

TV Futures

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Digital Television Policy in Australia

Edited by
Andrew T Kenyon



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Preface

It has been enjoyable and rewarding to bring together academics from media and cultural research, copyright law, and media law and policy to analyse questions about digital television. The book has benefited greatly from their engagement and diverse disciplinary backgrounds. Many thanks to all the authors for their willing contributions, their valuable debates about draft chapters and the careful revision of their work.

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And for her support and suggestions, the final credit is due to Esther Milne—with whom I watch television.

Andrew Kenyon

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CHAPTER 1

Changing Channels

Media Studies, Copyright Law and Communications Policy

*Andrew T Kenyon*¹

Past Predictions ...

In September 1982, the Federation of Australian Commercial Television Stations (FACTS)—a group representing Australia's free-to-air commercial television broadcasters—held a seminar in Canberra about the future of television. The event involved commercial and public broadcasters, politicians, government departments, unions, the advertising industry, print media and other interested groups.² It followed a report from the Australian Broadcasting Tribunal (ABT) recommending the introduction of subscription television in Australia³, a report which, at that time, appeared 'most probable' to see quick implementation.⁴ Entitled 'Australian Television—1990', the seminar aimed to predict and analyse the issues that would be most significant for Australian television during the 1980s. FACTS believed television faced 'significant and dramatic changes' during the decade in 'its economic, social, demographic, technical and structural environment'.⁵ The seminar also considered the expected convergence of

media forms due to new communications technologies and the evident US trend towards lighter regulation of broadcasting.

One of the invited presenters at the seminar was David Jones, who was then chair of the ABT. Speaking as if it was 1990, Jones canvassed the areas he thought would have had the greatest effect during the 1980s. His comments offer an interesting time capsule—not only in terms of the view from 1990 that he envisaged when speaking, but from the present distance of more than twenty-five years during which FACTS has become Free TV Australia and the ABT has been reconfigured, first as the Australian Broadcasting Authority in the early 1990s and then as the Australian Communications and Media Authority early this century.

Not surprisingly, Jones addressed new ways to deliver television content and the associated decline in spectrum scarcity as a regulatory rationale. But he also emphasised the value in limiting concentration in ownership and encouraging new entrants by carefully approaching the licensing of new delivery platforms. He noted the importance of continued viability for existing commercial broadcasters, and critiqued a simple quantitative understanding of ‘choice’ in relation to viewers’ engagement with a multi-channel environment.⁶ And Jones included a brief reference to copyright, as a concept about which the regulatory approach would have been ‘refined’ during the 1980s.

The actual history of introducing subscription television in Australia was far more protracted than expected in 1982 when this FACTS seminar was held. The eventual launch of subscription in the mid-1990s was preceded by ‘a sorry story’ of ‘detailed recommendations which were never acted on and mostly sank without a trace, of wheels reinvented, of initiatives not taken, of sensible courses of action ignored—usually for political expediency’.⁷ The commercial broadcasters’ resistance of pay TV was a ‘most spectacular’ instance of them protecting their position.⁸ It is a telling example of Hernan Galperin’s observation that: ‘A political logic, rather than an economic one, has traditionally governed the evolution of media industries.’⁹ Notwithstanding that history, two points made by Jones’s speech are notable for this book’s engagement with questions of media and cultural research, copyright law and television’s place within media and communications regulation.

... and Present Issues

First, so many of the issues facing digital television policy in Australia have been debated for decades. The context has changed with technology, but issues recur about the convergence of platforms, fragmentation of audiences, and policy challenges for regulators in matters of diversity, access and control. The recurrence relates to the ways in which the end of broadcasting as a mass medium has been 'prophesised many times ... over the last twenty years'.¹⁰ Matters addressed by Jones in the 1982 seminar remain prominent issues in recent and contemporary debates about Australian television policy¹¹, such as: the diversification of content sources; the regulatory challenges faced because of that; the emergence of what was later called the information economy; the changing social position of existing free-to-air broadcasters; and the need for a merged telecommunications and broadcasting regulator—which Jones perhaps mischievously predicted would be created during the 1980s and, among many others, Trevor Barr called for at the turn of this century.¹² High-definition television was also on the regulatory agenda during the 1980s, although not of the form that is now seen in Australia.¹³ And, as now, the greatest regulatory challenge could be conceptualised in terms of pursuing the public interest through appropriate regulation in a changing technological environment.

Second, while copyright law and policy was far from unknown in 1980s debates about television, what copyright involved for regulators was not as prominent or closely analysed an issue as it has become during the last ten years. In the 1980s, Australian concern about copyright and television focused on the retransmission of broadcasts if cable was introduced and issues such as 'must-carry' provisions and statutory copyright licensing. For example, these matters were included in the terms of reference for the ABT inquiry that preceded the 1982 FACTS seminar. In such areas, the regulator saw important connections between copyright and broadcast regulation:

Overseas copyright models indicate the range of policy options available and at the same time illustrate the integral inter-relationship between copyright and broadcasting communications policy. There is no doubt that the adoption of a particular copyright framework will influence the

nature and effect of the [cable television] industry and that general broadcasting-communications policy will in turn impact on the extent of copyright protection.¹⁴

However, wider connections between copyright and broadcasting do not feature prominently in the regulatory or academic literature from this time. While the US had seen similar debates about cable and copyright¹⁵, it also offered an important additional element: 1984 saw the completion of one of the most significant instances of copyright and broadcast litigation in the ‘Sony Betamax’ case about US copyright law’s exception for ‘fair use’.¹⁶ It is only with the 2006 amendments to the *Copyright Act 1968* (Cth) that Australian law has moved a little way towards allowing the scope of personal re-use of copyright content that is recognised in US copyright law under fair use. But with digital networked audiovisual communications, issues of re-use have gained much greater importance than at the time of the Sony decision. The ‘refining’ of the regulatory approach to copyright that Jones predicted is of increasing note.

Media Studies, Law and Copyright

This collection addresses these two points—one involving challenges facing communications policy and analysis, and another that reflects the growing recognition of copyright’s significance for audiovisual content. The book seeks, in particular, to add two matters to analyses of television: interdisciplinary material from law and media studies around a range of policy issues, and more detailed examination of issues of copyright law as it exists nationally and as influenced by international copyright treaties. While the book’s focus is Australia, copyright law and digital communications mean its scope necessarily includes important comparative jurisdictions.

Adding relevance to the consideration of policy are the substantial recent changes to Australian legislation. Broadcasting law has undoubtedly seen its biggest changes in the two decades since ownership limits were reconfigured in the 1980s.¹⁷ The changes to the *Broadcasting Services Act 1992* (Cth) include relaxed limits on cross-media and foreign ownership, a staged introduction of multi-channelling by commercial and national broadcasters, new broadcasting licences which may see the rise of mobile TV, and

changes to the regulator's powers.¹⁸ Copyright law has also seen major reforms passed by parliament in 2006, furthering the 'Digital Agenda' amendments of 2000.¹⁹

The changes have meant that Australian digital television policy is playing out in a very different ownership environment, with an influx of private equity and a future less dominated by 'moguls' being envisaged by commentators.²⁰ And the take-up of digital reception equipment has accelerated markedly since 2005.²¹ At the same time, the development of broadband in Australia—however criticised it is when compared to some other countries and notwithstanding vitriolic arguments in 2007 between telecommunications companies, regulators and government—promises an even greater changing of TV channels. Alternative platforms for content distribution suggest that Australian viewers might bypass broadcasters entirely and 'access their favourite programs directly—whether via authorised or unauthorised avenues'.²² While caution is needed in analysing the adoption of media technologies²³, and the cultural, political and institutional weight of free-to-air TV offers it some sustenance, television's content, control and regulatory situation are likely to change markedly. As in the mid-1990s, it remains true to say that commercial television is 'forced to choose, constantly, between backing the new—technologies, programs, forms of service—at the risk of undermining established recipes for success'.²⁴ And the threats of new distribution platforms substantially complicate the choices facing broadcasters.

