communication regulatory framework of broadcasting and telecommunications in Canada, see (Bannerman 2020, pp. 159–214); see also Communications Future Report, *supra* note 1 at 39–41.

[19] S.C. 2000, c. 5, s. s. 2(1) "federal work, undertaking or business" (the Act applies to private sector radio broadcasting and telecommunications companies); other privacy laws applying to the private sector include laws in provinces with general private-sector laws that have been deemed substantially similar to *PIPEDA*, i.e., Alberta, British Columbia, Quebec: see Office of the Privacy Commissioner of Canada, "Summary of Privacy Laws in Canada" (31 January 2018), online OPIC <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/> (accessed on 3 June 2021); *Privacy Act*, R.S.C., 1985, c. P-21, *s. 3* "government institution" (the Act applies to crown corporations including public broadcaster CBC/SRC); *Telecommunications Act*, *supra*, note 14, s. 7 (i) (policy objectives include "the protection of the privacy of persons").

[20] Bannerman, *supra* note 18 at 164 (tracing back increased media convergence to the nineties).

[21] See, e.g., Communications Future Report, *supra* note 1 at 63–64 (while report generally acknowledges legal regimes convergence, one of recommendation is to keep telecommunications and broadcasting regulation distinct). See also (Flew 2016, p. 78) (on how traditional assumptions about media regulation are increasingly challenged in a digitized online environment).

Canadian legislative developments lean toward maintaining the distinction between the regulation of broadcasting (programming, media content) and communications (conduit to personal communications and media content), with some recognition of their connection to issues of personal data protection. Communication networks and media content raise distinct issues that have traditionally given rise to separate regulatory frameworks, liability regimes and policy goals, such as net neutrality applying primarily to communication network providers.[22] At the same time, we cannot lose sight of the additional challenges that the *legal regimes' convergence* brings to the regulation of communications in Canada and worldwide. Additionally, while the primary focus of this article is on media content regulation traditionally associated with broadcasting regulation, our discussion on competing national, transnational platform, and personal (data) sovereignties exposes the limits of our siloed communications regulation even further.

The CRTC regulates the transmission of programs[23] through over-the-air, satellite, and cable television and radio. Radio and television stations transmitting signals over the air or by other means (e.g., CBC/Radio Canada, CTV), cable companies and satellite distributors retransmitting programs received from another source (e.g., Rogers)[24] and companies that sell programs to, e.g., broadcasters (such as pay TV, specialty channels)[25] require a licence to operate (with some exceptions),[26] and must comply with a variety of obligations and content standards. They include, at varying degrees, the obligation to provide minimum thresholds of Canadian content,[27] to contribute to the creation of Canadian content,[28] to provide accessible content (such as through close captioning), to respect standards against offensive materials, guidelines during elections,[29] and to provide accurate news.[30] The Act mandates that the *Canadian broadcasting system*,[31] a mix of national public broadcaster (CBC—SRC), privately-owned entities, and community-based organizations, be effectively owned and controlled by Canadians.[32]

The *Broadcasting Act* states an elaborate list of policy objectives, some mandatory (e.g., with respect to the prevalence of Canadian content, and about content reflecting the English-French linguistic duality), and some directional, to guide the CRTC in implementing the Act to the Canadian broadcasting system, as a *single* system.[33] Among those goals, the Canadian broadcasting system needs to be adaptable to technological change,[34] a concept akin to the principle of technological neutrality guiding the construction and interpretation of statutory instruments.[35] The Act justifies Canadian assertion of sovereignty over the broadcast system via its operation through radio frequencies as public property, and as a service that is essential to *national identity* and *cultural sovereignty*.[36] Several policy objectives are still highly relevant to ongoing debates in media content regulation (e.g., to ensure adequate levels of regional content, high-quality standards for news, diversity of views) while others need important updating (e.g., treatment of indigenous peoples' productions

[22] See discussion below Section 4.3.2 "Personalization of Media Content and Net Neutrality".

[23] *Broadcasting Act*, *supra* note 2, s. 2(1) ("program", i.e., "sounds or visual images, or a combination [thereof] that are intended to inform, enlighten or entertain," with some exclusions such as content which "does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text").

[24] Ibid., s. 2(1) "Distribution Undertaking" (referred to as "Broadcast distribution undertakings or BDUs).

[25] *Broadcasting Act*, *supra* note 2, s. 2(1) "Programming Undertaking".

[26] Internet and mobile broadcasters do not require a licence: see discussion below in this part.

[27] This requirement also applies to cable and direct to home distribution undertakings: (CRTC 2019b), (listing mandatary Canadian stations that must be offered by distribution undertakings under their basic services); Broadcasting Distribution Regulations (SOR/97-555), ss. 17–19.

[28] Including through funding to the Canada Media fund. See (CRTC 2016), (on the Policy framework for Certified Independent Production Funds).

[29] (CRTC 2018).

[30] See (CRTC 2019c), (providing an overview of CRTC content standards and requirements policy).

[31] *Broadcasting* Act, *supra* note 2 ("Canadian broadcasting system" is frequently referred to in the act; the expression is not defined).

[32] Ibid., s. 3 (1) (a).

[33] Ibid., s. 3(1), 3(2).

[34] Ibid., s. 3(1) (d) (iv).

[35] See discussion below in Section 4.1.1 "The Principle of Technological Neutrality".

[36] *Broadcasting Act*, *supra* note 2, s. 3 (1) (b).

and media content, and obligations with respect to people with disabilities).[37] The Act modulates levels of responsibility among the various broadcast players in the Canadian ecosystem, the public broadcaster sharing the bulk of responsibility in the implementation of the act's policy objectives, distribution undertakings (e.g., cable companies) and private networks being assigned others. Among broadcast players, internet audio and video programming entities (e.g., Netflix and Apple TV) have been conspicuously absent from this shared responsibility.

In recent decades, the CRTC has declined on a number of occasions to regulate internet audio and video program undertakings, while, technically, such activity falls within the definition of broadcasting under the *Broadcasting Act*.[38] First in 1999, through exemption order, inter alia on the basis that the internet was not viewed a significant threat to Canadian broadcasters, and that there was sufficient Canadian content on the internet, no regulation was required to encourage more creation and access.[39] A decade later, the CRTC declined to impose minimum content requirements for internet broadcasters, on the request of the Society of Composers, Authors and Music Publishers of Canada (SOCAN), a copyright collective society acting on behalf of music creators, publishers and visual artists.[40] Furthermore, the CRTC did not see the need to lift the exemption order granted in 1999 nor to adopt "specific measures for the visibility and promotion of Canadian content in new media".[41] Following a reference by the CRTC to the Federal Court of Appeal, the Supreme Court later confirmed that internet Service Providers (ISPs) are not broadcasting undertakings under the *Broadcasting Act* when they merely provide the mode of transmission, exempting them as such from regulation under the Act.[42]

Meanwhile, the number of internet video subscriptions in Canada is steadily growing from 14.1M in 2016 to an estimated 21.9M in 2023.[43] In 2018, the revenue generated from internet video services was $4.3B, compared to $6.627B from the traditional television sector, of which $2.6B was generated from private and public broadcaster (CBC/SRC) traditional stations.[44]

Forbearance from regulating internet audio and video services has led to a two-tier media content space in Canada.[45] On the one hand, internet audio and video undertakings do not have to comply with content requirements—such as minimum levels of Canadian content, linguistic duality, close captioning and other accessibility requirements, quality standards for news reporting—nor do they have to contribute to the Canadian media fund. At the same time, all other broadcasting undertakings need, in varying degrees, to comply with these requirements in pursuance of the policy objectives under the *Broadcasting Act*. Additionally, while technically, the Act's objectives do not include sustaining one particular industry or business model, this two-tiered system places the burden of Canada's

[37] See Communications Future Report, *supra* note 1 at 127–28 (recommending important changes to *Broadcasting Act*, s. 3 policy goals to more adequately reflect Indigenous peoples needs and demands with respect to Indigenous media content, and also to improve accessibility of media content for peoples with disabilities). Bill C-10, *infra* note47, if adopted, would amend the *Broadcasting Act* ss. 3 (1) (d) (iii), (o) to (s), 5(2), and add s. 9.1(i) to that effect.

[38] New Media Broadcasting Exemption Order, *infra* note 39, "Summary"; Review of Broadcasting in New Media, *infra* note 41 at para. 27.

[39] CRTC, "Public Notice CRTC 1999-197: Exemption Order for New Media Broadcasting Undertakings," Orders (17 December 1999) Government of Canada, online: https://crtc.gc.ca/eng/archive/1999/PB99-197.htm (accessed on 3 June 2021). [New Media Broadcasting Exemption Order]; see also Bannerman, *supra* note 18 at 230–33.

[40] Bannerman, supra note 18 at 231 (citing: Society of Canadian Authors and Composers (SOCAN), "C. Paul Spurgeon, Vice-President Legal Services and General Counsel, SOCAN to Robert A. Morin, Secretary General, CRTC, 10 July 2008," https://services.crtc.gc.ca/Pub/ListeInterventionList/Documents.aspx?ID=72066&en=pb2008-44&dt=c&Lang=e, accessed on 13 May 2016).

[41] (CRTC 2009, paras. 23–24, 48), [Review of Broadcasting in New Media].

[42] CRTC, "Reference to the Federal Court of Appeal—Applicability of the Broadcasting Act to Internet service providers", Broadcasting Order CRTC 2009-452 (28 July 2009) Government of Canada, online https://crtc.gc.ca/eng/archive/2009/2009-452.htm (accessed on 3 June 2021); *Canadian Radio-television and Telecommunications Commission (Re)*, 2010 FCA 178; *Reference Re: Broadcasting Act*, 2012 SCC 4 at para. 5 (confirming decision by the Federal Court of Appeal).

[43] (CRTC 2019a), (services from 2016 to 2019 include Netflix, Prime Video, Crave, Disney, Club Illico).

[44] Ibid.

[45] Golick and Speer, *supra* note 10 at 16 (citing scholars, policy report, ministry declarations pointing toward the need to bring important changes to the broadcasting system).

broadcasting policy objectives on the non-internet-based undertakings, while some of the overall broadcasting revenues are being diverted to internet-based undertakings.[46]

This differential treatment between internet and non-internet-based undertakings is increasingly under pressure given that overtime, technological advances improving internet speed of transmission, access, and sophisticated targeted online content programming, have brought the internet and non-internet broadcasting spheres closer together. Legislative reform seeking to address this gap is underway.[47] Among others, regulatory forbearance with respect to internet broadcasting calls into question the principle of technological neutrality, which we explore further below.[48]

In sum, the *Broadcasting Act* and the CRTC's main role and objectives have been to steer the curating and commissioning of media content in accordance with stated legal requirements and policy goals, which, in recent decades, have not applied to internet undertakings. The regulation of the Canadian broadcasting system has given rise to intense debate, legislative review and proposed reform. We will now examine current media content regulatory challenges, in particular the forbearance to regulate internet broadcasting undertakings, through the lens of sovereignty. This organizing principle helps identify the source of the legitimacy of various subjects and actors' powers and interests, locally and globally.

4. The Competing Dynamics of Sovereignty

Sovereignty is a principle of international law generally associated with a state's absolute power over its territory and its peoples, as well as mutual recognition of such powers among states in the international order.[49] Under a modern conception of sovereignty, the power of the state stems from its peoples. Therefore, sovereign subjects in international law are the peoples within states and no longer states alone.[50] Likewise, sovereignty is exercised and constrained by the peoples through the international and national legal orders.[51] As a corollary, international democratic standards can support the emergence of new sovereign states, through the right to self-determination.[52] As such, state sovereignty "cannot be dissociated from the protection of the political equality and human rights of the individuals constituting that State, and cannot per se be regarded as incompatible with the values it is meant to help pursue," which at times gives rise to contradictions arising from the co-existence of individual and collective autonomy.[53]

Sovereignty, as the measure of permissible exercise of power, is highly politicized and its contours are therefore contested.[54] As pointed out by Besson, the concept of sovereignty, epistemically and normatively endures and has remained not in spite of, but because of its controversial nature.[55] Several legal principles flow from the concept of sovereignty, including to determine the territorial application and scope of laws.[56] Additionally, while there may not be a uniform definition of sovereignty, the concept implies a critical mass of

[46] Ibid.

