CONCERNING HOME TELEMATICS

Proceedings of the IFIP TC9 Conference on Social Implications of HIT

Amsterdam, the Netherlands, 24-27 June, 87

Edited by F. Van Rijn
R. Williams

North-Holland

BENEVOLENT HIT IN A BENEVOLENT SOCIETY A TARGET FOR EUROPEAN LAWYERS*

Claire Monville and Yves Poullet
Research Center for Computer and Law
Law Faculty, Namur, Belgium

INTRODUCTION

From the ascent of consumer telematic services ...

The first experiments in consumer telematics date back to the year 1979. In seven years, telematics has changed: the number of terminals is in some countries very high (for example, more than two million Minitels in France); the services are multiplying: Home Banking, Home Shopping, let alone electronic publishing and above all electronic mail, which have met real success with the public. Finally, the actors are diversifying: not only the public authorities, but also bankers, distributors, and even actors who – at the beginning – were suspicious of this new medium, no longer hesistate to play an active part in supplying these services; for instance the publishers of the written press are moving progressively towards the electronic press. With the development of these new services, called telematic services, companies of various backgrounds are undertaking new activities.

The development of the market for telematic services for the private consumer is however falling far short of the possibilities offered by the existing network technology and the forecasts of its promoters.

...to their failure

The results of consumer telematic experiments were rather dis–

*Report resulting from a research made for the programme FAST, DG XII, Commission of the European Communities.

appointing; the number of calls by the users was low and these users did not always find the desired information or service easily.
This relative failure did not deter nation administrations, which developed telematic networks and prompted the distribution of terminals (experiments Bildschirmtext in Germany, Prestel in Great Britain, Télétel in France, Viditel in the Netherlands).
Telematics succeeded therefore in asseting itself to the general public. But the failure to make the readjustments which should have followed the experiments, and the absence of preliminary consultation of the consumers, led to problems related to the demand for services. In particular the actual use of telematics did not conform to promoters' expectations.

Electronic information services were perceived in 1980 as a "must" for any modern society. Actually, these services are secondary compared with electronic mail (and especially erotic mail) which has found preference with the public. If the French videotex had more success than the English or the German ones, it is due to the fact that France has designed its videotex as a communication instrument and not as a mere information vehicle.

The divergence between the expectations and the results can be explained by the following: most of the actions undertaken focused on the supply, that is the infrastructure, and not the demand, that is the services expected by the user.

At the national level, the network is in service and terminals have been distributed. Beside these actions and a few regulations protecting the consumer, consumer telematics has not been subjected to fundamental examination in particular regarding the content of the services.

At the European level, the position is the same: actions have been directed towards compatability of terminal equipment, opening the national public markets and the limitation of monopolies. Nothing is said about measures to afford adequate protection of demand.

... to need to take demand into account: a benevolent HIT

This error of perspective seems to be the source of the relative failure of consumer telematic services.

It is urgent, we suggest, to switch from a "telecommunications policy" a "services policy", from a "policy of supply" to a "policy of demand" in order for Home Interactive Telematics to become "benevolent".
Our purpose is to examine the regulatory conditions to take into consideration and protect the interests of demand. But to this first object, we must add a second one which is even more fundamental.

...to an examination of the principles of a benevolent society

It is usual to say that electronic services are only new ways to render services which were until now rendered by traditional media. For example, the electronic mail has replaced the paper mail; the electronic press is simply a substitute for our traditional newspapers.

This assertion has its limits. We must be aware that these new media may overthrow the constitutional balances patiently elaborated to guarantee our liberties. Whether it is the privacy ot correspondence, the freedom of expression or its corollary the freedom of the press, the guarantees elaborated during the past centuries are called in question again because the actors are not the same anymore and the technological tool runs the risk of creating new concerns or shifts in power.

It is therefore essential that a fundamental study of the risks that our societies are running, or more precisely our liberties, is undertaken without delay. This is the second subject of our paper.

PART I - A BENEVOLENT HIT ...