The collection's interest in copyright arises against a background in which much legal research about copyright and broadcasting has occupied separate spheres in the literature.²⁵ This, however, is changing.²⁶ While Jones, for example, did mention the Berne Convention on the Protection of Literary and Artistic Works in his address to the FACTS seminar—it was the key international copyright agreement at the time—the impact of international provisions is now of a different order. Copyright increasingly will be a primary reference point and constraint on communications policy.

The change in register of the relationship between media policy and copyright was anticipated, in part, by Ithiel de Sola Pool in the early 1980s. He saw copyright as a key economic support for the concept of a 'free press' that had developed under print technology, and

he investigated a similar role for copyright under changed communications technologies:

In the seventeenth century reproducing a text by printing was a complex operation that could be monitored. Once the text was printed on paper, however, it required no further servicing, and no one could keep track of it as it passed from reader to reader. In the electronic era copying may become trivially easy at the work stations people use. But both the hardware and the software in which the text is embodied require updating and maintenance. In ways that cannot yet be precisely identified, the bottleneck for effective monitoring and charging is migrating from reproduction to the continuing service function.²⁷

As Clive Barnett (among others) has noted, basing regulation on broadcasting's technical characteristics means 'there is a built-in tendency for the expansion of technologies, or the emergence of new ones, to trigger deregulatory policy measures.'²⁸ This tendency can certainly be seen in de Sola Pool's analysis and, while valuable critiques are open about the libertarian aspects of de Sola Pool's work²⁹, what is interesting to note here is his suggestion that *copyright* will become more about *communications* than print reproductions. (It is also worth noting that, elsewhere, de Sola Pool doubted how easily copyright might survive with changed communications technologies.)³⁰ Similar to copyright's change, *broadcasting* is being reconfigured within a broader frame of *communications* policy. Thus, copyright and television come together within the 'digital crucible' of post-broadcast, convergent media.³¹

This relevance of copyright is becoming widely referenced by media and cultural researchers, in relation to media and communications policy, the creative industries, media theory, the information society and the services economy. Many examples could be offered. Stuart Cunningham has noted the importance of intellectual property and the rise of supranational sites of policy formation.³² John Hartley and others have underlined the importance of copyright for creative industries.³³ Robert Hassan and Julian Thomas have offered an extensive consideration of copyright in multiple readings in their

collection on new media theory.³⁴ Tim May has examined ways to make economic and political choices about the ‘information society’ while paying close attention to intellectual property, and David Hesmondhalgh has sought to bridge political economy and cultural studies approaches to information society critiques by drawing closely on international treaties affecting copyright.³⁵ Tom O’Regan and Ben Goldsmith have analysed the repositioning of television and film policy as part of a whole-of-government approach to service industries, noting copyright’s significant economic role within that.³⁶ And a range of chapters engage with content and copyright issues in Virginia Nightingale and Tim Dwyer’s collection on ‘new media worlds’.³⁷ Work from within legal research—particularly concerning copyright and other aspects of intellectual property—is also engaging with media and cultural studies, as Kathy Bowrey’s research on internet cultures and Matthew Rimmer’s recent analysis of digital copyright and consumer revolutions illustrate.³⁸

This book aims to emphasise the value in such research. And it seeks to foster more developed debates across legal and media studies, in part by providing accessible analyses of some of the *detail* of digital copyright law. In this respect, it would add to the ‘triple imprint’ suggested in Galperin’s analysis of the transition to digital television in the UK and US. He argued that three elements are central to understanding the deployment of digital television: international forces; domestic institutions that constrain policy development; and national broadcasting histories.³⁹ The international forces that Galperin had in mind were primarily the decline in the consumer electronics industry in the US and Europe, the stimulation of digital networks across many regions, and high demand for radio spectrum.⁴⁰ This book adds another element to Galperin’s ‘triple-play’—copyright in both its international and national aspects. In particular, treaties relevant to copyright have an important role in relation to digital communications; treaties such as the Berne Convention, the TRIPs Agreement which deals with trade-related aspects of IP under the World Trade Organization, the World Intellectual Property Organization’s 1996 Internet Treaties and its proposed Treaty on the Protection of Broadcasting Organizations.⁴¹ Digital communications and the international treaties make it timely to add to the recognition of copyright within existing television literature.

The book's disciplinary scope, encompassing aspects of legal analysis and media and cultural research, has meant the collection is weighted towards matters of media policy. Policy is a prominent, but not necessarily primary, element of studying television.⁴² But policy offers a useful initial focus with which to bridge legal and media fields. While matters such as the media's symbolic power, the generation of subjectivity in mediated societies, changing production practices within multi-platform digital communications companies, and media representations of citizenship inform many of the chapter authors⁴³, such issues remain for more detailed future consideration across the fields of legal and media studies.

This scope also means that the collection is both wider and narrower than some of its key antecedents. In the leading 1990s collection *Public Voices, Private Interests: Australia's Media Policy*⁴⁴, for example, copyright was not a major topic for analysis. The greater recourse to legal researchers here allows that to be addressed. Including authors from both legal and media studies backgrounds, however, means some topics which are already receiving valuable attention in the literature do not see focused analysis here, such as the creation and distribution of Australian content in a digital, multi-platform environment, which has ongoing consideration from legal and cultural researchers as well as creators.⁴⁵ The choice here has been to group contributions around three major issues for digital television—changing platforms and audiences, copyright law, and media and communications regulation.

Changing Platforms and Audiences

The chapters in Part I explore issues related to platforms and audiences. Gerard Goggin begins with mobility, since mobile television 'became a mainstream object of policy and legislation discourse' during the 2006 media reforms. In 'Mobile Digital Television: *Dancing with the Stars*, or *Dancing in the Dark?*', Goggin examines technical standards for mobile television, existing content on Australian mobile services, the place of mobile in recent policy debates, and the challenges that mobile poses for digital television. A key question is how mobile television may contribute to media diversity—diversity beyond the availability of standard broadcast content on mobile platforms—which informs his argument for analyses of digital television to embrace the mobile.

Market relationships underpinning subscription television are examined by Rodney Tiffin in a historically aware analysis of Australian pay television, 'From Technological Abundance to Commercial Monopoly in Australian Pay TV: Key Relationships in Institutionalising Subscription Television'. Tiffin considers central relationships in the institutionalisation of pay TV—between consumers, platforms and pay TV operators, and between pay TV operators and channel owners—and explores complications arising from the high degree of vertical integration in subscription television:

Monopoly owes less to Australia's small size than to policy. Monopoly power, vertical integration, the veto power of gatekeepers, the ability to block competitors, and the lack of mechanisms to give market rewards to the preference of consumers—these are the dominant characteristics of how pay TV has developed in Australia.