[47] Bill C-10: *An Act to amend the Broadcasting Act and to make consequential amendments to other Acts*, 2d Sess, 43rd Parl, 2020 (third reading 21 June 2021) [Bill C-10] (adding "online undertaking" to "broadcast undertaking", amending ss 3(1) (f) to (h) and (o) to (s) with various obligations regarding contribution to creation and discoverability of Canadian content; as of the submission date of this article, Bill C-10 was still under review and debate).

[48] See discussion in Section 4.1.1 below "The Principle of Technological Neutrality".

[49] (Besson 2011, para. 13), (the origins of the modern conception of sovereignty goes back to the Treaty of Westphalia in 1648 which recognized state power over their territory as well as the principle of non-intervention between states); (Troper 2012, p. 354), see also (Woods 2018, pp. 328, 360).

[50] Besson, *supra* note 49 at para 143.

[51] Ibid. at para 143.

[52] Ibid.

[53] Ibid. at para 133, 36 (pointing to a "two-pillar construction of the international legal order that protects democratic autonomy through sovereignty, on the one hand, and individual autonomy through human rights, on the other").

[54] Troper, *supra* note 49 at 350–54 (on various scholarly debates around sovereignty and on how concept is used in constitutions and in legislative instruments).

[55] Besson, *supra* note 49 at para 4.

[56] See below Section 4.1.2 "Territorial Jurisdiction Constraints and Precedents".

competence, power, and ultimately legitimacy to act over a range of matters.[57] Sovereignty is dynamic and in flux. As with other powers, it is exercised or waived in varying degrees, eventually leading to greater or diminished political autonomy.

Of course, it is the de-territorialized immaterial nature of cyberspace that resists the seamless application of this traditional conception of sovereignty—devised, after all, to refer to bounded places. From this perspective, McLuhan may have been apt in addressing global flow and lack of borders as the major change and challenge of digital culture. He often applied the phrase "without walls" as a visual image to help us see the radical openness associated with connectivity; without sense of privacy or individuality—the hallmark of modernist identity—we are in the process of cultivating a sense of attachment to others and groups, bounded in affiliations less by locale than by common interests.[58] This move from any sense of being rooted in place and autonomous or independent could mean, he argued, an end to nations and the practice of national politics as we know them. It might lead to an expanded sense of identity—stepping in to cosmic consciousness—yet if mismanaged or undermanaged, it could lead equally to dissension and division. To echo a title work, there were possibilities for "war and peace in the global village"[59]—the latter if we had a shared or overarching commons.

Contrary to popular view, cyberspace is not a global commons, as can be said of the atmosphere or the ocean.[60] As one international relations scholar notes: "Paradoxically, although cyberspace seems borderless, it is actually bounded by the physical infrastructures that facilitate the transfer of data and information. Such infrastructures are mostly owned by the private sector and are located in the sovereign territory of states. Therefore, it would be more precise to argue that cyberspace comprises a global common infrastructure, but is not a global commons."[61] Another international scholar, casts virtual space as not entirely new or unknown, but resembling such spaces we have known and successfully navigated in the form of the "*tele*gram, the *tele*vision and *tele*communications."[62] Advising states to act, and to resume models they have mobilized for other electronic communications media, this commentator suggests that while sovereignty and state authority is "changed" it is "not erased."[63] This argument is linked to the internet imagined as layered space, particularly as given in Benjamin Bratton's *The Stack*, with six-layers, one of which is inhabited by users. Bratton invites us to understand digital space as structure and infrastructure—as having materiality—as something we not only engage but enter. Even if it offers "new spaces" that mix material with immateriality, it is potentially manageable.[64] Bratton says sovereign authority can emanate from within this new space—which again suggests that the internet can be conceptualized as having a form into which we have already integrated.

Media content creation and dissemination act both as a fuel and threat to democratic institutions. Likewise, the imposition of constraints through state regulation can both nurture and hamper meaningful, diverse, and representative expression. As we saw earlier, the extent to which national media content regulation should apply to internet broadcasting undertakings continues to be a highly contentious issue in Canada.[65] Approaching regulation through sovereignty requires understanding not only of the immaterial nature of cyber space but also the multiple claims of many stakeholders—increasingly, the corporate grip and network effects of powerful platform actors.[66]

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57 Besson *supra* note 49 at para. 77.
58 See, e.g., *Understanding Media*, *supra* note 7 at 176, 255.
59 *Supra* note 8.
60 (Liaropoulos 2016, p. 16), (citing the work of David J.Betz and Tim Stevens).
61 Ibid. at 16 (citing the work of Paul Cornish).
62 (Mainwaring 2020), at 7 (referring to the work of Mark Lemley, and of Stephen Graham).
63 Ibid. at 7.
64 (Bratton 2016, p. 52).
65 *Supra* note 38–46.
66 See generally Liaropoulos, *supra* note 60 (on the multi-stakeholderism involved in cyberspace governance).

At the international level, scholars observe that there is an East–West divide on the exercise of state sovereignty in cyberspace. We think of China as favoring national control (to maximize state power), as opposed to North American strategies that favor a wider coalition, one including business interests. As one international relations scholar summarizes, China emphasizes "the sovereign rights of states in cyber-space" to discourage global governance which they see as "still dominated by Western countries particularly the United States, in terms of Internet resources, technology standards, international norms, and ideological discourse".[67] Other scholars note the friction between competing visions of cyber governance—a cosmopolitan view favoring a free internet (open to corporate incursions) "that aspires to one set of rules everywhere" and, "diametrically opposed," a more nationalistic approach "a sovereign-difference ideal that sees the Internet operating differently in different places according to local norms, customs, and rules".[68]

The appeal of sovereignty, as an organizing principle, lies in mapping out the exercise of state power through its peoples, both domestically and as generally recognized in the international order. It embeds the duality and contradictions between political and individual autonomy. We now turn to how sovereignty is claimed, exercised, or recognized by states, transnational media platforms, and individuals with respect to media content.

4.1. National Sovereignty

This part examines the space in which Canada exercises its sovereignty on media content (or has refrained from doing so) through the lens of technological neutrality, territorial jurisdiction constraints and precedents, and revisits the main justifications of media content regulation in light of various external and internal pressures, including with respect to data or digital sovereignty. In this realm, *national sovereignty* refers to the exercise of power through state regulation, and *national cultural sovereignty* to a main justification for such exercise, and overall objective of Canadian regulation of media content.[69] The purpose here is not to argue how media content regulation may or should further national cultural sovereignty. Rather, we examine the parameters within which Canada may exercise national sovereignty in the current media space.

State attempts to regulate media content are bound to be controversial. Support for ensuring access to quality content that informs, entertains, and exposes viewers to a diversity of opinions and perspectives is intertwined with fears of censorship and control to serve powerful state and other interests. The controversies around national cultural sovereignty as a Canadian objective of media content regulation, and on how it should be implemented are not new. There are longstanding internal political pressures, from Indigenous peoples and the Québec francophone population, that call in question the legitimacy of the Canadian government to make decisions about funding, programming and content that concern their culture.[70] Broader debates include whether national cultural sovereignty should promote a strong local broadcasting industry or support local creators and producers[71]; or whether we should let media content to market forces, or promote identified values and objectives, Canadian creations, and content through regulation; and the particular focus of this part, the extent to which we may regulate internet broadcasting to the same extent as traditional forms of over-the-air broadcasting outlet.

The current media space does not alleviate the tensions around the justifications for state regulation. Globalization, the rising power of transnational media platforms,

[67] (Cuihong 2018, p. 648).

[68] Woods, *supra* note 49 at 367.

[69] *Supra* note 33–36.

[70] Bannerman, *supra* note 18 at 195, 207 (on how at the time of the entry into force of Canada's first Broadcasting Act in 1932, associations based in Québec were suspicious and disliked that the federal government affirm its power in Canadian broadcasting; and on how Indigenous peoples' claims of sovereignty regarding the broadcasting spectrum are founded on section 35 of the Constitution Act, 1982, however have not yet been formally recognized in Canada, unlike other jurisdictions, and on how following the Truth and Reconciliation Commission Report (2015) questions are discussed on how broadcasting law and policy can further the objective of reconciliation).

[71] Golick and Speer, *supra* note 10 at 7 (on how Canada's broadcasting law and policy has traditionally been focusing on protecting local broadcasters and a local market, and how it needs to shift toward supporting Canadian creators and producers on global markets).

neoliberalist ideals engendering a priori suspicion of state regulation, and more generally the networked society, which knows no boundaries, all clash with the idea of national jurisdiction exercise of power.[72] At the same time, this current media space is giving rise to a growing support for some form of state regulation and intervention. In a post-truth, fake news, networked society era, there is a recognition that while media content can be a key engine of modern democracies, it can also be a weapon undermining their institutions and existence.

State sovereignty referring to the flexible exercise of state power on behalf of the people is a concept that can be helpful in allaying populist resistance to the exertion of any state power to media content. Central to Maurice Charland's now-classic critique of Canadian broadcast policies as "Technological Nationalism" is the assumption that the Canadian government has used technologies such as a national railroad and broadcast system to "foster empire", with the aim of building a sense of unified nationhood under the centralizing power of the Ottawa capital—integrating the west "into the economic and political systems which had developed in eastern Canada".[73] In recommending that Canada reinvigorate regulatory policy frameworks already in place, we are acknowledging Canada's history of space binding through government mandated technological projects, but calling for a form of rejuvenation that is less attached to the goal of consolidating state power than it is to fostering local and independent citizen projects. Certainly, McLuhan was a strong advocate for citizen involvement in technological developments, describing public participation as an energizing agency positioning us "to anticipate events hopefully, rather than to participate in them fatalistically".[74] More recently and specifically Hackett ascribes critical value to involvement in the form of "audience resistance," so that audiences do not simply accept packaged content but act as participatory stakeholders and seek out and contribute to sources whose value they determine.[75] If we call on government to develop and implement flexible policies to regulate digital content and distribution, there is new urgency in the user-interactive digital environment to ensure public involvement.

We now turn to the principle of technological neutrality and the extent to which it may provide a useful framework of reference to navigate through Canada's ongoing media content regulation dilemma including the extent to which it should regulate internet media undertakings.

4.1.1. The Principle of Technological Neutrality

Technological neutrality is a principle according to which laws should be drafted and interpreted independently of any form of technology, ensuring their *pérennité* (longevity) and adaptability, as new forms of technology continue to emerge and evolve.[76] The principle is embedded in legislation,[77] legislative reform objectives and has been applied by the Supreme Court of Canada to the *Copyright Act*.[78] Technological neutrality guides

[72] Hamilton and Robinson, *supra* note 4 at 22; Flew, *supra* note 21 at 75–76, (pointing to five main challenges to state regulation of media content: decline of nation-state power, neo-liberalism, the internet as global network, global media enhancing consumer choice and removal of previous media scarcity as justification for state regulation, and shift of regulatory influence to non-state actors, media platforms, non-governmental organizations and various advocacy groups).

[73] Charland, *supra* note 10 at 199, 202–3.

[74] (McLuhan 1973, p. 57).

[75] (Hackett 2019, pp. 96–97).

[76] (Reed 2007, p. 266), (while also emphasizing the ambiguity of the concept, at 264–69); (Greenberg 2016, p. 1495); *see* (Craig 2016, p. 603); (Hagen 2013, p. 311), (pointing out that the principle applies unless Parliament intended otherwise). *See* also (Hutchinson 2015) (describing technological neutrality as containing two dimensions when applied to copyright: non- discrimination between technologies and non-interference, requiring high thresholds of conduct or activity before copyright liability will be attracted).

[77] See, e.g., *Copyright Act*, R.S.C., 1985, c. C-42, s. 3(1)c (describing the exclusive right to produce or reproduce a work "in any material form whatever"); *Broadcasting Act*, *supra* note 2 ("Broadcasting: means any transmission of programs, whether or not encrypted, by radio waves *or other means of telecommunication* for reception by the public [. . .] emphasis added); see (Trudel 2009, p. 9).