Telematics is the tool of a major change in the field of information and transaction services. Through the videotex system, the services enter the household and reach the user in the intimacy of his home. For example, from his armchair the user can gain access to many databases, order goods for consumption or manage his bank account.

If they present many advantages, these services can also constitute a risk for the user: interference with his privacy, increase his expenditure and create imbalance between the parties.
Before proposing legal norms which could affort protection for the user, it is important to understand the specific features of HIT compared with traditional services.

I.A - The specific features of hit

1. The multiplication of the actors

Numerous actors intervene between the final user and the supplier of the information, the product or the service. Among these actors, there are public of private carriers, technical agents (the computer centers) and commercial intermediaries.

In such a situation, it is difficult for the user to determine the identity and the function of all the actors intervening in the telematic process. What happens then if a problem arises?

According to the principles of civil liability, the user having suffered a damage will have to prove the fault which caused the damage. Telematic networks are so intricate that this fault will be difficult to find: it can be a technical error as well as a mistake in the original data, or the object of the service, or a criminal intervention. For example if a user, consulting his bank account by videotex, notices that the amounts indicated do not correspond to the real amounts. Is it a failure in the technical transmission, the consequence of the intrusion of a criminal in the system, a mistake from the bank which did not record all the operations,...? Even if the cause of the damage is determined, the injured user must be able to identify the person liable - his name or its trade-name. Many national legislations already require the suppliers of services to mention on the first screen-page their name or trade-name in order to facilitate any eventual actions by the users.

It is obvious that in case of transborder flows of services, the identification and prosecution problems are further accentuated.

2. The dematerialization of the services

Electronic information appears and disappears on the screen without leaving a trace or proof for the user.
It must be ensured that, before making a commitment, the user is clearly informed of the general and specific conditions of the services: the price, the duration, the possible remedies, the general conditions of sale (for the teleshopping). But in most cases the information about the service exists only in an electronic form.

Because the price of the service increases with the duration of the connection, the user does not always call the information pages and when he is obliged to see them, he makes them pass rapidly. Some regulations require the suppliers to display in addition to their name or trade-name, the price of the service. This information however remains electronic. It can be changed unilaterally and easily by the supplier and leaves no trace for the user.

Once the telematic operation has been completed, the parties must be able to prove its existence and its content. For example, a user can deny having called a specific information, another user can consider that the price charged is not the one he had agreed on, a third person can receive a product different to what he had ordered.

There is a legal principle which says that "what is not proved does not exist". But how can one prove transient and intangible information?

3. The importance of the time factor

One of the main factor of the costs of telematic services is the duration of the connection to the service. Telematic communications are invoiced by the carrier following the same method for calculation as for the telephone communication. In addition, for some services, the user must pay the supplier an amount depending on the duration of the call.

In such circumstances, it is the user's interest to reduce the connection time. On the other hand, whether he is aware of this or not, the user must be well informed of the conditions of the service (cost, identification), especially if it leads to the conclusion of a transaction (general conditions of the contract). The problem is to find a balance: how, in a minimal time, to obtain all the information about the service?

In the same way, it must be ensured that the suppliers of the services organize their databases in such a way that the users reach the data searched by the shortest way. The clarity of the menu-presentation of the headings and subheadings - is an important element of the conviviality of telematic services.

4. The technical dependency

Computer and telematic technology has allowed the development of numerous, varied services. But, on the other hand, people – and especially users – have not entirely mastered the technique. No system can guarantee freedom from failures, short–circuits, bad transmission.

Telematics can also be used in a perverse way. For example by the creation of pirate–programs and by the illegal use of personal data (infringement of privacy).

There is thus a security problem.

From the user's point of view, security has at least three meanings:
- "integrity", that is the ability of the whole transmission system to guarantee the correctness and completeness of the message;
- "continuity", that is the ability of the whole transmission system to ensure a service which is not interrupted, and in such a case to prevent the consequences of such an interruption;
- "confidentiality", that is the ability of the whole transmission system to guarantee the absence of disclosure of the data to unauthorized persons. In the case of HIT, by the use itself of the service, personal data enter the system and can show, if one is not careful, the behaviour and the habits of a user (see under).