However, an important point arising from his analysis of TV's 'second age'—multi-platform and digital—is that the temporal limits of policy are much more obvious. Policy is continual. Thus, his analysis makes clear some of the central challenges for future policy, while also reclaiming the importance of policy for influencing Australian subscription television.

In 'Traditional Media Buys Online: Not all Good News for Audiences', Tim Dwyer also considers relationships as they affect the audience, including the changing influence of advertising across varied digital platforms, related trends in ownership of traditional and online media, and the position in which they place TV—the medium that was the 'giant of the media world' from the mid-twentieth century. The changes provide necessary background to understanding the rise of new distribution platforms for audiovisual content, and the transition of media companies into multi-platform enterprises. Dwyer concludes, cautiously, that:

The implications of traditional media more intensively integrating with online media are 'not all good news' for an informed, mainstream citizen audience. ... [A]s traditional media corporations reconfigure themselves ... and build

their online consumer malls, the bottom-line demands of global private equity capital are unlikely to allow much scope for thoughtful news journalism, or other forms of more questioning information programming.

The policy challenge remains, as for Jones in the early 1980s, to develop viable 'public interest frameworks' within both legislation and regulatory practice.

Viewers are central to Teresa Rizzo's chapter, 'Programming your own Channel: An Archaeology of the Playlist'. She investigates the concept of the playlist, and its movement from the realm of broadcast programmers to the audience. Through case studies of the Foxtel iQ, YouTube and Apple's iPod, Rizzo examines how 'democratisation' of the playlist challenges traditions of broadcast viewing—changing its temporal basis to a spatial one, moving from mass audiences to personalisation, and shifting from domestic to mobile viewing. 'Rather than producing viewers who are caught up in broadcast flow, the televisual experience becomes one of co-participation and interactivity.' These changes prompt her to re-examine Raymond William's classic concept of 'flow', and some of its adaptations and critiques, by drawing on the work of Gilles Deleuze and Félix Guattari to suggest a concept of flow that accounts for 'an interactive and productive engagement' with audiovisual content. Questions about that engagement are developed in subsequent chapters on matters such as copyright and regulation.

Copyright Law

Following the consideration of these issues of mobility, interactivity, institutional relationships and the rise of multi-platform ownership, the five chapters of Part II explore copyright law as it relates to the audiovisual.

Kathy Bowrey begins with the history of copyright's response to broadcasting in 'What are You Missing Out On? Big Media, Broadcasting, Copyright and Access to Innovation'. Bowrey examines how broadcast copyright was conceptualised and explains some of the implications for contemporary debates about digital audiovisual copyright. Her excavation of copyright's history allows a rich and nuanced reading of one of the key cases about TV and copyright in

Australia, *The Panel* case.⁴⁶ Her analysis suggests how both copyright and broadcasting regulation ‘assemble audiences that facilitate the marketing of goods and services’. Thus, the well-recognised difficulties of defining the subject matter that is protected by broadcast copyright become less significant—the object of regulation is assembling audiences ‘to on-sell to advertisers and invent and reinvent demand for more and more products and services’. Bowrey’s work shifts our attention from discourses of originality and creativity—which are commonplace in copyright scholarship about literary and artistic works, for example—to ‘more important economic relations and conditions for consumption’. While earlier communications innovations succeeded in being seen as worthy of copyright protection through developments such as broadcast copyright, digital innovators are characterised as ‘outsiders, newcomers, freeloaders and rebels that need to learn their place within the domain of copyright’—and a similar reception has greeted the interactivity promoted by such digital innovations. This leads Bowrey to conclude:

The problem with contemporary Australian copyright is not just that digital copyright laws reflect the sway of old media interests over new media ones. It is not simply that the laws are designed to suppress or outlaw everyday technological practice. The larger problem is the historical one. Copyright did not really know how to accommodate mass media such as broadcasting, and did it so crudely.

Bowrey argues that what is missing is an understanding of contemporary audiences and innovation, and without that copyright will cease ‘to have any relevance to the future of cultural production’.

In ‘Australia’s Fair Dealing Exceptions: Do they Facilitate or Inhibit Creativity in the Production of Television Comedy?’, Melissa de Zwart examines a particular aspect of copyright law—one that is not specific to audiovisual content but has gained prominence from earlier litigation about TV content in *The Panel* case. Australian law now has a copyright exception for ‘fair dealings’ that are made for the purpose of ‘parody or satire’.⁴⁷ Remembering great satirical moments in Australian television history helps explain the interest in such a provision.⁴⁸ The growing re-use of digital audiovisual content in

networked communications—in part ‘amateur-to-amateur’ content creation and distribution⁴⁹—makes the parody and satire exception even more timely to examine. De Zwart analyses the new exception alongside the most relevant earlier fair dealing provisions for criticism or review and for reporting the news—Australian copyright exceptions which continue to operate—and considers what may be drawn from US copyright law and cases about parody and satire. While cautious about how widely the new provisions may be interpreted in Australian court cases, should they arise, de Zwart argues carefully for the allowance under the new law of transformative uses that critique social norms.

Robin Wright also examines the re-use of television content, in ‘So You Want to Tape Off TV? Copyright Law, Digital Television and Personal Use’. In particular, she notes the 2006 amendments to s. 111 of the *Copyright Act* which allow domestic time-shifting of broadcast content. Wright explains how the provisions remain narrower than many commonplace actions by viewers. Given the legislative limits, and the growth of transformative re-uses on digital platforms, she suggests that two alternative developments may eventuate: new business models that license viewer re-use of content, or a repeat of experiences with video cassette recorders (VCRs). With domestic use of VCRs, copyright violation became the norm—but that norm was not popularly understood as copyright ‘piracy’⁵⁰—and politicians eventually caught up with public practices by amending the *Copyright Act* in 2006. Wright suggests that newer productive uses of such resonant cultural artefacts as TV content may take similar time to be recognised by legislators.

A central issue in copyright debates, since at least the mid-1990s, has been relationships between copyright and technological measures that can control the use of copyright content. In ‘Flag Waving in the Digital Jungle’, David Brennan examines proposals that have been developed in the US and Europe for ‘flag-based’ digital broadcast standards—the broadcast flag and CPCM or ‘content protection and copy management’—as well as the encryption model used for Japan’s digital television. He explores a tension highlighted by flag technologies between copyright law that allocates private rights and broadcasting law that regulates public spectrum. As Brennan makes clear, flag-based systems require all reception

equipment to recognise and comply with the ‘flagged’ signal, and this necessitates the legal mandating of standards for reception equipment. He explains how, since the 2006 reforms to broadcasting law, the Australian regulator has this power.⁵¹ And his analysis offers an innovative basis on which to exercise that power, which recognises the CPCM system’s applicability across a range of digital media, including but exceeding TV.