[78] *Supra* note 77; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at paras 5–10, 48–49; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 43; *Canadian Broadcasting Corp v SODRAC* 2003 Inc, 2015 SCC 57at paras 45–55, 62–63, 65–96, 139–44, 148,150–83 [SODRAC]; *Robertson v Thomson Corp*, 2006 SCC 43 at paras 48–49, 74–75, 86–88, 94 (referring to the concept of "media neutrality"); *Keatley Surveying Ltd. v Teranet Inc.*, 2019 SCC 43 at paras 86–88.

how the CRTC implements telecommunication policy objectives,[79] and it has been invoked as a guiding principle for the future of communications and media content regulation in Canada.[80]

The principle of technological neutrality has been inconsistently applied by courts and governments, giving rise to diverging outcomes.[81] As such, technological neutrality is criticized for its lack of clarity and certainty. Does technological neutrality require that the law apply uniformly for different types of technology, regardless of the compatibility of the outcome with the overall purpose of a statute, or does technological neutrality require to apply the law to new technology following a purposive analysis of the statute? For example, a strict interpretation of technological neutrality may consider a digital reproduction of a work for archival or back up purposes as an act that a priori infringes copyright and requires the consent of the right holder.[82] A more purposive application of technological neutrality may situate the digital reproduction as an inherent exigency of the new technology; and, in light of the overall objective of copyright, would lead to an opposite conclusion, i.e., that the digital reproductions should not fall within the exclusive rights of copyright holders and should not attract additional royalties.[83] In this latter understanding, perhaps *technological neutrality* is a misnomer[84] and *technological adaptability* or *technological discrimination* might be a better way of achieving the intended goals of longevity and equality that technological neutrality seeks to achieve.[85]

An application of technological neutrality based on the overall purpose of a statute seems to be more aligned with its *raison d'être* of adaptability of legal interpretation to counter, or at a minimum slow down, the obsolescence of statutes in light of ongoing technological shifts.[86] In this view, it calls into question the role of judges, from applying judicial restraint with respect to laws adopted democratically, to more creative judicial interpretation as the context and technological environment continue to evolve.[87] The principle of technological neutrality and how it should apply go to the heart of the debate on the role of the judiciary vis à vis legislative bodies in a modern democracy. In other words, technological neutrality has its own limits and building too much adaptability into this principle may bring it to collapse under the weight of impracticability or vagueness or lead to unwarranted judicial creativity.

With these preambles in mind, we now look at how a purposive application of technological neutrality may inform media content regulation dilemmas, using the example of the CRTC forbearance to regulate internet broadcasting in recent decades, leading to a two-tier broadcasting system in Canada.[88] The definition of "broadcasting" in the *Broadcasting Act* includes audio and video internet transmissions, and has been interpreted as giving jurisdiction to the CRTC to regulate such transmissions.[89] The question of how technological

[79] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355, s. 1(b)(iv).

[80] Communications Future Report, *supra* note 1 at 116 (recommending "a redefinition of the activities and actors subject to regulation that is technologically neutral and forward looking" with respect to the regulation of media content); (Government of Canada 2020c), (on how Bill C-10, *supra* note 47, follows technologically neutral principles by applying similar regulations to similar broadcasting undertakings).

[81] Reed, *supra* note 76 at 266–69 (on different understandings and applications of technological neutrality); Craig, *supra* note 76 at 606–15.

[82] *SODRAC*, *supra* note 78 at paras 45–55, 62–63 (majority reasons).

[83] Ibid. at paras 139–44, 148, 150–83 (dissenting reasons by Abella J.).

[84] See (Craig 2013, p. 274), (citing Bert-Jaap Koops on the many facets of technological neutrality, and observing that none of these components effectively require neutrality that would preclude any discrimination between technologies).

[85] See Greenberg, *supra* note 76 at 1546–59 (making the case for embedded mechanisms allowing technological discrimination in the US Copyright Act (and eventually other statutes) as a better way to ensure that the goals of technological neutrality of statutory longevity and doctrinal equivalence would be achieved, while avoiding the unintended effects of the application of technological neutrality).

[86] See Craig, *supra* note 76 at 612–15 (referring to an expansive application of technological neutrality in Canadian copyright law as an application of principle of *prescriptive parallelism*).

[87] *See* (Chapdelaine 2017, pp. 184–87).

[88] *Supra* note 45.

[89] *Broadcasting Act*, *supra* note 2, s.2(1) (definition of "broadcasting", referring to radio waves *or other means of telecommunication*, (emphasis added)); CRTC New Media Broadcasting Exemption Order, *supra* note 39; Bill C-10, *supra* note 47 (ss. 1(1), 2(1) to amend "broadcasting undertaking" to include "online undertaking: an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus").

neutrality applies arises with respect to the CRTC specifically exempting internet audio and video undertakings by order. Arguably, such exemption order was not, at the time it was issued, inconsistent with a purposive application of technological neutrality (although it would have contravened a strict application of technological neutrality). The CRTC looked at the nature of internet broadcasts, in light of the Canadian broadcasting space at the time, together with the overall objectives of the *Broadcasting Act*. This was meant to ensure that the *Broadcasting Act* would be applied consistently in accordance with its overarching purpose and policy objectives, across various methods of transmission, while taking their differences into account.

Over time, digital technology improvements progressively allowed the dissemination of high-quality internet broadcasts bringing them closer to traditional over-the-air broadcasting.[90] Sophisticated "over-the-top" (OTT) broadcasting offerings, specifically targeting Canadian audiences, competing for subscription and at times advertising revenues, resemble in many ways on demand, discriminatory and other over-the-air broadcasting offerings. In turn, traditional over-the-air broadcasters have increased their reach by making their broadcasts available online, and by developing specific video-on-demand platforms. Under a technologically neutral approach to media content regulation, whether through a purposive or strict application of this principle, one would be hard pressed to find arguments supporting a completely differential treatment of internet broadcasts relative to traditional over-the-air broadcasts. In fact, such interpretation is bound to engender what the principle of technological neutrality seeks to avoid: a discriminatory and arbitrary application of the law based on technological differences, and the obsolescence of the *Broadcasting Act* and of the Canadian broadcasting system overtime. The exercise of national sovereignty through regulation of media content needs to follow the principle of technological neutrality, while respecting the boundaries of jurisdiction normally attributed to laws' territorial reach.

4.1.2. Territorial Jurisdiction Constraints and Precedents

Attempts to regulate activity originating from foreign entities via the internet are often met with resistance on the basis that this might overstep a state's jurisdiction. State powers and laws are generally limited to the state's territory, in accordance with the international law principle of state sovereignty,[91] and further to presumptions of legislative intent.[92] Canadian laws may confer powers of extra-territorial effect,[93] provided that Parliament's intention to do so is unequivocal or by necessary implication.[94] For instance, the *Radio Communication Act* makes explicit reference to the exercise of extra-territorial power.[95] Even when a law follows the general rule of territoriality, its application will often involve multi-jurisdictional aspects giving rise to extra-territorial issues. Pursuant to the principle of international comity, such extra-territorial effects are acceptable on a consensual and reciprocal basis between nation states.[96]

The regulation of telecommunication is a good example where a law's extra-territorial effects may come into play. By nature, telecommunication necessarily involves multi-jurisdictional actors, transnational networks, and other international components. To determine Canada's jurisdiction over matters with extra-territorial aspects, courts have

[90] Gollick and Speer, *supra* note 10 at 6 (referring to estimates that by 2020 there would be more over-the-top subscribers than subscribers to traditional broadcasters, citing statistics reported by Danielle Desjardins).

[91] (Kindred et al. 1993, p. 325). See also *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 53 (on the general rule of non-extraterritoriality of laws in the context of the enforcement of foreign judgements).

[92] (Sullivan 2014, p. 839), (on the presumption "that legislation is not intended to apply extra-territorially to persons, things or events outside the boundaries of the enacting jurisdiction); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para 55 [*CAIP*].

[93] Statute of Westminster, 1931, 22&23 Geo. 5, c.4, s.3 (Parliament of a Dominion "has full power to make laws having extra-territorial operation").

[94] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1051. Allowance between states for some extra-territorial effect of laws flows from the principle of international comity: *Hilton v. Guyot* 159 U.S. 113 (1895) at 163–64.

[95] *Supra* note 15, s. 3(3) (stating the application of the Act within Canada and on board specific vessels, aircrafts, etc., with a specific connection to Canada (as listed) and on any structure, platform, etc., attached to land in the continental shelf of Canada).

[96] Sullivan, *supra* note 92 at 842; see also *CAIP*, *supra* note 92 at para 60.

developed the "real and substantial connection test", under which the conduct over which Canada seeks to assert its jurisdiction must have a significant connection to Canada.[97] This test seeks to minimize national overreach and reflects the reality of "the territorial limits of law under the international legal order."[98]

In *CAIP*,[99] the Supreme Court had to determine whether music downloaded in Canada from another jurisdiction was subject to the *Copyright Act* and, in such case, whether internet intermediaries were liable to pay royalties to SOCAN, a copyright collective society.[100] The Court noted that the *Copyright Act* respected the general territoriality principle.[101] The Court confirmed that the *Copyright Act* can apply to international internet transmission if the transmission involves a "real and substantial connection to Canada".[102] With respect to the internet, the connecting factors include the location of the content provider, of the host server, the intermediaries, and end users, to be weighed depending on the particular facts of the case.[103] The Court concluded that the *Copyright Act* could apply to transmissions originating in Canada and originating abroad but received in Canada (although the liability of foreign content providers was not an issue in that case).[104]

The *real and substantial connection* test when met may confer jurisdictional powers to Canada over activities, services provided over the internet even by foreign companies. As per *CAIP*, an internet broadcast entity that specifically targets a significant portion of Canadian consumers could constitute a sufficient connecting factor to confer regulatory powers to Canada. There are other precedents conferring jurisdictional powers to Canada over the internet that have some extra-territorial ramifications.[105]

Claims that the regulation of foreign internet undertakings goes against the principle of state sovereignty are unfounded. In that space, rhetoric condemning any regulation impacting internet content as an affront to freedom of expression and as impeding "innovation without permission" looms large.[106] There are precedents allowing flexibility when it comes to the jurisdictional space that Canada can occupy regarding media content regulation. The recent Communications Future Report recommends that Canada's jurisdictional powers under the *Telecommunications Act* should be clarified to "establish explicit jurisdiction over all persons and entities providing, or offering to provide, electronic communications services in Canada, *even if they do not have a place of business in Canada*", and should not be left to be decided by courts on a case by case basis.[107] The same clarifications would be in order with respect to media content regulation. Furthermore, another assertion of Canadian sovereignty over foreign media content providers includes subjecting those foreign entities to collect sales tax to the same extent that Canadian companies do.[108]

4.1.3. Justifications for National Media Content Regulation

This part revisits traditional justifications invoked for the national regulation of media content, i.e., scarcity, pervasiveness, and national cultural sovereignty, through the lens

97 *CAIP*, *supra* note 92 at para 60 (citing previous Supreme Court decisions elaborating and applying the principle); *R v Larche*, 2006 SCC 56 at para 59 (citing *Libman v. The Queen*, [1985] 2 S.C.R. 178 and United States of America v. Lépine, [1994] 1 S.C.R. 286).

98 *CAIP*, *supra* note 92 at para 60 (citing Tolofson, supra note 94 at 1047).

99 *Supra* note 92.

100 Ibid. at paras 1, 6–7.

101 Ibid. at para 56.

102 Ibid. at para 60.

103 Ibid. at para 61.

104 Ibid. at paras 76–77.

105 *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para 47 (on the inevitable extraterritorial reach for injunctive relief sought against Google Inc. for materials posted on the internet, Supreme Court upholding worldwide interlocutory injunctions against Google Inc.).

106 Review of Broadcasting in New Media, *supra* note 41 (with Concurring Opinion of Timothy Denton, then CRTC Commissioner, arguing that the critical issue around any attempt to regulate internet broadcasting was freedom of speech as it amounted to censorship and the CRTC role was not about protecting traditional broadcasters).

107 *Supra* note 1 at 67 (Recommendation 19).

108 Ibid. at 174 (making such recommendation, following the footsteps of the Province of Québec and Saskatchewan that already collect sales tax with respect to foreign online services undertakings); (Government of Canada 2021), (Government of Canada introducing goods and services and harmonized sales taxes as of 1 July 2021 for cross-border digital products and services including video and music streaming platform sites).

of technological neutrality, state jurisdictional powers and in light of the current media content ecosystem and space.

A common justification invoked to support national regulation of media content is scarcity.[109] Over-the-air broadcasting requires the careful allocation of radio frequencies, a limited resource viewed as public good.[110] Thus, in exchange for spectrum allocation, a broadcast undertaking needs to comply with various technical and content requirements. Digital technology improvements progressively allowed the dissemination of high-quality internet broadcasts (OTT), independently of traditional over-the-air broadcasting.[111] Even in the realm of over-the-air broadcasting, digital broadcasts require less space than analog broadcasts, so that more channels can co-exist on the spectrum.[112] Thus, scarcity does not provide a justification for the regulation of internet broadcasts, and more generally, the rationale of scarcity has become less prominent with respect to digital broadcasts.