I.B - The user's demand

In the introduction, we showed that it is necessary to take users demand into account to achieve a benevolent HIT.

The specific features and risks of these services were defined above. Depending on these characteristics, we must now determine how and in which direction the consumer could influence the regulation of consumer telematic services. The development of regulation to protect the consumer (the demand side) requires on one the hand the participation of the users, and on the other hand the definition of the requirements of these users.

1. The partici tion of the users

The word "participation" covers a general concept including all the means for the consumers to take part in the decisions which concern them and the definition of the aims guiding these decisions. The representation of the consumers within the decision–making and supervising bodies constitues without a doubt the most complete form of participation, since it offers direct involvement in their internal deliberations.

In the field of consumer telematics, there is a deficiency: it cannot be said that the individual, as a potential user of telematic services, has been involved in the implementation of the consumer network and participates in its continuation and development. During the telematic experiments, the user's position was more that of a subject of experiment than that of a person acting as a partner in conjunc–tion with the public and private promoters of this new medium.

In order for the new technologies, and especially HIT not to be imposed on consumers, their participation in both the elaboration of the information services created and their supervision is desirable, if not imperative.

2. The regulation of telematic services

Before defining concretely the requirements of the consumers, it is necessary to restate the principles to be followed in the choice of regulations applicable to telematics.

- **An intervention of a "soft law" type** is preferable to an interven–tion of a "hard law" type; it implies the delegation of regulatory power to authorities empowered, but acting within a framework provided by legislation. In the face of a changing reality such as telematics, this type of intervention seems to be the best to create effective and adaptable norms to cover new situations.
- The regulations cannot bear on all the telematic services as a whole; they must be established **service by service.** It is obvious that the problems raised by an information service are not the same than the problems raised by teleshopping or electronic mail. It is certain that the regulation should provide greater protection for the consumer who has not signed a preliminary contract with the supplier – as is the case for the "kiosk" services offered by the Teletel system in France.

- At the present time, the conditions of the supply and the use of telematic services as well as the legal value attached to these conditions vary from one country to another. However, through the telecommunication networks, the users of the videotex system have access to services located in foreign countries. Thus the diversity of legal norms for the conditions of the supply and the use of the services raises a problem. When a consumer has access to a foreign service, the protection which he is granted in that country does not always correspond to the protection requirements of hiw own country; in addition, it is difficult for this consumer to know the conditions of supply of such services in a foreign country. From the point of view of the suppliers of the services, the conditions of access to this activity and the obligations which are imposed on them vary from one country to another and constitute distortions in competition. The answer to this problem is to unify the condictions which go with the supply and the use of telematic services. In this field, it is necessary to establish international standards. If it is not possible to deal with all the problems, these standards will at least reflect the lowest common denominator; the minimal requirements of the user.

At the end of this first part, let us pinpoint some of the requirements that the users would need to see fulfilled in order for HIT to become really benevolent:

a) The variety of choice for the consumer should be encouraged by all possible means. In other words, the consumer should have access to the highest number of services offered. This implies on the one hand the standardisation of the networks and terminal equipments, and on the other hand respecting the diversity (ideological and cultural among others) of the suppliers.
b) The services whould fulfil minimal conditions of quality and conviviality. These requirements, which will be established service by service, imply the definition of sincere and honest practices on the part of the suppliers.
c) The consumer should be able to use these services at "fair and reasonable" prices.
d) The consumer is entitled to the protection of his security, that is the respect of the confidentiality and maintenance of the integrity of the messages.

PART II - ... IN A BENEVOLENT SOCIETY

The introduction stated that the development of home telematic services alters some of the constitutional balances and requires the adoption of new social principles.

This assertion has its origin the observation that the management of a telematic service implies three components for each of which some constitutional provision have been traditionally been made.