Kimberlee Weatherall presents perhaps the most direct example of the importance for analysts of media and communications policy to pay close and careful attention to copyright law. Her chapter, ‘The Impact of Copyright Treaties on Broadcast Policy’, explains effects on TV policy of treaties that are relevant to copyright—such as the proposed WIPO Treaty on the Protection of Broadcasting Organizations and the Australia–United States Free Trade Agreement. Australia’s international obligations in copyright signal a key change from past practices for media and communications policy: ‘Historically broadcast regulators have been able to tailor broadcasters’ rights according to the demands of broadcast policy’. But, in a dramatic shift, copyright now ‘precedes, and to some extent pre-empts, broadcast and communications policy’. With a clear awareness of changing markets for digital audiovisual content, Weatherall examines a historical precedent—cable retransmission of broadcast TV in the US and Australia—which shows the past tendency for issues of broadcasting policy to take precedence over issues of copyright. And she highlights some important issues of contemporary policy that are reconfigured by treaties. As Weatherall shows, policy choices in all areas are not constrained equally—there is room for public interest communications policy in the area of flag technologies, for example—but considering the effects of copyright treaties will be inescapable for many future commentators on media and communications regulation.

Media and Communications Regulation

Part III considers issues about regulating media and communications. Jock Given provides a timely update of his valuable work on digital television in ‘Switching off Analogue TV’,⁵² While closely considering the Australian context, he also considers the plans, experience and future surrounding digital TV in the UK, US and

New Zealand. Given shows that although costs and complexities in changing to digital were recognised, they were underestimated or given too little attention in policy terms, while the benefits of the transition were speculatively valued. However, the momentum of policy has now 'shifted from the benefits of digital take-up to the costs of deferring analogue shutdown'. Given's chapter explores inter-related factors underlying this change in the prevailing policy position. Four broad areas are considered: television and the development of other media; benefits and costs of digital transmission; attitudes of industry entities; and in particular, unpredicted factors that exist in some of the four countries examined (such as the recent attention paid to using television for public safety information in the US). In the Australian context, one factor that Given highlights may be especially interesting to watch; namely, changes in media ownership under the amended *Broadcasting Services Act*. 'New television owners may adopt different strategies' towards digital, 'either because they see the future differently or because they control different portfolios of assets'.⁵³ He notes that:

James Packer has now virtually removed the family from the medium his grandfather and father dominated for half a century and the political influence of other media seems likely to grow. It may be harder for tomorrow's television proprietors to co-opt parliamentarians to help craft the media future into the shapes they most desire.

This change in the relative weight of interests is a notable element in the transition from policy that is centred on broadcasting to policy for the wider environment of digital communications.

The formation of past and future policy is a focus of Jason Bosland. 'An Analogue "House of Cards" in the Digital Era: The Shifting Structures of Television Broadcasting Policy in Australia' provides a useful overview of important elements of the 2006 reforms to the *Broadcasting Services Act*, including ownership, new services, multi-channelling and anti-siphoning, as well as reviewing earlier digital television amendments. Bosland considers structural constraints on policy formation, in terms of technology, ideology, economics, geography and population, and their relations to political

influence. He suggests the ‘house of cards’ of Australia’s analogue television policy has been unsettled by digital communications. And through his analysis of recent reform he sees a reduction in the ‘media mates’ understanding of Australian television policy, alongside a ‘rethink of the protectionist regime that has characterised broadcasting policy in Australia’. How the structural factors that Bosland analyses play out as digital develops could be a useful prism for considering future media and communications policy.

The development of multiple platforms for delivering digital content prompts Lesley Hitchens to examine how regulation should approach media’s public-regarding role, in particular mediated news and commentary—an aspect which has been central to media regulation for decades in many countries. In ‘Citizen Versus Consumer in the Digital World’, Hitchens seeks to revive a citizen perspective incorporating civil, political, social and cultural aspects to be considered alongside the consumer-centred focus in much current regulatory discussion:

To think about digital content—its operation and impact—as simply a private, consumer matter, means that we ignore or fail to acknowledge that it will also have a public nature and a public role to play. As digital content increasingly contributes to the facilitation of public discussion and debate, then it too joins the coffee house, newsprint and broadcasting in the public sphere domain.

Given critiques of the presumptions of democratic consensus that can be seen in some public-sphere work⁵⁴, it is worth noting that Hitchens draws from a range of public-sphere theory’s leading interlocutors, such as Nancy Fraser. Focusing on political citizenship and the ‘integrity’ of media content—and drawing on her substantial comparative research into media regulation and diversity⁵⁵—Hitchens suggests valuable Australian approaches to citizen interests could be drawn from European developments in the proposed Audiovisual Media Services Directive, approaches which could be taken up in regulation or by content providers themselves.⁵⁶

The idea of ‘providing content for themselves’ underlies the chapter by Ellie Rennie and Julian Thomas, ‘Analogue Nation, Digital

Community'. They ask whether there is 'a place for community communication in digital television' and investigate community TV's precarious place in the transition to digital. They also offer community television as a case study about digital media and communications policy, and in particular about where and how to foster 'localism, innovation and creative development'. Rennie and Thomas note 'the extraordinarily vigorous survival of the nation-building model of broadcasting, with an increasingly high level of government intervention evident in all sectors: the directly publicly funded broadcasters, the commercial free-to-air operators, and subscription providers'.

They suggest that the allocation of public resources has a 'substantial influence' on the broadcasting market and that this 'national' dimension of policy 'is now most significant in understanding the current impasse'. In that regard, digital television policy has emulated Australia's earlier analogue model. The proposed mobile TV licence aside, digital policy has not pursued the creation of new markets for television. Instead, it has pursued a vision of the 'analogue nation' and national popularism. Analysing the challenges facing community television opens up significant issues facing digital Australia more broadly.

Children are a classic consideration of broadcasting content regulation, and their position in the transition to digital is analysed in the final chapter by Elizabeth Handsley, 'What's in it for Children? Dedicated Channels and the Effectiveness of Regulation'. Handsley considers the Australian traditions of content quotas and advertising restrictions and, with an eye to the regulator's 2007 review of the Children's Television Standard (CTS), she emphasises that changes in delivery platforms do not necessarily have any effect on the interests that have driven children's content regulation. Handsley usefully outlines the detail of the current content quotas for preschool and school-age children's programming, and highlights some of the potentially confusing terminology used in the CTS. And she identifies apparent weaknesses in the existing system, such as there being no requirement to regularly schedule or promote C programs, and the lack of age-specificity within the five-to-fourteen age range for those programs. Similarly, advertising restrictions are generally focused on particular time periods, which are not the only times specific children's programming is broadcast, nor the times when the largest

children's audiences exist. Handsley's analysis situates these regulatory issues for future attention if proposals develop for a dedicated digital free-to-air children's channel.

TV Futures

The longstanding qualities of many of these issues of media and communications regulation—which echo concerns that were raised by Jones as chair of the ABT in the early 1980s—arise now in a changed context of digital networked communications. As Geert Lovink commented at the International Communication Association's 2007 annual conference, with services like YouTube people are no longer watching television, they are watching a database. That development seems a good point at which to welcome you to the futures of television.