The progressive expansion of internet broadcasts also occasioned a shift away from the physical connection of radio frequencies to a given territory—an a priori traditional requirement for the exercise of state sovereignty—to global borderless means for the dissemination of content. However, this is not the only reason why scarcity is an insufficient justification for the regulation of media content. While scarcity may once have provided a sound rationale for national regulation for some aspects of broadcasting, e.g., the quality of equipment used to avoid interference and preserving the integrity of signals, scarcity has never been *sine qua none* for the regulation of media content, e.g., minimum Canadian content requirements, quality standards of news, ban against offensive material, and respect for linguistic duality. One can easily conceive the national regulation for careful spectrum allocation and respect for technical standards, with no requirement of content standards whatsoever. Furthermore, the scarcity justification for media content regulation is bound to one specific form of technology and in this way departs from the otherwise technologically neutral definition of broadcasting in the *Broadcasting Act*. For these reasons, the justification for parameters and quality standards of media content ought to be found elsewhere.

Another frequent justification for the national regulation of mediation content is pervasiveness. The broadcasting market in Canada and other parts of the world, is or was once heavily concentrated, offering viewers a limited amount of programming options including news on which viewers heavily relied.[113] In this environment, broadcasting was viewed as pervasive and invasive to a fairly captive audience. These characteristics have traditionally justified the regulation of broadcasting.[114] Then, viewers were progressively exposed to a broad range of TV channel options with the introduction of cable TV. Recording technologies (VCR, PVR) added flexibility to viewing habits diminishing even more the pervasiveness of early day, over-the-air broadcasting.

With the proliferation of OTT broadcasting, the offerings increased even more, and the market has become highly decentralized and fragmented. [115] OTT global platforms not subjected to Canadian broadcast regulation emerged as dominant content programming forces, putting even greater pressure on national cultural sovereignty as a central objective of Canada's broadcasting policy. Viewers access their news, tv shows, movies globally, in an environment that is very different from the early days of broadcasting. The proliferation of internet broadcasting through global platforms (Netflix, Apple TV, Amazon Prime

109 Flew, *supra* note 21 at 75; Bannerman, *supra* note 18 at 190–91.

110 Bannerman, *supra* note 18 at 190; Golick and Speer, *supra* note 10 at 7 (on how the scarcity of radio frequencies were viewed as a public asset that justified, necessitated even media content regulation).

111 Gollick and Speer, *supra* note 10 at 6 (referring to estimates that by 2020 there would be more over-the-top subscribers than subscribers to traditional broadcasters, citing statistics reported by Danielle Desjardins).

112 Bannerman, *supra* note 18 at 191 (explaining why spectrum scarcity, at a technical level, has become less prevalent with the introduction of digital technologies).

113 Golick and Speer, *supra* note 10 at 9–11 (on the evolution of broadcasting in Canada from a concentrated market of a small number of broadcasters, where access to programming was free to viewers, and revenue was derived from advertising, to a subscription model to channels with the advent of cable tv specialized channels, to a decentralized global market with the advent of OTT internet broadcasting).

114 Bannerman, *supra* note 18 at 192–93.

115 Ibid.

Video, etc.) is significantly distancing viewers from traditional broadcasters including the Canadian ones.

While pervasiveness is no longer a defining trait of over-the-air broadcasting, it manifests itself elsewhere through the devices with which we access media content on the internet.[116] Smart phones and other devices have progressively mutated media content consumption habits from newspapers or confined household TV sets, to an "always on" portable mode defying any temporal, geographical, or physical constraints. Architectures of devices, of internet platforms, are specifically designed in a way that baits and then retains our attention, in constant competition for advertising revenues, and accessing even more highly lucrative personal data.[117] The personal data collection on those platforms and smart phones, the ability to track our habits, preferences, ins and out as we consume media content, have brought the pervasiveness elsewhere, justifying new forms of regulation.

In the Canadian context, national cultural sovereignty has been at the heart of broadcasting regulation both as justification and overall policy objective.[118] In theory, national cultural sovereignty is more technologically neutral than scarcity or pervasiveness, which flow from specific traditional over-the-air broadcasting (i.e., in method of delivery and as fixed unidirectional real-time scheduled programming). In a borderless networked society, is it still sound to ground media content regulation on the need to nurture and preserve national cultural sovereignty? Can this objective be realistically achieved or is it illusory in the current media content space?

We contend that national cultural sovereignty was, and still is, the most plausible justification for national media content regulation, although some of the goals and dynamics have shifted in a digital environment. The pressures that supported such justification 50 years ago for a population the size of Canada, are still present today in different forms, both domestically and abroad. As a key subset of this objective, steering the commissioning and the curating and discoverability of media content toward strengthening Canadian culture and identity—in all its diversity, locally and abroad—should remain among the essential functions and focus of media content regulation. While scarcity and pervasiveness may have supported curating-driven regulation, as offerings continue to multiply, curation plays another role of sorting through a sea of media content to connect Canadian viewers to content that is relevant to them, through discoverability or other means. Regulatory oversight of firms' data-driven personalized discoverability practices may also be warranted.[119] Of course, the framework and parameters we apply to such objectives will be critical, as discussed below.[120] This includes adapting the exercise of national (cultural) sovereignty over media content regulation to the exigencies of the internet, and properly accounting for other competing sovereignties.

The exercise of national cultural sovereignty needs to assess Canada's data sovereignty in light of the intensification of extraction and aggregation of personal data of media content viewers.[121] At the infrastructure level, does it serve Canada's broadcasting law and policy and the interest of Canadian viewers to have our national broadcasting corporation CBC/SRC use YOU Tube as a default platform to disseminate its programming online? Has CBC/SRC entered into an agreement with YouTube to ensure the interests of Canadian viewers accessing the digital platform are protected and in line with Canada's broadcasting

[116] See (Klonick 2018, p. 1661) (on the traditional justification of pervasiveness for the regulation of broadcasting in the US and about a different form of pervasiveness on the Internet); Flew, *supra* note 21 at 78 (on the convergence of different media requiring new approaches to media content regulation).

[117] (Wu 2016) at 6 (on how attention is a commodity, the retention of which is central to several media business model and on how it impacts human consciousness).

[118] *Supra* note 33–36.

[119] See below Section 4.3.2 "Personalization of Media Content and Net Neutrality".

[120] See below Section 6 "Conclusion: Mapping the Contours and Justifications of States' Mediating Powers and Regulation of Media Content" (reaffirming and redefining national cultural sovereignty).

[121] See below Section 4.3.1 "Viewers' Personal Data Collection". For a discussion on scope and limits of data or digital sovereignty, see Woods, *supra* note 49 at 360–66; (Pohle and Thiel 2020).

law and policy?[122] Furthermore, Canada's media content policy should address which Canadian viewers' personal data is collected in the aggregate, used, and generally available to internet broadcasters, concerning viewers' programming choices, preferences, viewing habits, etc. Such Canadian personal data in the aggregate contains a wealth of information which could be used for purposes that undermine Canadian national (cultural) sovereignty. Conversely, proper use of such aggregated personal data could strengthen Canada's endeavors towards its media content policy goals, including to better support its creators and producers. Canada's media content policy should therefore ensure proper control and accessibility to aggregated viewers' data to serve such greater public interest goals.

4.2. Transnational Digital Platforms Sovereignty

Julie Cohen describes how digital platforms such as Netflix, AppleTv, and Facebook have the characteristics of sovereign states.[123] Digital platforms, as the main locus of economic activity in the networked society, have territories and populations of users in the billions, out numbering any of the largest states.[124] Platform territories are not physical spaces: they are rather "defined using protocols, data flows, and algorithms. Both technically and experientially, however, they are clearly demarcated spaces with virtual borders that platforms guard vigilantly".[125] Transnational digital platforms develop diplomatic relations with various states and regional organizations and have states design new roles to specifically deal with them.[126] Digital platforms exercise power over users through standard term agreements, privacy policy, algorithms, platform architectures, codes and processes to sanction undesirable conduct.[127] Similarly, attorney and political activist Zephyr Teachout is relentless in her attack on the governmental aspirations of mega companies like Google, Facebook, Amazon and Apple, who" dominate all aspects of choice, controlling markets, picking winners and losers, listening in on conversations, directing purchases".[128]

Although in the past, similar comparisons have been made between state exercise of power and other transnational corporations, the level of connectedness, network effects, pervasiveness, and control exercised by digital platforms on large populations of users, make the analogy of digital platform powers to state sovereignty even more compelling. They disrupt the traditional model of state sovereignty and international order at the domestic level of exercise of state power, by exerting dominant power in the global sphere, and by inserting themselves between the state and their peoples, who become governed by a complex, opaque web of non-state orders on which their livelihoods, social networks, education, entertainment, and fitness routines increasingly depend (as intensified during the COVID-19 pandemic times).

Examples abound about digital platforms defying states' sovereignty and enforcement powers, behaving more like countries at the international level than as ordinary corporate entities subjected to the law of the jurisdiction where they conduct business.[129] Closer to home, Facebook has refused in the past to comply with demands by Canada's Office of the

[122] An access to information request was submitted to CBC/SRC asking whether CBC/SRC entered into agreements with YouTube and about the general terms of such agreements concerning the handling and access by CBC/SRC to personal data relevant to Canadians. CBC/SRC did not disclose any specific agreement and responded that it was not aware of specific terms between CBC/SRC and YouTube/Google Inc. concerning the handling of personal data.

[123] (Cohen 2017, pp. 199–202).

[124] Ibid. at 136, 200.

[125] Ibid.

[126] Cohen, *supra* note123, at 187–188. See also: (Teachout 2020, p. 111), (pointing out that "Corporate money is everywhere in politics" leading to "a new kind of political system in which big companies directly become the primary political institution").

[127] Cohen, *supra* note 123 at 202 ("imposing their own regulatory structures on permitted conduct—e.g., sponsored search results, Facebook "likes" and "tags," Twitter retweets—and their own internal sanctions on disfavored conduct").

[128] Teachout, *supra* note 126 at 56.

[129] Woods, *supra* note 49 at 339–51 (providing an overview of high-profile disputes opposing dominant internet companies and states).

Privacy Commissioner,[130] and Netflix has refused to comply with reporting requirements that the CRTC introduced for internet broadcasters.[131] As one commentator observes, while in the short term, internet firms may have interest to operate under a single set of norms at the global level, in the long run, "resisting state rules while taking advantage of the state's market is likely to be unsuccessful for the company" and to be harmful for internet users more generally, inviting for more *sovereignty deference* by internet firms.[132]

More often, digital platforms exert their dominance without breaching laws. Voids, weaknesses, and ambiguity of the law have facilitated digital platforms prodigious ascensions, changing the narrative on how human rights, local tax, labor, anti-trust, privacy, contract and consumer protection laws should apply, and to their advantage.[133] A case in point is Canada's decision in recent decades (through the CRTC) to largely exempt digital platform broadcasters from regulation, leaving internet broadcasting platforms such as Amazon Prime Video, Apple TV, Netflix off the hook to contribute to creation of Canadian content, to comply with Canadian content minimum requirements, close captioning, or other broadcast regulation requirements. Even when laws and their regulatory compliance requirements are in place, the lack of enforcement powers, or of foresight from regulatory bodies (e.g., anti-trust or privacy regulators) on how the law should apply to digital platforms leaves platforms largely free to operate on their own terms, unhindered.[134] Decades later, the dominance of internet broadcast platforms challenge the very notion of Canadian cultural sovereignty as implemented through broadcasting law and policy.

With strong rhetoric and aspirations for an open, global internet where transnational platforms should innovate and operate freely, we should not lose sight that while having global presence, digital platforms such as Netflix and others, target jurisdictions individually and tailor their offerings accordingly and locally. This attenuates the global nature of the internet argument, under which states should stay out of any interference. When internet platforms offer programming in Canada that is distinct from programming offered elsewhere, this needs to be taken into account in assessing the extent to which Canadian media content regulation should apply to them. Local tailoring of offerings increases the real and substantial connection of an internet undertaking to Canada, and with that, Canada's justification to exercise its jurisdiction thereto.[135] Furthermore, digital media content platforms may impair viewers' personal (data) sovereignty in important ways, which we explore next.