II.A. About the components of home telematic services and the relating constitutional provisions

These components and their respective provisions are as follows:

- **The information content**
  The constitutional provision of the **right to the freedom of** expression conceived as a guarantee for suppliers of information, not only for individuals but also for publishers (principle of the freedom of press), corresponds to the principle of the **right to information** as a guarantee for the receivers, on the demand side, and ratifying the right of all citizens to "pluralistic" access to intelligible information.

- **Computer methods for processing the content**
  The principle of a "right to the image" was recently confirmed by data protection legislation and in some recent Constitutional provisions it can be defined as the right of the person to check the use made by third persons of the electronic data collected about himself on a computerised database.

- **The information carrier**
  Application of the principle of the privacy of correspondence in the telecommunication network, traditionally ensured by the regulation of the telecommunications public service.

Maintenance of the three constitutional balances rested on the separate existence of three spheres: information, computers and telecommunications. Owing to the fact that telematic services are born from the connection of these different spheres, new balances must be asserted.

II.B. The connection of the components and the problems raised

Thus the connection of the worlds of computers and telecommunications allows, through home telematic services, "electronic supervision" of the behaviour and habits of the users. Our data protection legislation, implemented at the time of centralized computer world, is inadequate in the face of this new problem. In telematic services, it is the use of the service itself which constitutes the personal information collected by the computer centers.

In order to avoid any form of "electronic supervision", it will then be necessary, as in the German "BTX Vertrag", to regulate the types of uses of data that computer centers are allowed to undertake (invoicing and statistics for example) or even, as in the French law and telecommunications, to guarantee the anonymity of the choices made by the users (for example by implementing a "kiosk" service).

In the same way, the connection of the wordls of telecommunications and information renders difficult the traditional conceptual distinction between "press" and "correspondence", public and private messages. Electronic mail "for all" is taking the place of the "Newsletters", or even of the newspapers but is keeping the appearance of correspondence. The principle of "privacy of correspondence" must then be combined for these services with the limits traditionally provided for the freedom of the press: in particular prior identification of the responsible "publisher", and subsequent confirmation of messages where abuses have been recognized.

II.C. The confusion of the actors

Connection between separate spheres of activity is compounded by confusion of the idles of the actors, in particular we note that some private actors occupy more and more functions formerly reserved to public actors. Transmission of information is no longer carried out solely by public actors. The liberalisation of cable networks, the privatization of the telecommunication services have destroyed the old guarantee of the privacy of the correspondence given by the public status of the carrier and regulation. It is therefore important that the security obligations already imposed to the public carriers are extended to these new actors.

In the field of information, the connection of the worlds of information and tel mmunications has entailed two developments: the first one is internal to the traditional sector of information, which increasingly develops multi-media strategies. It is therefore important to implement a general regulation of the media to confer to a single institution the duty to supervise all the media. In addition, this institution would ensure a fair balance between the media, in order not to favour one type of media over the others through regulatory means.

The second development is even more important: it transforms the internal structure of sphere of information. The "telematic press"– the provision of information services intended for the general public or for a class of public – is supplied not only by traditional publishing companies, but also by new actors such as software or telecommunication companies, or even financial companies, etc. The appearance of these new actors not subject from the start to the constitutional provisions, especially the body of rules and duties governing the press, requires consideration, the necessity and difficulties of extending the application of these provisions to them and the problems, in this transitory phase of combatting the corporate responses of the actors of the traditional press.

Particular care should be given therefore to establish a real right or reply adapted to the new media, to guarantee the independence of the journalists and to impose a clear identification of the "publishers" of the electronic press.

Equally, the commercial methods and situation of these new actors may call into question the traditional ideological pluralism of the written press and maintained in the statutes of the audiovisual public companies. In addition the international dimension of the market for electronic information may result in the domination of one culture over the others.

II.D. The emergence of a concept of right of communication

Faced with the major risks created by the advent of the new technologies and the creation of international markets, the "Mac Bride" Commission, set up by the UNESCO in 1980, has proposed that a broader concept at a right of communication should be overlain, on top of the traditional freedom of speech and right to information,

pillars of our constitutional law. "The necessitv for a bi-directional circulation; and free exchange, of possibliti of access and participation adds a new qualitative dimension to the liberties successively conquered in the past. The idea of a right to communicate lifts the entire debate on "free circulation" to a higher level".