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Notes

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- ² Federation of Australian Commercial Television Stations, p. 5.
- ³ Australian Broadcasting Tribunal, *Cable and Subscription Television Services for Australia*. An overview of the ABT's powers and relations with government and broadcasters is provided by Hoffmann-Riem, pp. 230–3, 255–8.
- ⁴ Federation of Australian Commercial Television Stations, p. 3.
- ⁵ *ibid.*, p. 1.
- ⁶ Jones, 'Draft Speech for the Chairman', p. 3.
- ⁷ 'The Sorry History of Pay TV Policy 1977–1992'; see also Dwyer; Rodney Tiffen's chapter in this book, 'From Technological Abundance to Commercial Monopoly in Australian Pay TV'. For a brief legal review of some of the more telling developments that did occur during the 1980s, such as changes to ownership limits and equalisation, see Armstrong, Blakeney and Watterson, pp. 183–6.
- ⁸ Chadwick, Ferguson and McAuslan, p. 65.
- ⁹ Galperin, p. 272.
- ¹⁰ Sinclair, p.42.
- ¹¹ See, for example, the influential text by Cunningham and Turner.
- ¹² Jones, 'Draft Speech for the Chairman', p. 7; Barr, pp. 224–6. For an overview of the creation of ACMA, see Selvadurai, and for an interesting analysis of UK moves in 2000 towards a converged regulator, see Tambini.
- ¹³ For a brief review of HDTV in the international context at that time, see Starks, pp. 21–2.
- ¹⁴ Jones, 'Copyright Implications of Cable Television and Satellites', p. 5.
- ¹⁵ See, for example, Botein.
- ¹⁶ *Sony Corporation v. Universal City Studios* 464 US 417 (1984).
- ¹⁷ For an overview of those 1980s developments, and a useful review of the launch of the Aussat satellite, for example, see O'Regan, chs 2, 3.
- ¹⁸ See *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth); *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth); and *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth). For a legal overview of some of the significant changes, see Rodrick and Butler.
- ¹⁹ See *Copyright Amendment Act 2006* (Cth); *Copyright Amendment (Digital Agenda) Act 2000* (Cth).
- ²⁰ See, for example, Ricketson, and Tim Dwyer's chapter in this book, 'Traditional Media Buys Online'.
- ²¹ See Australian Communications and Media Authority, *Digital Media in Australian Homes—2006*, and 'ACMA report finds take-up of digital free-to-air television has more than doubled since 2005'.

- ²² Kenyon and Wright, p. 342; and see, for example, Pesce, p. 7.
- ²³ See, for example, Lievrouw and Livingstone; Cook.
- ²⁴ Given, 'Commercial TV', p. 31.
- ²⁵ There are notable exceptions, particularly involving research into copyright and the licensing of audiovisual content; for example, see Brennan.
- ²⁶ See, for example, Weinberg, and other articles in that themed issue of the *Cardozo Arts and Entertainment Law Journal* on 'Copyright Law as Communications Policy'.
- ²⁷ De Sola Pool, *Technologies of Freedom*, p. 250.
- ²⁸ Barnett, p. 118. Barnett also cites Hoffmann-Riem, p. 52; Le Duc, pp. 170–4.
- ²⁹ De Sola Pool's view, however, is echoed by some parallel commentary. For example, broadly similar predictions were offered in 1981 by a leading UK industry figure, Peter Jay, who argued there should be pay-per-view television by the year 2000 with as many programs as viewers and as much diversity as in print media because there would be 'no technically based ground for government interference in electronic publishing': Jay, p. 82. Subsequent, similar arguments made by UK industry figures for broadcasting to be understood and regulated as a 'digital bookshop' are recounted by Born, pp. 493–4.
- ³⁰ See the posthumously published de Sola Pool, *Technologies without Boundaries*, pp. 254–9, in which copyright is discussed as an 'anachronism' and difficult to translate to digital communications.
- ³¹ The term is used by Terry Flew in 'The Social Contract and Beyond in Broadcast Media Policy'.
- ³² Cunningham, 'Policy'.
- ³³ Hartley.
- ³⁴ Hassan and Thomas.
- ³⁵ May; Hesmondhalgh.
- ³⁶ O'Regan and Goldsmith.
- ³⁷ Nightingale and Dwyer. The place of copyright is also being raised explicitly in relation to digital television; for example, see Castañeda.
- ³⁸ Bowrey; Rimmer. Copyright law, in turn, has gained greater prominence for media law academics; for example, cf. the first edition of Barendt's analysis of free speech, pp. 62–3, with the second edition, pp. 247–63.
- ³⁹ Galperin, p. 229.
- ⁴⁰ *ibid.*, ch. 2.
- ⁴¹ See, generally, Ricketson and Ginsburg; Kimberlee Weatherall's chapter in this book, 'The Impact of Copyright Treaties on Broadcast Policy'.
- ⁴² See, for example, McKee, pp. 309–18.
- ⁴³ See, for example, Couldry; Hartley; Cottle; Alysen; Lewis, Inthorn and Wahl-Jorgensen; Lumby.
- ⁴⁴ Craik, James Bailey and Moran.
- ⁴⁵ See, for example, Bosland; Cunningham, *What Price a Creative Economy?*; Goldsmith et al.; Harris; and in relation to content regulation and diversity, in particular, Hitchens.
- ⁴⁶ See, for example, *Network Ten v. TCN Channel Nine* (2004) 218 CLR 273.

- ⁴⁷ *Copyright Act 1968* (Cth) ss 41A, 103AA.
- ⁴⁸ See, for example, McKee, pp. 68–82.
- ⁴⁹ Hunter and Lastowka.
- ⁵⁰ For a critical review of the ways in which metaphors such as piracy have been used in copyright and other areas of intellectual property, see Loughlan.
- ⁵¹ cf. Kenyon and Wright, pp. 363–7, which outlines the different situation before the *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth).
- ⁵² Given, *Turning off the Television*.
- ⁵³ This change in commercial interests may mean that the promise of digital TV is not seen as being of primary or particular value to the national broadcasters. Regarding the opportunities digital TV offers national broadcasters see, for example, the papers in Jacka and Given.
- ⁵⁴ For analyses of this see, for example, Jacka; Nolan.
- ⁵⁵ Hitchens, which could be analysed usefully with the subsequent Baker.
- ⁵⁶ Such analysis could also be linked to work on Ofcom's attitudes to consumers and citizens by Lunt and Livingstone.

Part I
Platforms and Audiences

CHAPTER 2

Mobile Digital Television

Dancing with the Stars, or Dancing in the Dark?

Gerard Goggin

When you're nowhere near your sofa. In the transit lounge between flights? Catch a special mobisode of 24: Conspiracy™. Girlfriend trying on another pair of shoes? Watch some South Park highlights. Mobile TV lets you get your fix.¹

We do not think that the mere fact that someone will be able to see *Dancing with the Stars* on a mobile telephone device is diversity. It is diversity of device; it is not diversity of content.²

Introduction

Digital television has been eagerly discussed and anticipated for quite some time, but 'official' mobile television is a comparatively new phenomenon. For instance, what has been called mobile television was only trialled in Australia from 2004 onwards, and not commercially offered until 2006. However, various media players, not

least phone companies and equipment manufacturers, have high hopes for mobile television: a November 2006 Telstra advertisement promoting mobile media featured a primary school teacher asking her pupils to tell her what particular images in a book are. She points to what is obviously a mobile phone, and a young boy happily declares it to be a television.