4.3. Personal (Data) Sovereignty

The assertion of power through state regulation of media content, founded upon the preservation and flourishing of national cultural sovereignty,[136] is intimately intertwined with issues of personal sovereignty, on the premise that the state's powers are legitimate in so far as they are as a *vessel to its peoples*, and particularly so in matters so fundamental to democracy and to personal and collective identity, as is the expression embedded in media content.

The exercise of personal sovereignty and autonomy justifies important limitations to state powers in media content regulation. Canadian legislative reform could (un)intendedly subject user-generated content to regulation as a form of broadcast program. Concerns about such potential overreach were strongly voiced in recent public debates.[137] Most

130 See, e.g., (Office of Privacy Commissioner of Canada 2019), (around the Cambridge Analytica scandal, about Facebook disputing the findings of the Privacy Commissioner of Canada, and refusing to implement recommendations to address deficiencies).

131 (Armstrong 2014), (Netflix invoking confidentiality and sensitivity of information concerns).

132 Woods, *supra* note 49 at 405.

133 Cohen, *supra* note 123 at 176.

134 (Khan 2017, p. 743), (generally on anti-trust laws and regulatory bodies inability to properly identify and address market dominance in the new platform economy, resorting to Amazon.com business model example as case study).

135 Supra note 97–105 (on real and substantial connection test to assert jurisdiction over extra-territorial matters).

136 See above Section 4.1.3 "Justifications for National Media Content Regulation" (on the enduring prevalence of national cultural sovereignty as main justification and objective of media content regulation in Canada).

137 See, e.g., (Geist 2021a).

would agree that media content regulation should not per se target individuals and the content they share via social media platforms, in compliance with Government's obligations under the *Canadian Charter of Rights and Freedoms*.[138] Any legislation bringing internet broadcasters under the Canadian broadcasting system would also need to ensure that proper limitations for user-generated content are in place. Recognizing that the tension between the exercise of state sovereignty and personal sovereignty embedded in user-generated content needs to be adequately dealt with, this part focuses on less explored facets of viewer-citizens' sovereignty and autonomy.

Three areas involve issues of personal sovereignty and autonomy that are inextricably linked to cultural and media content policy. The first one deals with the lack of control viewers have over the collection of their personal data. The second area concerns issues of personalization of media content and its connection to net neutrality. The third one deals with individuals' access to quality, reliable, and secure networks.

4.3.1. Viewers' Personal Data Collection

While the relationship between media content regulation and issues of privacy and personal data protection has been noted in recent legal reform and policy papers,[139] this interaction tends to be overlooked in policy and legal reform debate, relative to other issues such as imposing Canadian content funding obligations on internet broadcasters, to level the playing field with traditional broadcasters subjected to this obligation.

In recent decades, an entire economy has developed around the extraction of personal data for the purpose of perfecting the predictability of viewers and other consumers' behavior. "Data is the new oil".[140] This massive extraction goes way beyond the collection of personal data for the purpose of service delivery and service improvement that directly benefit viewers. Additionally, increasingly sophisticated personal data extraction is not confined to advertisement purposes either: it is of direct benefit to any firm having an interest in purchasing or accessing probabilistic information about viewer and other consumer behavior.[141]

Recently, Zuboff picked up the theme of the digital world as one marked by loss of boundaries, suggesting that this leaves us vulnerable to prying extractions and lets corporate marauders move at will. We are open books, paying for services and content we never knew we wanted and vulnerable to data extraction, living in a state of "boundarylessness".[142] In her view, corporate platforms can take what they want since we are unguarded by individual or national defenses. They offer targeted menus of media services, devised to curtail user options and maximize corporate profits, and we navigate through and select from these targeted offerings with little state protection. Ron Deibert, too, picks up the language of geographical exposure to argue that we are rendered vulnerable to attack, without fortress, gate or barrier to incursions.[143] Both commentators would agree, we have a situation in which anyone can watch us, all guards down.

The value embedded in the collection and analysis of personal data has been referred to as "behavioral surplus".[144] Initially developed to improve the quality of targeted advertising and online advertising revenues,[145] the powerful algorithms enabling data extraction and predictive analytics continually improve through machine learning and

138 S. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

139 See, e.g., Communications Future Report, *supra* note 1 ss. 4.3, 4.4 (on the need to address the impact of big data collection on consumers of communication and broadcasting services and making recommendations for legal reform in that regard, such as explicit reference to privacy as a policy objective of the *Broadcasting Act*, and increased cooperation between the CRTC and the Office of the Privacy Commissioner).

140 Coined phrase attributed to Clive Humby, UK Mathematician and architect of Tesco's Clubcard, 2006.

141 Zuboff, *supra* note 6 at 96.

142 Ibid. at 289.

143 (Deibert 2020, p. 283).

144 Zuboff, *supra* note 6 at 8, 63–97.

145 Ibid. at 74–82 (describing how, in the early 2000, Google created new algorithms protected by patents, that tapped into detailed personal data available through users' search engine functions to develop a profitable business model based on increasing advertising revenues).

exponential online traffic, enabling the creation of "data doubles".[146] In the realm of television broadcasting, personal data collection across various platforms enables more precise audience predictions and analysis.[147]

Under the guise of convoluted standard terms of use nobody reads but "agrees to", misleading and deceptive privacy terms,[148] and often soft privacy laws with limited public bodies' enforcement powers and oversight, the collection of big data has quickly become one of the largest forms of extraction with the lowest public regulatory oversight.[149] While in Canada, there has been some recognition of personal data protection as a quasi-constitutional right,[150] the regulatory regime of personal data protection under *PIPEDA* (and other relevant laws) offers flexibility in the types of uses made of personal data by firms,[151] with limited public body enforcement powers.[152]

A substantial gap exists between viewers and other consumers' reasonable expectation of how their personal data is used (e.g., strictly to improve the quality of the service to viewers' benefit or other purposes serving supplier or third parties' benefit) and how such personal data is actually used by the digital platforms collecting the data and third parties. As Frank Pasquale explains in *The Black Box Society*,[153] the lack of transparency regarding the handling of personal data has been a defining feature of e-commerce and the digital economy.[154] This knowledge gap illustrates the lack of control viewers have over the use of their personal data online. There is often no opting out from personal data not being used beyond a specific purpose, other than by not using the app or digital platform altogether.

Movements toward regaining more control over consumers' personal data, returning to a decentralized web,[155] and regulatory responses to that effect such as the EU GDPR,[156] California *Consumer Privacy Act of 2018*,[157] and Canadian privacy legislative reform,[158] flow directly from this growing concern. In the realm of media content, the pervasiveness and intrusiveness that once was a primary justification of the regulation of broadcasting in a highly concentrated market environment, has now shifted to the realm of the collection and use of viewers' personal data in the most intimate corners of our lives, for concealed

146 (Haggerty and Ericson 2000, p. 613), (referring to "the formation and coalescence of a new type of body, a form of becoming which transcends human corporeality and reduces flesh to pure information").

147 (Murschetz and Schültz 2018, p. 8).

148 See, e.g., Complaint at 9, 23, 48, United States v. Facebook, No. 19-cv-2184 (D.C. 24 July 2019) [hereinafter US Complaint]; settlement order granted: United States v. Facebook, No. 19-2184. 2020 U.S. Dist. WL 1975785 (D.C. 23 April 2020) (under which Facebook agreed to pay a fine of US $5 billions and to take various remedial actions in settlement of US Complaint, having allegedly resorted to misleading and deceptive information regarding users' privacy settings, e.g., "Facebook did not disclose to users that sharing their non-public posts with Friends would allow Facebook to share those posts with third-party developers of Friends' apps").

149 (Pasquale 2015, pp. 3–4; Lillington 2019; Radin 2013, pp. 19–51), (on why we do not read standard terms of use and generally on the normative and democratic degradation that ensue from the widespread use of "boilerplates").

150 *Douez v. Facebook* 2017 SCC 33 at para 59; Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 7–8 (affording some protection without specifically referring to privacy, under the right to life, liberty and the security of the person, and the right to be secure against unreasonable search or seizure).

151 *PIPEDA, supra* note19, s. 6.1; Sch.1 s. 4.3.1, s. 5.3 requires firms to obtain valid consent to collection of personal data with no obligation to state the purpose of use, subjecting appropriateness of purpose to a reasonable expectation test. See (Piper 2000), (criticizing the permissive personal data collection framework of *PIPEDA*, as it is based on a commodified view of personal data as opposed to deserving human rights protection).

152 (Office of Privacy Commissioner of Canada 2020), (calling for law reform and more enforcement powers); See also (Office of Privacy Commissioner of Canada 2021), (about how privacy Bill C-11 if passed into law, would not grant more public enforcement power and could even be a step back regarding the protection of personal data).

153 Pasquale, *supra* note 149.

154 Ibid. at 3 (facilitated by: "The law, so aggressively protective of secrecy in the world of commerce, is increasingly silent when it comes to the privacy of persons"); Zuboff, *supra* note 6 at 338–35 (listing several factors explaining how "surveillance capitalists" have been able to get away for so long with concealing personal data handling practices from their consumers and the public; among them, consumers' self-interest, social persuasion, inevitabilism, ignorance, and unprecedented, i.e., sui generis environment, logic and methods that were initially impossible to comprehend).

155 *See*, e.g., (Verborgh 2019).

156 EU, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, [2016] OJ, L 119 at 1 [EU GDPR].

157 *California Consumer Privacy Act of 2018*, CAL. CIV. CODE §§1798.100–1798.199 (2018).

158 BILL C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2d Sess, 43rd Parl (2020), (first reading 17 November 2020); (Government of Canada 2020b).

purposes that may go beyond viewers' immediate interests and benefits as they engage with media content. Ensuring tighter control over the extraction of personal data related to media content consumption is even more critical than other online mundane e-commerce transactions. As such, media content regulation needs to pay attention not only to content, how it is produced, how it is disseminated, but also to what happens behind the scenes when viewers are watching or listening.

4.3.2. Personalization of Media Content and Net Neutrality

The second area whereby personal sovereignty and autonomy may be compromised is a subset of personal data extraction. It concerns the widespread practice of algorithmic *personalization* of media content. It raises issues of curation, content discoverability, traditionally associated with media content law and policy. Personalization also raises concerns similar to the ones that preservation of net neutrality seeks to address.

The *personalization* of viewers' experience is a well-established business practice of media content providers such as Netflix, Spotify, or You Tube, or of social media platforms. More generally, *personalization* is a staple of search engine tools' efficiency, and is the preferred seductive lexicon used by online service providers to justify the collection and use of viewers' personal data.[159]

While consumers may benefit from the convenience of content personalization, including discoverability of relevant content among an overwhelming abundance of information, there is cause for concern when personalization seeks to influence viewers' decisions or behavior in ways that may work against their interests, while serving the primary interests of the platform operator or third parties.[160] As Tanya Kant observes: "if content is not being customized and personalized by consumers themselves, then what agent(s)lie behind personalization?"[161] To what extent does it compromise rather than serve consumer autonomy?[162] Our exposure to cultural, educational, entertainment content through films, TV programming, news reporting, shapes our beliefs, understanding and connection to the world. It touches upon profound and intimate aspects of the human experience where viewers may be more vulnerable, impressionable, or more easily manipulated, than in other online spheres of e-commerce.[163]

Hunt and Mc Kelvey posit algorithmic personalization of media content as a form of cultural policy, i.e., the management of "cultural expression through code".[164] Personalization of media content is a form of curation, a main function of traditional broadcasting, subject to the *Broadcasting Act*'s framework and policy goals.[165] Yet, personalization diverges from traditional broadcasting curation in important ways. As Kant points out, personalization of media content amounts to a form of *narrowcasting*.[166] Traditional broadcasting offers the same programming to all viewers who actively and consciously select therefrom. System-initiated personalization changes the discoverability of offerings in ways not necessarily transparent to consumers, and as such may compromise consumers' sovereignty, as not solely serving viewers' autonomy and empowerment.[167]

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159 The collection of personalized data for online personalized ads has been widespread for several years. See Zuboff, *supra* note 6 at 19, 256 (on how the term "personalization" is used by suppliers as a euphemism to justify detailed collection of consumers' personal data to improve the prediction of their behavior to better influence their future decision making and choices).

160 Ibid. at 19, 78.

161 (Kant 2014, p. 394).

162 Ibid. at 394–95.

163 (Elkin-Koren 2007, pp. 1136–37), (arguing that the consumption of "cultural artefacts" may require more attention than the consumption of mundane commodities: "Cultural artefacts are not simply useful commodities. While they often have an entertainment value that could be quantified, they also possess a communicative value and a symbolic significance. They engage our minds in a more direct and intimate way than do mundane commodities and, therefore, expose consumers to a higher risk of deeper and more intrusive restrictions of freedom. This particular vulnerability of information consumers is often overlooked.").