The "right to communication" adds an active dimension to the "right of information" conceived for the individuals as a right to pluralistic access to intelligible information. It is intended to assert the right of the individuals to fully participate in society through the new information technologies: everybody has a **right to communicate.**
The components of this fundamental human right comprise the following rights, but are not limited to them: (a) the right of assembly, of discussion, of participation and the other rights of association, (b) the right to ask questions, to be informed, to inform and the other rights of information and (c) the right to culture, the right to choose, the right to privacy and other rights for the development of the individual.

II.E. The consequences

Establishment of the right to communicate entails a reassertion of the role of the State. Rather than relying on traditional solutions, a return to old monopolies, on the longstanding safeguards we have noted some constitutional liberties, it requires the implementation of regulation and measures that effectively ensure the right for all to communicate. Privatisation does not necessarily amount to deregulation. For example, government policies should allow the development of community and alternative media; be careful to preserve a balance between the foreign information and the information of a national or regional origin; guarantee access to the media by the public and public interest groups and finally maintain the principle of pluralism.

But beyond all that, the right to communicate imposes a fundamental consideration about the **accessibility to the services.** The magnetic card or the secret code, like the credit card, have become the criterial for selecting customers. Their general use in the new information technologies may entail an even greater imbalance between those who possess the means of access to the services offered by these technologies and those who do not possess them. Some measures must be taken not only to avoid any discrimination when providing these means of access, but also especially to guarantee to the public the access to the minimum information necessary fol ıll understanding questions of general interest.

II.F. The need to define the new principles of the society and its modalities

An active policy from our governments is necessary in view of the unquestionable importance of the new information technologies for our society. The technology could be a perfect tool of conviviality, exchange and better sharing of the information; they could on the contrary create an ever increasing imbalance between the "Information Poor" and the "Information Rich". Already now they oblige us to examine the principles of our societies; to adapt them or even to create new ones.

On the dawn of the explosion of a new technology, it is out of the question to regulate everything and to enclose technical progress within rigid legislation. Here also, "soft law" techniques will have to be used. How to ensure the right of reply in the new media? What guarantees should be given to journalists of the electronic press? All these fundamental questions require a technical and adaptable answer.

The argument for the "soft law" does not, however, mean that the public authorities can renounce their responsibilities. Of course, the debate which will occur will often be technical, but the key issues are elsewhere: they are not only economic – for example, marked forces as the suppliers would like to persuate us, they are also, and more importantly cultural.

Policies for New Information Technologies must define how a society conceives both the appropriation of information by its members and their ways of living together.

Going beyond the technical debates, conscious of the economic stakes, the responsibility for the choices in this matter should be entrusted to a body with broad cultural comptences: the French example of the creation of the "Commision Nationale de la Communication et des Libertés" (National Commission of Communication and Liberties) is noteworthy on this point: this Commission has prerogatives over both the sphere of information and the sphere of telecommunications.

The cultural debate cannot be dissociated from the technical debate anymore, it is necessary to add that it precedes and transcends it.

References

[1] Bourgoignie, Goyens, Laffineur (1986). **Questions juridiques liées a l'introduction de la télématique grand-public.** U.C.L. Centre de Droit de la Consommation, Louvain-la-neuve.

[2] Monville, C., and Poullet Y. (1987). **La demande finale en télématique, aspects juridiques.** Rapport écrit dans le cadre du programme F.A.S.T.(C.C.E.), Mars, 300 p.

[3] La télématique. (1984). **Aspects techniques juridiques et socio-politiques.** Actes du colloque organisé a Namur les 5 et 6 Décembre 1983 par le C.R.I.D. des facultés Notre-Dame de Namur, Story-Scientia, Gand.

[4] Trudel (1984). **Droit de l'information et de la communication.** Ed. Thémis, Montreal.