While mobile phone companies and equipment manufacturers have particular reasons to be championing the advent of a new consumer application, 'unofficial' mobile television has been developing for quite some time: whether in short film and video for mobiles (mobisodes, for instance); video recording with mobiles; video calling; multimedia messaging; personal video recorder software for mobiles; video iPod; and even streaming video and television program downloads over wireless laptops. Much of this 'unofficial' world of mobile television has more obvious connections with the rapidly expanding and intensifying cultures and technologies associated with internet protocol, including IP TV.

Against such a backdrop this chapter seeks to discuss the emergence of mobiles as a significant new part of digital television in Australia. In doing so, I wish to argue that mobile television *is* a significant new media and cultural force in digital television, and is one that poses significant policy challenges. However, I also wish to explore the social shaping of mobile television, as part of the complex re-envisioning of television, that digital more broadly signifies—and in particular the 'unofficial' as well as 'official' varieties of this mobile televisuality.

In this chapter, firstly, I introduce the different platforms and forms of mobile television in Australia, distinguishing between DVB-H and other standards, third-generation mobiles and IP television over mobiles, as well as noting other forms. Secondly, I look at what is on mobile television—what is actually offered by the four mobile carriers. Thirdly, I discuss the spectacular, if inconclusive, entrance of mobile television in digital television and media policy debates. Finally, I close with some remarks on the policy challenges for digital television raised by mobiles, not least the need to decisively confront key weaknesses in Australia's communications and media policy, regulatory and legislative framework.

Mobile Television Platforms and Players

There has been an extensive discussion concerning digital television and the transformations it represents for our ideas of the medium of television. Much of the debate has centred on the possibilities afforded by digital broadcasting, its superior resolution and picture quality, the possibilities of opening up extra spectrum to allow new broadcasters into the market or to carry high-resolution television, the new viewing habits, and cultural practices associated with new forms of interactivity and scheduling.

The ironies of digital television discourse and debate aside (chronicled so fittingly by Jock Given)³, at present the public imagination is being captured by the changes coming from another direction: the new possibilities of control afforded the viewer in personal digital video recording devices and also internet technologies such as peer-to-peer (p2p) networks like BitTorrent, ushering in widespread downloading and exchange of internet programs. Although current developments in internet culture are not well understood, or captured, in discussions of digital television, nonetheless it is true to say that the topic of television and the internet, or even internet television, has been ventilated for some years. Not so with mobile television.

The thing called mobile television appeared on the scene in various countries in 2004–05, especially through trials, the most publicised of which was Nokia's partnership with various mobile carriers and television program and channel providers. My sense is that prior to this time mobile television, as such, was only understood in technical and standards-setting circles. It neither formed part of the policy debates and industry struggles concerning digital television, nor did it form part of the cultural imaginaries of television and media futures. Certainly much policy attention and public discourse centred on the promise of telecommunications, of which the cellular mobile phone had become prominent, but it took some time to engage and invoke the televisual specifically.

There is something curious about this in a way, as the idea of moving pictures over telephony has quite a long genealogy. In his account of the evolution of the video phone, Carson notes that the 'first public demonstration of the television as an adjunct to the telephone took place on April 7, 1927, when Herbert Hoover, then

Secretary of Commerce, and other officials in Washington, DC, spoke “face-to-face” with Walter S Gifford, President of AT&T and other Bell System officials in New York City.⁴ Serious research into commercial video telephone service commenced in the mid-1950s. Video telephone sets were displayed at the New York World’s Fair, and some 700 curious visitors to the exhibit were surveyed for their reaction. A commercial picturephone trial between New York, Chicago and Washington, DC commenced on 25 June 1964.⁵ Writing about this, Carson hopefully declared that ‘a new “see-as-you-talk” telephone, long a dream of telephone people, is nearing the day when it will be a standard service’.⁶

As it transpired, video telephony was not enthusiastically welcomed by users in the late 1960s and 1970s. It was not commercially offered on any widespread basis until Integrated Services Digital Networks (ISDNs) were implemented in the 1980s and 1990s. This was roughly the same time that third-generation (3G) mobile technologies were being conceived. As the second-generation digital global standard for mobiles (GSM) was being launched, the Europeans had already commenced standardisation work for its successor, next-generation network through the European Telecommunications Standards Institute (ETSI).⁷ In the late 1980s the European Commission program Research into Advanced Communications in Europe (RACE) recognised that before GSM could be commercially introduced, ‘a new generation of mobile technology would be necessary to cater for the perceived challenges of the 21st century’.⁸ This was the universal mobile telecommunications service (UMTS), which by the mid-1990s was conceived as a ‘multi-function, multi-service, multi-application digital system that would use end-of-the-century technology to support universal roaming and offer broadband multimedia services with up to 2 Mb/s throughput’.⁹ By the beginning of the next century, there was a consensus on 3G as critically important social technology: carrying the ‘possibility to convey data with a large bandwidth enables the *wireless transmission of a vast range of content forms* such as high quality audio, still and moving pictures, large data streams including access to the Internet’.¹⁰ According to its creators ‘[t]hese new dimensions clearly qualify 3G as a key element in realising the Information Society’.¹¹ Yet as we know, the vision was stymied by the exorbitant prices paid for

licences, especially in Europe, and so the slow development of the 3G market has caused the rethinking of multimedia futures ever since.¹²

In the period when 3G was being delayed by the nervousness of carriers, mobiles were beginning to become part of television in a rather prosaic yet effective way. Program producers and broadcasters began to offer viewers the opportunity not only to phone in to stations, as they had done since early in the history of television, but also to register information through dedicated mass-calling platforms made possible with premium-rate telephone numbers. Voting on *Big Brother* or *Australian Idol* is an obvious and lucrative example of this. The most recent example is the advent of late-night interactive quiz programming, featuring ludicrously easy questions. For instance, in 2006–07 Channel Nine competed directly with Channel Ten in this new genre, which has become very popular in other markets, notably in the UK where entire channels are devoted to the telephone and mobile text interactive quiz genre.¹³ Mobiles become part of this conversational, communicative, digital architecture of television through the popularity of text messaging cultures. For their part, mobile carriers and new cultural intermediaries responded to these developments, commodifying and extending its possibilities.¹⁴

While short message service (SMS) was text-based, its successor, multimedia message service (MMS), not only allows the exchange of pictures and videos, but also enables their receipt, delivery and downloading. MMS, then, as a 2.5-generation or even 2.75-generation mobile technology, allowed short snippets of television programs to be sent to mobile handsets and replayed, stored and exchanged at the user's convenience. The other technology that has allowed the downloading and playing of video is Wireless Access Protocol (WAP), basically a form of mobile internet that was slow to take off.