164 (Hunt and McKelvey 2019, p. 318).

165 *Supra* note 33–37.

166 Kant, *supra* note 161 at 394–95 (taking a critical stance on the view that commercial personalization as a form of narrowcasting enhances consumers' autonomy).

167 Ibid. at 396.

Algorithmic personalization of media content deserves greater attention when directly running against core democratic values and the main objectives pursued by media content regulation. For instance, Canadian broadcasting regulation seeks to protect viewers' potential vulnerabilities while at the same time promoting respect of identified shared values, and exposure to a variety of perspectives, and by setting minimum content quality standards, such as ensuring news' accuracy.[168] Various effects and concerns of personalization of media content have been widely commented upon. Among those, the phenomenon of "echo chambers" or "filter bubbles" and the proliferation of fake news, have been analysed in detail by Napoli.[169] On that front, platform operators are rarely mere neutral conduits and their interests may be misaligned with viewers' personal or the greater public interest of maintaining a level of news' accuracy.[170] The displacement of the traditional curation role of broadcasters fulfilling certain journalistic standards places increasingly heavy burdens on viewers in sorting out the true from the false.[171] Proposals for a public-regarding approach to promote meaningful exposure to media content diversity have been made by Helberger and others, while acknowledging the complexities and pitfalls of state intervention in that regard.[172]

Algorithmic personalization of media content raises issues similar to what the law and policy objective of net neutrality seeks to address.[173] Net neutrality is the principle by which broadband carriers should not discriminate the traffic that goes through their networks, as a mean to preserve the public nature of the internet and maximize the socio-economic benefits to be derived therefrom.[174] In Canada, the application of the principle derives from the *Telecommunications Act*.[175] The CRTC manages exceptions to net neutrality through the framework of Internet Traffic Management Practices ("ITMP") and Differential Pricing Practices ("DPP").[176] The merits of net neutrality are controversial and debated and its application is in a state of flux in many parts of the world including the US.[177] internet service providers lead the pack of opponents to net neutrality, invoking the need for flexibility to manage their network traffic efficiently.[178] Proponents supporting regulatory oversight of net neutrality invoke various arguments such as the transparency of internet backbone infrastructure, maintaining a competitive environment, promoting innovation, and preserving free expression and political freedoms.[179]

Technically, net neutrality applies at the level of internet service providers traffic management (speed, quality of transmission, site access blocking, etc.) and not at the level of the content travelling through this infrastructure. The division between internet content and infrastructure delivery has been (and still is) subject to distinct regulatory frameworks regimes with different liability regimes applying to internet service providers and content

168 *Supra* note 33–37.

169 (Napoli 2018, pp. 61–62), (how personalization of newsfeeds and media content reinforces existing views and beliefs with less exposure to counter facts or truths; the author suggests six main reasons why digital technology favours the circulation of misinformation within the broader purpose of unpacking assumptions embedded in the counter speech doctrine from a US perspective).

170 See, e.g., Hunt and Mc Kelvey, *supra* note 164 at 314 (about platform operators' incentives to increase shareholder value through algorithms and architectures that retain viewers' attention to generate higher advertising revenues); Wu, *supra* note117.

171 Hamilton and Robinson, *supra* note 4 at 25 (referring to the work of Napoli, *supra* note 169).

172 See, e.g., (Helberger 2015, pp. 1329–30), (on the role public service media can play to ensure diversity of media content through meaningful exposure beyond broad supply, and on the use of "diversity by design" algorithms that could counter the effects of personalization and "filter bubbles", while also warning against dangers of use of state powers and intervention in that regard).

173 (Easley et al. 2018).

174 (Wu 2003, p. 171).

175 *Supra* note 14, ss. 27(2), 36.

176 "Telecom Regulatory Policy CRTC 2009-657" (21 October 2009), online: Canadian Radio-television and Telecommunications Commission https://crtc.gc.ca/eng/archive/2009/2009-657.htm#VII (accessed on 3 June 2021); "Telecom Regulatory Policy CRTC 2017-104" (20 April 2017), online: Canadian Radio-television and Telecommunications Commission https://crtc.gc.ca/eng/archive/2017/2017-104.htm (accessed on 3 June 2021).

177 (Ovide 2021).

178 Ibid.

179 Communications Future Report, *supra* note 1 at 108 (summarizing key justifications of net neutrality based on a multi-jurisdiction overview of the principle).

providers.[180] Subjecting content providers offering services in a given jurisdiction to comply with its criminal, language, intellectual property, or consumer protection laws does not contravene network neutrality. Although it raises unique issues of monitoring and legal enforcement, the internet is no law-free zone and the law of a relevant jurisdiction will apply a priori and indiscriminately to all. The carrier vs. content provider divide is less clear when content providers handling large volumes of media content (e.g., Spotify, Netflix) dictate the architecture, i.e., order of appearance, discoverability, search results, recommendations, related ads, or may favor affiliated content over other.[181] In such cases, content providers discriminate amongst users and do not apply data neutrality. This discrimination is reminiscent of what net neutrality seeks to prevent at the backbone infrastructure level of the internet.[182] As a form of media content curation which has traditionally been the realm of broadcasting regulation, algorithmic personalization by firms deserves attention from a cultural media content law and policy perspective.

In Canada's ongoing debate about whether it should regulate some aspects of internet broadcasting to bring it more on par with traditional over-the-air broadcasters, some commentators opine that such regulations would weaken the principle of net neutrality.[183] Following this logic, this means that in the name of a *free internet*, internet broadcasters and other content providers would remain free of the scrutiny of non-neutral and discriminatory data curating practices which in principle raise issues akin to the non-discrimination principles that net neutrality seeks to preserve. Additionally, on the same basis, any attempt to bring more transparency to such practices through content regulation would go against what? Net neutrality? Such argument brings to bear the weakness of opposing almost any form of state regulation for going against a *free internet.* Au contraire, regulatory oversight may well be necessary, precisely to make the relevant media content operations more open to scrutiny, transparent and accountable to the public.[184]

4.3.3. Access to Affordable Communication Networks

Citizens' autonomy, their ability to work, study, get access to news, entertainment, games, to connect to their world, locally and globally, requires access to quality, reliable, and secure networks. In the networked society, internet access has quickly become a basic utility, just as water, gas, or electricity. Discrepancies in internet access create important barriers that may give rise to opportunity gaps and socio-economic disparities between regions. On that basis, state investment and regulatory oversight of internet access at the infrastructure level are required to reduce those inequalities. Recent policy recommendations and reports on the future of communications make recommendations in that regard, and that *Telecommunications Act* policy objectives should include security and reliability of telecommunications networks for the benefit of all Canadians.[185] In recent years, both Federal and Provincial levels of governments have announced massive investments in network infrastructure to address the *digital divide*.[186] The exercise of personal autonomy and sovereignty is intimately tied to the state ensuring access to strong network infrastructure. Any media content regulation cannot lose sight of the pre-requisite of reliable secure networks for peoples' ability to access such media content in the first place, and become full participants in the networked society, locally and globally.

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180 e.g., *Copyright Act*, *supra* note 77, s. 2.4(1) (b) (states the common carrier exception under which providing the means of communication transmission of copyright works does not on its own attract copyright liability).

181 Easley, Guo and Krämer, *supra* note 173 at 265 (arguing that when favoring affiliated content is harmful and the gatekeeper has incentives to do so, then data-neutrality regulation may be warranted); Hunt and McKelvey, *supra* note 164 at 314.

182 Easley, Guo and Krämer, *supra* note 173 (arguing that net neutrality relating to gatekeepers at the infrastructure level is part of a larger issue of data neutrality when gatekeepers operate at the digital platform level).

183 (Geist 2020), (arguing that recommendations to promote Canadian content are inconsistent with the core principles of net neutrality in Canada).

184 (Mittlestadt 2016), (generally proposing algorithm auditing for providers of content personalization systems for the purpose of maintaining the transparency of political discourse).

185 See, e.g., (McNally 2017); Communications Future Report, *supra* note 1 at 70–76, 105 (Recommendation 45).

186 See, e.g., (CRTC 2021; Government of Ontario 2020; Government of Canada 2019).

To sum up, it is hard to conceive of any law and policy overseeing the creation, curation and dissemination of media content made available to its citizens, without considering various external influences that may undermine such endeavors at the individual and community levels. While media content and personal data protection may have been relatively distant fields of regulation in the past, the networked society environment has brought the objectives pursued by each sphere closer together.[187] Setting the parameters of how the personal data of Canadian viewers is collected and used by internet broadcasters ties to the objectives of national cultural sovereignty. Such parameters should address any use of personal data that undermines viewers autonomy as well as the democratic and human rights values that withstand Canada's media content law and policy.

5. Mediating Sovereignties in the Networked Society: Insights from Media Theorists and Other Scholars

In the ongoing debate on the future of media content regulation in Canada, the state emerges as a mediating force between competing powers, and as gatekeeper to its peoples' individual interests and collective aspirations, across competing technologies, physical and virtual territories, domestically and globally. Before mapping out the contours of such state's mediating powers, and their underlying legal and normative justifications, we look at the insights provided by media theorists and other scholars that may inform this trajectory.

McLuhan often invoked "control tower" imagery, calling artists, scientists, and scholars from "the ivory tower to the control tower of society".[188] Artists (those tuned into their sense and, in exemplary cases, trained to understand some of the physical properties of media) are like traffic controllers for being able to see patterns and provide order to those of us caught in the fray on the ground. Rather than rest his hope in a world calibrated by computers and algorithms—albeit, initiated by the minds and hands of human programmers—he was imagining more human intervention and interface, a world where computers work for and with us, rather than one we pre-program and then walk away. McLuhan was well aware that talk of a programmed environment was bound to raise alarms, yet he explored it as hopeful and necessary.[189] He did not imagine the created environment as one-way system, devised by a powerful cadre, deployed by computers, and let lose to control a populace. Instead, he imagined an interactive environment, so that intelligent users would influence programs, or use itself would lead adjust the system, leaving room for a sort of third-space citizen hack.

Whereas our current situation encourages us to think about media distribution and control as largely an economic and political matter—with the large transnational media platforms acting as sovereigns with limited transparency or accountability to the public, McLuhan saw programming as prioritizing the establishment of social wellness. The forms of control he envisioned had at least three levers: on the level of personal sovereignty, individuals need to be more aware of the effects of media and exercise greater agency in self-regulation; on the level of governmentality or systemic organization, an informed leadership needs to make creative and humane decisions meant to support social goals and sustain life; and on the level of the regulatory framework itself, such a document and/or set of practices needs to be subject to revision and interactive correction, so that user feedback shapes policies and directions.

It is befitting to hearken back to McLuhan in considering our current questions about regulating communications media. Indeed, with more media forms and concentrations, our current questions have evolved toward clearer lines of tension—between states and corporate giants; between citizens who want a free internet and governments intent on protectionist measures. Additionally, whereas McLuhan tended to frame the problem as

[187] Communications Future Report, *supra* note 1 at 187 (recommendation 90 recommending that Canada's *Broadcasting Act* and *Telecommunications Act* be amended to include a commitment about protecting consumer privacy).

[188] *Understanding Media*, *supra* note 7 at 96.

[189] (McLeod Rogers 2021, p. 165).

one information overload—too much innovation, connection, and information—we tend to see the problem in terms of economics and governance: whose cultural and financial interests are being served and whose overlooked or compromised? Yet, we would contend the differences are more a matter of emphasis than content, and our situation now in fact connects to and extends from the one emerging in his day. More than responding as individuals, we need a systemic response. This response affects a global world but needs to be sensitive to regional or localized trends. The response needs to be citizen informed rather than imposed by any group who, not neutral, inevitably serve parochial interests. Recognizing the links between then and now also suggests that we may not need upheaval and radical change in our approach to control—it may help to observe what we have done, what worked, and how to make strategic revisions.