The invention of mobile television owes as much to these humble, kludge-like beginnings as it does to the more recent, grander visions that have accompanied its introduction.¹⁵ What this story indicates is not only that third-generation networks are incremental, and continuous, with their second-generation networks, but also that user and viewer roles in shaping the technologies are often unexpected. So far I have focused on the role of telecommunications in prefiguring mobile television. Though I do not have time to explore

this at greater length here, there is also a set of inventions, narratives, images and desires about portability and mobility that can be traced through television history. The most obvious of these is portable television.¹⁶ With advances in miniaturisation, electronics, reception and screen technologies, it became possible to manufacture sets that could be easily carried to different rooms of a house or building, or be watched in a workplace. Even smaller, more portable sets were made, and sets also appeared in vehicles and other forms of transportation. This is a rich history of mobility that I can only note here, but it is worthy of further attention.

In 2006, all mobile carriers introduced mobile television to 3G customers, and started to promote it as *mobile television*. To provide this kind of mobile television, carriers used the capability of 3G networks to send such content to customers who subscribe or select it—what has been called ‘unicast’. As I discuss at length later in this chapter, 3G networks currently have real limits on how widely they can serve as a broadcasting platform. A threshold technical difficulty is that 3G networks in their present incarnation have problems dealing with the ‘huge bandwidth that modern streaming Internet applications, such as TV, require’.¹⁷ While there are only a few customers consuming mobile television in this fashion, the 3G networks can cope. However, if mobile television becomes a mass form, 3G telecommunications networks will be unable to cope as the sole form of broadcast. For this reason, much attention is being given to the possibility of broadcasting television directly to mobile handsets.

One standard that enables direct broadcast to mobile devices is Digital Video Broadcasting-Handheld (DVB-H), part of the family of open digital television standards developed by an industry consortium that has developed standards for digital terrestrial television (DVB-T):

DVB-H can offer a downstream channel at a high data-rate which will be an enhancement to the mobile telecommunications network, accessible by most of the typical terminals. Therefore, DVB-H creates a bridge between the classical broadcast systems and the world of cellular radio networks.¹⁸

ETSI-approved, DVB-H is supported internationally by a number of interests in broadcasting and telecommunications (most prominently, perhaps, by the mobile handset manufacturer Nokia). It should be noted that there are a number of other possible technical solutions and standards for delivering mobile television.¹⁹ There is also the possibility of adapting the digital radio (Digital Audio Broadcasting or DAB) standard for multimedia delivery. It has been argued, for example, that the digital radio standards are a better alternative because they were designed for mobile radio receivers from the outset, whereas the DVB-H standards involve adopting standards for cell phones that were originally conceived for stationary or portable reception using a rooftop antenna.²⁰ Broadband-renowned South Korea has been a pioneer in mobile television, with football's 2006 World Cup reportedly making the medium 'ubiquitous'²¹ based on its own standard—Terrestrial-Digital Multimedia Broadcast (T-DMB).²² Interestingly, T-DMB has standardised with the Eureka 147 Digital Audio Broadcasting Standard. (In October 2005 Minister Coonan announced a framework for the introduction of digital audio broadcasting in Australia that adopts Eureka 147, with launches in six capital cities in January 2009. But the question of the interaction of digital radio and mobile television has not been explored seriously to my knowledge.) There is also the Japanese standard ISDB-T, used by the Iseg service launched in April 2006.²³

A North American standard that became a talking point in the Australian 2006 mobile television policy debates is Qualcomm's MediaFLO system, aimed at network operators, content providers and device manufacturers. As well as its email application Eudora, Qualcomm is best known for its second-generation digital mobile CDMA (code division multiple access) system adopted by Telstra in 1999 specifically to provide the extra range needed in country areas following the mandated close-down of the analogue (AMPS) network (which GSM, of course, could not then provide).²⁴ Qualcomm does not foreground mobile television, but rather high-quality streaming or 'clipped' multimedia²⁵—which is a better summation of what is actually being delivered over mobile networks at the present. (FLO stands for 'Forward Link Only', or one-way broadcasting from the tower to the device—which raises interesting questions about how the technology fits into visions of users producing and distributing

their own content, from the device back to the broadcasting or communications network.) When Qualcomm launched in March 2004 it precisely targeted key concerns of the various players about network capacity and quality (mobile carriers), digital rights management (content providers), and the messy convergence of various telecommunications platforms with broadcasting and online systems (broadcasters being especially concerned about this):

Qualcomm ... today announced the MediaFLO™ Content Distribution System (MCDS), an end-to-end product and service offering that enables secure and efficient delivery of high-quality, network-scheduled video content to a large number of subscribers for easy viewing on handsets. It can be deployed over today's unicast (point-to-point) third-generation (3G) wireless networks and will scale easily for tomorrow's multicast (one-to-many) networks.²⁶

In effect, Qualcomm's pitch grasps mobile television as a supplement and extension of other online network services and cultures: 'Via this new distribution channel, content providers can generate additional revenue by repurposing their existing TV and Internet content or by creating new content for what QUALCOMM believes will emerge over time as a new medium'.

In March 2007 Verizon launched V Cast Mobile TV, the first commercial mobile television service in the US. Partnering with Vodafone to offer 'full-length programs with image quality that's close to traditional television broadcasts' on eight channels in twenty states, the company's chief marketing officer bruted: 'Television has revolutionized our culture, and wireless Relevant Products/Services phones have become an integral part of our everyday lives. V Cast Mobile TV represents the convergence of these two realities.'²⁷

As well as the mobile television standards drawing upon the various competing efforts in digital television and digital audio and radio broadcasting, there is also the prospect of mobile broadcasting conceived on the model of internet television. As of late 2005, a suite of DVB standards was adopted for the transmission (in technical terms, datacast) of digital television using internet protocol (so-called 'IP' or 'internet' television) but via handheld mobile devices. In July

2006, ETSI approved a revision of the Digital Audio Broadcasting standard to allow transmission of mobile television via the internet. The resulting DAB-IP standard allowed Virgin Mobile to launch the UK's first mobile broadcasting service in October 2006, with its 'lobster' phone that only offered five channels and struggled for customers.²⁸

Even more than digital broadcasting in general, mobile television is still in a state of flux regarding which standards, systems and technologies will predominate. While Australian broadcast and telecommunications industries for the most part have vested faith in the DVB-H system (consistent with choices in digital television and the technical and market developments in second- and third-generation mobile networks), the process of inventing television for portable cellular mobile and wireless devices has seen other possibilities open up and participants are actively considering other options.²⁹ Nonetheless, the general possibility that mobile television represents is using available spectrum to broadcast television signals not just to televisions in the household or in public spaces, but directly to mobile phones. It is precisely this possibility that has seen the clamorous appearance of mobile television in Australian debates on digital television and media reform in August–September 2006. I will discuss this at length later in the chapter when I turn to questions of policy, but suffice to say that the vision of mobile television as a way to open up new channels has occasioned the interest of new players, content providers and cultural intermediaries.

What's On Mobile TV?