If we turn to more recent communication and internet theorists, they also advocate for more control, involving a combination of citizens and government. Zuboff ends *The Age of Surveillance Capitalism* by calling on all of us to take notice of how technology has changed our actions and expectations, throwing a yoke around our necks that inhibits free choice or action. She says we need to individually awaken and to collectively demand an end to thralldom by pronouncing "No more".[190] If Zuboff is dire in her forecast about the wages of big tech moving in on our lives, others are equally bleak. Emphasizing aesthetics and culture, British author and scholar James Bridle warns of the social dissolution and planetary degradation that accompany digital life.[191] Yet, despite deep concerns, both theorists believe it is in our human reach to regain control by recognizing the dangers and asserting human values. Zuboff concludes her critique by calling for "collective effort" to break the cycle.[192] Similarly, Bridle also urges humans to take corrective action: "Our understanding of those systems and their ramifications, and of the conscious choices we make in their design, in the here and now comma, remain entirely within our capabilities".[193]

Amongst many media theorists and other scholars, there is growing recognition that left to unfold without rules or structure—unfurled by private corporations who have playbooks designed to advantage their position—proliferating communication technology threatens the safety of both planet and people. Apart from cancelling citizen privacy and freedom and driving global economies, there are also accompanying concerns that unbounded production of technological devices, structures, and infrastructure requires Earth resources and produces irreversible pollutants. There is, in short, urgent and multiple need for policy improvement and protections.[194]

McLuhan noted all of these pressure points intensifying with increased networking and technological acceleration—power aggregating around manipulative corporate suppliers, citizen loss of privacy and freedom, and increasing artifice coupled with environmental degradation—yet his underlying concern was not so much with these observable external changes as with transformations within the human psyche and character. Media change us, he warned. We learn to do less and want more of what they offer. Sometimes he referred to numbing and narcosis. Other times to being drowned in a whirlpool of ever new gadgetry. His concern was that technology was extending or externalizing some senses and amplifying others, in the process altering our ability to perceive and know. Media, he contended, are neither good nor bad in themselves but "morally neutral"[195]—they take on such characteristics in the uses to which we put them. For this reason too they require strategic management aimed at creating a life-fostering environment or outcomes. He encouraged recognition of the learning possibilities and life supports attendant on a networked environment, imagining us as on the "threshold" of "a liberating and exhila-

190 Zuboff, *supra* note 6 at 525.
191 (Bridle 2018, p. 252).
192 Zuboff, *supra* note 6 at 525.
193 Briddle, *supra* note 191 at 252.
194 See for recent treatment: (Crawford 2021).
195 (Rogaway 1969), at 22 [McLuhan, Playboy].

rating world."[196] We hear similar enthusiasm in Laura Denardis' recent examination of imbedded internet—, when she notes that governance wrangles and dangers aside, we now use technology for medical leaps and discovery and correction, so that we need to understand it part of us, "a human space."[197]

As these reference points show, the call for regulation and protection has history amongst communications scholars—we can hear it, from McLuhan forward, in various urgings for humanity to establish safety nets to protect culture and citizens. There have been accompanying exhortations to discourage digital creep—to prohibit not only the stealing of recognizable architectures like state and national boundaries, but also hooding the dimensions and content of human dreams and actions. New media still comes with promise—not false enchantments to amuse us to death (as Postman famously feared),[198] but real excitements, such as the possibilities of travelling safely through space or curing bodies wracked by pain. To optimize these advantages—and to do so in equitable, sustainable and life-enhancing ways—requires the exercise of some meaningful form of public interest controls. Global governance scholar Denardis—noting that the internet has enhanced our lives with "groundbreaking transformation"—captures the pressing policy work ahead: "Ultimately, shaping human rights and security in the cyber-physical world is now an enormous collective-action problem in which all are vulnerable and all are responsible".[199]

Without providing map and plan, McLuhan urged that moving forward in our human-made technologized networked environment required human intervention/leadership and control. We needed, he said, a "civil defense against media fallout".[200] Of course, in his view, it was not rapid-fire media developments alone that posed the threat, but the corporate forces driving development, and teaching us to become ever more dependent and captive. We continue in the situation he described: walls down and digital services streaming across borders, looking for accountability and transparency to the public, and equity amongst key constituents of the media content space.

6. Conclusions: Mapping the Contours and Justifications of States' Mediating Powers and Regulation of Media Content

As media theorists and other scholars inform us, the stakes and power struggles around the regulation of media content between states, private undertakings, artists, creators, consumers, and various community groups are not new to the networked society and cyberspace. What has changed is the pervasiveness of personal data extraction as we consume media content, which calls for Canadian citizens' protection at the individual level, as well as national attention at the big data aggregate level.

What justified broadcasting regulation fifty years ago—i.e., *Canada's cultural sovereignty* in a global market, through the commissioning of Canadian content, steering the curation of content in a way that maintains news standards of accuracy, reflects Canadian values, identity, and diversity, regionally and nationally, indigenous peoples, bilingualism, and increasingly indigenous languages, marginalized, racialized, LGBTQ and other groups—remains highly relevant today. Yet, any state interference in that space, both domestically and externally, remains highly contested, from the low interventionist Canadian media funding contribution to more invasive content standard requirements.

Another angle for assessing justification rests on acknowledging how the aims and purposes of broadcast regulation have changed over time in Canada. It is understandable that Canadian Marshall McLuhan came to coin what is now widely seen as a truism that "the medium is the message " if we consider his exposure to a broadcast and communication industry that Charland aptly critiques as apparatus designed to promote the ideal of unity and connectivity rather than to enable circulation of extant cultural content—so

196 Ibid.
197 (Denardis 2020, p. 229).
198 (Postman 1985).
199 Denardis, *supra* note 197 at 228.
200 McLuhan, Playboy, *supra* note 198 at 19.

that the cross-continental train forged physical linkage while radio enabled national conversation and cultural exchange. In some ways, a similar situation holds today, for it is not so much particular content that government may want to control (not expressly limiting American-based and biased news and programming, nor censoring programming developed by groups or individuals), but to apply Canada's broadcasting policy to new technological environments when feasible and desirable (e.g., funding obligations for creation of Canadian content). This is a crucial difference. While the project of technological nationalism relied on technological apparatus itself to forge a unified sense of Canadian identity and nationhood, if Canada seeks a renewed broadcast policy framework, it will be one that aims at flexibility rather than consolidation and one that abandons unity and homogeneity to encourage individual, local, and heterogeneous voices and values.

It is precisely for its highly contested nature, not in spite of it, that the state needs to continue provide oversight of media content to varying degrees. The parameters of intervention will be informed by freedom of expression as a fundamental protected human right under Canada's Constitution, and its acceptable limits. Legislation and resulting ongoing policy implementation on the tools to be deployed (e.g., for the commissioning of Canadian content, or impacting content curating or its discoverability) will be transparent, follow democratic processes, consultation, participation by various groups, addressing collective interests (e.g., Canadian creators or Canadian identity, Indigenous peoples, Québécois/French Canadians, other minority groups) or individual rights (e.g., human rights or consumer privacy protection). The state intervention will be modulated. It may be prescriptive (e.g., requiring close captioning for media content specifically targeting Canadian viewers), commitment oriented (e.g., contribution to Canadian media fund) or standard based (ensuring undertakings' algorithmic content discovery practices are transparent or meet minimum requirements related to Canadian content). It will ensure that proper infrastructure is in place, providing affordable access to reliable and secure networks to all citizens. In a nutshell, maintaining state sovereignty through regulatory oversight of media content provides a public forum for debate, denouncing flaws, gaps, or inconsistencies, promoting transparency and accountability over matters that are fundamental to Canadians and to a functional democracy. Positing the importance of state oversight is by no means a glorification of current or future regulation of media content or of democratic processes in general. There is no shortage of imperfections or gaps and will likely continue to be.[201] What we emphasize here is the public platform and open process that state regulatory oversight provides. Additionally, this is critical for matters as sensitive and fragile as a country's cultural and media content policy and for its peoples' privacy, autonomy, and flourishing.

The absence of regulatory oversight of media content that specifically targets Canadians, on the basis that it is provided through the internet, amounts to outsourcing an increasingly significant portion of Canada's cultural policy to private undertakings either within, but mostly outside Canada. There is no transparency, or accountability to the public, other than to the private undertakings' shareholders and their bottom line, for matters such as the commissioning, curating and discoverability of media content. It is a significant divestiture of Canada's sovereign power as vessel to its peoples, abandoning the required checks and balances mechanisms that citizens should expect of a well-functioning democracy, such as state powers that protect individual and collective interests when its peoples are less amenable of doing so on their own. From a legal perspective, not regulating any internet media content creates an arbitrary distinction between different technological means of broadcasting that is not justified from a technological neutrality perspective, and that will progressively bring our media content regulations into obsolescence. Such regulatory restraint finds little support in Canada's territorial jurisdiction principles, which

[201] Recent attempts to limit debate in the Canadian House of Commons to hasten the adoption Bill C-10, *supra* note 47 that would lead to important amendments to the *Broadcasting Act*, supra note 2, have given rise to important criticism. See (Emmanuel 2021; Geist 2021b).

does not bar Canada from regulating certain forms of internet activity that have real and substantial connection to it.

The exercise of state sovereignty needs to be made in cooperation with international initiatives (e.g., the development of standards) while being bounded by its intrinsic limits and the exigencies of global cyberspace. Several law and policy goals cannot be implemented without such international guidelines. For instance, as much as Canada may endorse net neutrality as a policy goal, its reach will be limited absent a greater commitment and endorsement on the international stage. As Woods notes, a key global governance challenge is finding ways for states to exercise their sovereign powers in ways that are compatible with cyberspace.[202] For Woods, this means two things: "accommodating sensible sovereign control over the internet and, relatedly, embracing a global internet governance ideal that reflects sovereign differences. We should not give states reason to assert control by brute force—taking physical control over the network architecture in ways that produce negative externalities. Instead, we should allow sovereigns to enforce their laws on their soil wherever doing so does not interfere unreasonably with other sovereigns' regulation of the internet."[203] As such, "we must reject the fantasy that the Internet can or should be governed by the same rules everywhere."[204] This is true for media content regulation, and for many other spheres of regulation whereby the establishment of international minimum standards has traditionally allowed flexibility and respect for regional differences.

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References

Armstrong, Laura. 2014. Netflix Refuses CRTC Demand for Confidential Data. The Toronto Star. September 22. Available online: https://www.thestar.com/news/gta/2014/09/ (accessed on 3 June 2021).

Bannerman, Sara. 2020. *Canadian Communication Policy and Law*. Toronto: Canadian Scholars.

Besson, Samantha. 2011. Sovereignty. April. Oxford Public International Law. Available online: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?print=pdf (accessed on 3 June 2021).

Bratton, Benjamin H. 2016. *The Stack: On Software and Sovereignty*. Cambridge: MIT Press.

Bridle, James. 2018. *New Dark Age: Technology and the End of the Future*. London: Verso.

Chapdelaine, Pascale. 2017. *Copyright User Rights, Contracts and the Erosion of Property*. Oxford: OUP.

Charland, Maurice. 1986. Technological Nationalism. *Canadian Journal of Political and Social Theory* 10: 196–220.

Cohen, Julie E. 2017. Law for the Platform Economy. *UCDL Review* 51: 133.

202 Woods, *supra* note 49 at 359.

203 Ibid.

204 Ibid.

Craig, Carys J. 2013. Technological Neutrality: (Pre)Serving the Purpose of Copyright Law. In *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Edited by Michael Geist. Ottawa: University of Ottawa Press, p. 271.
Craig, Carys J. 2016. Technological Neutrality: Recalibrating Copyright in the Information Age. *Theoretical Inquiries in Law* 17: 601–32. [CrossRef]
Crawford, Kate. 2021. *Atlas of AI: Power Politics and Planetary Costs of AI*. New Haven: Yale University Press.
CRTC. 2009. Broadcasting Regulatory Policy CRTC 2009-329: Review of Broadcasting in New Media. Regulatory Policies. Government of Canada, June 4. Available online: https://crtc.gc.ca/eng/archive/2009/2009-329.htm (accessed on 3 June 2021).
CRTC. 2016. Broadcasting Regulatory Policy. CRTC 2016-343. Government of Canada, August 25. Available online: https://crtc.gc.ca/eng/archive/2016/2016-343.htm (accessed on 3 June 2021).
CRTC. 2018. Guidelines for TV and Radio Broadcasters and TV Service Providers during an Election. Government of Canada: Revised May 10. Available online: https://crtc.gc.ca/eng/industr/tvradio/guidelec.htm (accessed on 3 June 2021).
CRTC. 2019a. Communications Monitoring Report 2019. Online (pdf): Government of Canada. Available online: https://crtc.gc.ca/pubs/cmr2019-en.pdf (accessed on 3 June 2021).
CRTC. 2019b. Ensuring a Place for Canadians. Government of Canada, May 23. Available online: https://crtc.gc.ca/eng/cancon/c_services.htm (accessed on 3 June 2021).
CRTC. 2019c. Key TV Policies. Government of Canada. Modified June 14. Available online: https://crtc.gc.ca/eng/5000/tv2.htm (accessed on 3 June 2021).
CRTC. 2021. Broadband Fund, Closing the Digital Divide in Canada. Government of Canada: Revised March 19. Available online: https://crtc.gc.ca/eng/internet/internet.htm (accessed on 3 June 2021).
Cuihong, Cai. 2018. China and global cyber governance: Main principles and debate. *Asian Perspective* 42: 647–62. [CrossRef]
Deibert, Ronald J. 2020. *Reset: Reclaiming the Internet for Civil Society*. Toronto: Anansi.
Denardis, Laura. 2020. *The Internet in Everything: Freedom and Security in a World with No off Switch*. New Haven: Yale University Press.
Easley, Robert F., Hong Guo, and Jan Krämer. 2018. From Net Neutrality to Data Neutrality: A Techno-Economic Framework and Research Agenda. *Information Systems Research* 29: 253. [CrossRef]
Elkin-Koren, Niva. 2007. Making Room for Consumers under the DMCA. *Berkley Technology Law Journal* 22: 1119–55.
Emmanuel, Rachel. 2021. Blanchet Wants to Limit Debate of Broadcasting Legislation. June 1. Available online: https://ipolitics.ca/2021/06/01/blanchet-wants-to-limit-debate-of-broadcasting-legislation/ (accessed on 3 June 2021).
Flew, Terry. 2016. National Media Regulations in an Age of Convergent Media: Beyond Globalisation, Neo-liberalism and internet Freedom Theories. In *Global Media and National Policy*. Edited by Flew Terry, Petros Iosifidis and Jeannette Steemers. MacMillan: Palgrave, pp. 75–91.
Geist, Michael. 2020. Not Neutral: Why the Broadcast Panel Report Weakens Net Neutrality in Canada. Michael Geist. February 5. Available online: https://www.michaelgeist.ca/2020/02/not-neutral-why-the-broadcast-panel-report-weakens-net-neutrality-in-canada/ (accessed on 3 June 2021).
Geist, Michael. 2021a. Debating Bill C-10 at the Canadian Heritage Committee, Part One: My Opening Statement. Michael Geist. May 18. Available online: https://www.michaelgeist.ca/2021/05/debating-bill-c-10/ (accessed on 3 June 2021).
Geist, Michael. 2021b. Guilbeault's Gag Order, the Sequel: Time Running Out as Government Seeks to End Debate on Bill C-10 in the House of Commons. Michael Geist. June 15. Available online: https://www.michaelgeist.ca/2021/06/guilbeaults-gag-order-the-sequel-time-running-out-as-government-seeks-to-end-debate-on-bill-c-10-in-the-house-of-commons/ (accessed on 3 June 2021).
Golick, Jill, and Sean Speer. 2019. Turning the Chanel on CANCON. Online (pdf): Macdonald Laurier Institute. September. Available online: https://macdonaldlaurier.ca/files/pdf/20190913_MLI_CULTURAL_POLICY_Golick-Speer_PAPER_FinalWeb.pdf (accessed on 3 June 2021).
Government of Canada. 2019. Canada, Innovation, Science and Economic Development. High-Speed Access for All: Canada's Connectivity Strategy; Ottawa: Government of Canada, July. Available online: www.ic.gc.ca/eic/site/139.nsf/eng/h_00002.html#2_1 (accessed on 3 June 2021).
Government of Canada. 2020a. Canada, Broadcasting and Telecommunications Legislative Review. Canada's Communications Future: Time to Act; Ottawa: Government of Canada, January. Available online: https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf (accessed on 3 June 2021).
Government of Canada. 2020b. Fact Sheet: Digital Charter Implementation Act. November 17. Available online: https://www.ic.gc.ca/eic/site/062.nsf/eng/00119.html (accessed on 3 June 2021).
Government of Canada. 2020c. Modernization of the Broadcasting Act. November 3. Available online: https://www.canada.ca/en/canadian-heritage/services/modernization-broadcasting-act.html (accessed on 3 June 2021).
Government of Canada. 2021. GST/HST for Digital Economy Businesses: Overview. June 30. Available online: https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/digital-economy.html (accessed on 3 June 2021).
Government of Ontario. 2020. Up to Speed: Ontario's Broadband and Cellular Action Plan. Government of Ontario, May 21. Available online: https://www.ontario.ca/page/speed-ontarios-broadband-and-cellular-action-plan (accessed on 3 June 2021).
Grant, Peter S. 2018. The Broadcasting Act: Structure and Background. Innovation, Science and Economic Development Canada. December 5. Available online: https://www.ic.gc.ca/eic/site/110.nsf/eng/00005.html (accessed on 3 June 2021).

Greenberg, Brad A. 2016. Rethinking Technology Neutrality. *Minnesota Law Review* 100: 1495–562.
Hackett, Robert. 2019. Remembering the Audience: Notes on Control, Ideology and Oppositional Strategies in the News Media. In *Popular Cultures and Political Practices*. Edited by Richard Gruneau. Toronto: University of Toronto Press, pp. 83–101.
Hagen, Gregory R. 2013. Technological Neutrality in Canadian Copyright Law. In *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Edited by Michael Geist. Ottawa: University of Ottawa Press, pp. 307–28.
Haggerty, Kevin D., and Richard V. Ericson. 2000. The surveillant assemblage. *British Journal Sociology* 51: 605–22. [CrossRef]
Hamilton, Sheryl N., and Sandra Robinson. 2019. *Law's Expression, Communication, Law and Media in Canada*. Toronto: LexisNexis.
Helberger, Natali. 2015. Merely Facilitating or Actively Stimulating Diverse Media Choices? Public Service Media at the Crossroad. *International Journal of Communication* 9: 1324–40.
Hunt, Robert, and Fenwick McKelvey. 2019. Algorithmic Regulation in Media and Cultural Policy: A Framework to Evaluate Barriers to Accountability. *Journal of Information Policy* 9: 307–35. [CrossRef]
Hutchinson, Cameron J. 2015. Technological Neutrality Explained & Applied to CBC v. SODRAC. *Canadian Journal of Learning and Technology* 13: 101–18.
Kant, Tanya. 2014. Giving the Viewer a Voice: Situating the Individual in Relation to Personalization, Narrowcasting, and Public Service Broadcasting. *Journal of Broadcasting and Electronic Media* 58: 381–99. [CrossRef]
Khan, Lina. 2017. Amazon Anti-Trust Paradox. *Yale LJ* 126: 710.
Kindred, Hugh M., Jutta Brunnée, and Phillip M. Saunders. 1993. *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. Toronto: Emond Montgomery.
Klonick, Kate. 2018. The New Governors: The People, Rules, and Processes Governing Online Speech. *Harvard Law Review* 131: 1598–670.
Liaropoulos, A. 2016. Exploring the Complexity of Cyberspace Governance: State Sovereignty, Multi-stakeholderism and Power Politics. *Journal of Information Warfare* 15: 14–26.
Lillington, Karlin. 2019. Ban All Indiscriminate Data Gatherings. IRISH TIMES. November 7. Available online: https://www.irishtimes.com/business/technology/karlin-lillington-ban-all-indiscriminate-data-gathering-1.4074670 (accessed on 3 June 2021).
Mainwaring, Sarah. 2020. Always in control? Sovereign states in cyberspace. *European Journal of International Security* 5: 215–32. [CrossRef]
McLeod Rogers, Jaqueline. 2021. *McLuhan's Techno-Sensorium City: Coming to our Senses in a Programmed Environment*. Lanham: Lexington.
McLuhan, Marshall. 1973. At the moment of Sputnik the planet became a global theatre in which there are no spectators but only actors. *Journal of Communication* 24: 48. [CrossRef]
McLuhan, Marshall. 2003. *Understanding Media: The Extensions of Man*. Edited by Terrence Gordon. Berkeley: Ginko. First published in 1964.
McLuhan, Marshall, and Quentin Fiore. 1968. *War and Peace in the Global Village*. New York: Bantam.
McNally, Michael. 2017. House of Commons Standing Committee on Industry, Science and Technology—Broadband Connectivity in Rural Canada Brief online (pdf): Our Commons. Available online: www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9272661/br-external/VanHorneInstitute-e.pdf (accessed on 3 June 2021).
Mittlestadt, Brent. 2016. Auditing for Transparency in Content Personalization Systems. *International Journal of Communication* 10: 4991.
Murschetz, Paul Clemens, and Daniela Schültz. 2018. Big data and television broadcasting. A critical reflection on big data's surge to become a new techno-economic paradigm and its impacts on the concept of the «addressable audience». *Fonseca, Journal of Communication* 17: 23–38. [CrossRef]
Napoli, Philip M. 2018. What if more speech is no longer the solution? First Amendment Theory Meets Fake News and the Filter. *Federal Communications Law Journal* 70: 55–104.
Office of Privacy Commissioner of Canada. 2019. News Release. Facebook Refuses to Address Serious Privacy Deficiencies Despite Public Apologies for "Breach of Trust". April 25. Available online: https://www.priv.gc.ca/en/opc-news/news-and-announcements/2019/nr-c_190425/ (accessed on 3 June 2021).
Office of Privacy Commissioner of Canada. 2020. 2019–2020 Annual Report to Parliament on the Privacy Act. October. Available online: https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/ (accessed on 3 June 2021).
Office of Privacy Commissioner of Canada. 2021. News Release. Commissioner: Reform Bill "a Step Back Overall" for Privacy. May 11. Available online: https://priv.gc.ca/en/opc-news/news-and-announcements/2021/nr-c_210511/ (accessed on 3 June 2021).
Ovide, Shira. 2021. The Long, Painful Path of Net Neutrality—Where the War Over Net Neutrality Stands, and Why It (Sort of) Matters Today. *New York Times*. February 25. Available online: https://www.nytimes.com/2021/02/25/technology/net-neutrality-explained.html (accessed on 3 June 2021).
Pasquale, Frank. 2015. *The Black Box Society: The Secret Algorithms that Control Money and Information*. Cambridge: Harvard University Press.
Piper, Tina. 2000. The Personal Information Protection and Electronic Documents Act: A Lost Opportunity to Democratize Canada's "Technological Society". *Dalhousie Law Journal* 23: 253.
Pohle, Julia, and Thorsten Thiel. 2020. Digital Sovereignty. *internet Policy Review* 9: 1–19. [CrossRef]
Postman, Neil. 1985. *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*. New York: Penguin Group.

Radin, Margaret Jane. 2013. *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*. Princeton: Princeton University Press.
Reed, Chris. 2007. Taking Sides on Technology Neutrality. *SCRIPTed* 4: 263–84. [CrossRef]
Rogaway, Phillip. 1969. Marshall McLuhan Interview from *Playboy*. Available online: https://web.cs.ucdavis.edu/~{}rogaway/classes/188/spring07/mcluhan.pdf (accessed on 3 June 2021).
Sullivan, Ruth. 2014. *Sullivan on the Construction of Statutes*, 6th ed. Markham: Lexis-Nexis.
Teachout, Zephyr. 2020. *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech and Big Money*. New York: All Points Books.
Troper, Michael. 2012. *Sovereignty. The Oxford Handbook of Comparative Constitutional Law*. Edited by Michel Rosenfeld and Andras Sajo. Oxford: OUP Oxford, p. 354.
Trudel, Pierre. 2009. Regulation of Broadcasting on the Internet: A Risk Management Process. December 5. Available online: https://ssrn.com/abstract=1626848 (accessed on 3 June 2021). [CrossRef]
Verborgh, Ruben. 2019. How We Regain Control of Personal Data, A Return to a Decentralized Web. Towards Data Science. August 28. Available online: https://towardsdatascience.com/ruben-verborgh-on-data-privacy-accf91d280c9 (accessed on 3 June 2021).
Woods, Andrew Keane. 2018. Litigating Data Sovereignty. *Yale Law Journal* 128: 328.
Wu, Tim. 2003. Network neutrality, broadband discrimination. *Journal of Telecommunications and High Technology Law* 2: 141–79. [CrossRef]
Wu, Tim. 2016. *The Attention Merchants The Epic Scramble to Get Inside our Heads*. New York: Knopf.
Zuboff, Shoshanna. 2019. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: Public Affairs.