By 2006, all four Australian mobile carriers offered something that each called mobile television (at least some of the time). To watch mobile television, a viewer needs to have a suitable handset (at this time, a 3G handset) and a contract with a mobile provider, which then makes channels, programs or content available. A comprehensive charting, after Raymond Williams' famous exercise in his 1974 book *Television*, is beyond the scope of this chapter.³⁰ That is, the exercise of a detailed analysis of mobile television, noting what was actually broadcast, how, for how long, with how many advertisements, and to what effect. (For example, what is distinctive about the viewing experience of mobile television? Surely not flow. Perhaps,

with the now much-used adjective ‘snack’ in mind, it might be interruption—but then there is the absorption and mobile ‘privatisation’ akin to the Walkman and iPod.) It is made more difficult in any case by the effective ‘subscription’ nature of mobile television, which means one needs to contract with each provider. It is not assisted by the lack of published program schedules or information. There is only sketchy information available on websites, and electronic program guides for mobiles are in their infancy. For my purposes here, I took out contracts for mobile television with the two providers most invested in mobile television (Telstra and Hutchison), to be able to contrast at least two experiences of different providers. I also sought whatever information I could find in advertising, websites and press on the offerings of Vodafone and Optus. At 31 March 2007, then, ‘official’ mobile television in Australia included the channels and programs set out in Table 2.1.

Table 2.1: Mobile Television Channels in Australia, 31 March 2007

Hutchison	Optus	Telstra	Vodafone
Cricket TV	ABC (2006 trial)	Sky News Headlines	<i>South Park</i> highlights
Sky Racing	CNN International (2006 trial)	Sky News Business	<i>24: Conspiracy</i> mobisodes
CNN	SBS (2006 trial)	CNN	
BBC World		Fox Sports News	
Cartoon Network		Euro Sports News	
Comedy Channel		Comedy Channel	
ABC Kids		Cartoon Network	
SBS		Discovery Mobile	
Adultshop.com		MTV	
MTV		Union extreme sports	
Rage		National Geographic Channel	
STC		TV1	
E!		E!	
Vanadalism		Fox 8	
		Fashion TV	

Some brief observations on what shape mobile television has been taking are worthwhile. Telstra advertised its offerings over its NextG mobile services as an extension of existing brands Foxtel (subscription television) and BigPond (internet). While pricing is apparently clear and reasonably low, when the details are given it is actually quite complicated.³¹

Waiting for a train? Stuck in a queue? Want something to look at over lunch? With Next G you can make the most of every spare moment. Enjoy access on your mobile to FOXTEL by Mobile and BigPond® event coverage.

A key caveat, however, is that: 'FOXTEL™ by Mobile content is specifically made for your mobile and may differ from TV content. Usage limits of 200 minutes per month and 15 minutes per session apply'.

For its part, Vodafone does refer to mobile television on its website, introducing it under the heading 'Get Your Fix' (quoted in the first epigraph to this chapter). However, what is actually offered bears scant resemblance to television as it is commonly understood. In addition to video downloads, it specifically offers made-for-mobile mobisodes from *24: Conspiracy*, as well as highlights from the popular comedy program *South Park*. In August 2003, Optus offered one of the first Australian trials on mobile television, with live streaming of ABC, SBS and CNNi direct to video phone, PDA or n-Gage, through its OptusZoo portal service. It was still offering these channels for free at the end of 2006, and in 2007 mobile television was otherwise conspicuous in its absence from the Optus website. OptusZoo still provides a range of video content offerings, but these are not badged as mobile television.

This survey of mobile television in Australia is obviously indicative only, pending a comprehensive logging and analysis of what the medium consists. What it does show is just how fledgling and experimental mobile television still is. In this early phase, there is nothing especially ground-breaking in mobile television offerings. Much of the content available thus far on mobile television involves reworking, customising or abbreviating programs well known from other forms of television, especially free-to-air and subscription television. This is

most evident in Telstra's NextG offerings, which in fact do not mention mobile television, focusing instead on 'Foxtel' and 'channels'. Both Telstra and Hutchison are in step with providers overseas in using recognisable television channel, program and content brand names to put together a selection for their customers. It is difficult to say without further investigation precisely how such mobile television fare differs from other forms of television in Australia (especially free-to-air and subscription). However, it does appear there is little made-for-mobile content, other than the celebrated examples of *24: Conspiracy*, offered in Australia by Vodafone, and also some experimental local content.

While the industry, audiences and cultural forms associated with mobile television are yet to develop, there are obviously things going on already that merit further investigation. For instance, there were the unobtrusive but still significant things that occurred with the introduction of pay television in Australia, such as 'interstitials'—or short programs inserted to fill breaks between movies, events or programs. With pay television these apparently incremental or incidental developments in programming also represented an experimental change in format that corresponded to new forms of audience expectation. Take, for instance, the experience of mobile television represented by the only 'adult' entertainment channel, 3's *Adultshop.com*. The mobile television channel *Adultshop.com* comprises short three- to four-minute erotic or soft-core porn videos, interspersed with advertisements for leading Australian pornography provider *Adultshop.com*. While porn is often the driver of new media services (the internet being a spectacular example), porn and adult entertainment over mobile devices has been handled very gingerly indeed. I have discussed the mobile content regulation debates elsewhere³², but suffice to say that Australian mobile carriers, and their parent companies and peers elsewhere in the world, have been keen on the lucrative potential of these services—but very nervous indeed about the potential backlash and 'brand damage' from the wider public. With mobile phones used by millions of pre-teen Australians daily, the scope for panics about porn is very real. (Indeed, at the time of writing the federal government was circulating, very quietly indeed, draconian new legislation with criminal, not just civil, penalties for breaching classification standards on mobiles and the internet.) With much of the adult content to be found in titillating

and mildly erotic wallpapers, videos and downloads offered by carriers or premium-rate service providers, Hutchison is the only mobile carrier to offer an adult channel. One of the ways that it is able to at least imply or suggest more explicit content than it can actually show via *Adultshop.com*, is to use the small-screen nature of mobile television to frame sexual action, so that explicit sex and proscribed body parts (depictions of real penises banned; shots of prosthetic members—dildos, for instance—allowed) fall outside the frame, leaving much to the viewer's ears and imagination.

Before I draw this discussion of what is on mobile television to a close, I would also note that apart from ritually cited industry studies, mostly laudatory and confirmatory, of mobile television, we have little knowledge of who is actually watching mobile television, where they are watching it, how, for what ends, and with what significance. There do now appear to be developing audiences for mobile television, especially around sporting events and also new participative formats associated with *Big Brother*. In finding out more about this, it would be important also to place mobile television in a larger, messier field of developments, especially short videos and films for mobiles, which have been the subject of much innovation and experimentation in artistic and film communities, but have not as yet, it seems, often been distributed as part of either mobile television or mobile film content. Mobile television also needs to be discussed in the context of the watching of audiovisual content on mobile phones and wireless devices, associated with the new television and internet downloading cultures. Here we see the fast growing popularity of the downloading of television programs and videos, from either 'official' television sites set up by broadcasters, or from 'unofficial' p2p networks (such as those using BitTorrent and other applications), and the viewing of such programs on video iPods, mobiles, laptops and so on. Finally, we might contrast the slow, jerky development of mobile television with the extraordinary constitution of a new distributed user-producer community of audiovisual material in the form of YouTube and other such websites.

Mobile Television and Media Policy

As I have suggested, mobile television has been prefigured in cultural life for many years, most obviously in ideas of telecommunicating in

moving pictures, and then also in the possibilities of making television portable. As a new form of broadcast and telecommunications, mobile television has been a while in the planning, especially in the worlds of technical innovation, standards development and spectrum regulation. Despite this, as I have just discussed, mobile television is still in very early stages of industry, cultural and audience developments. This is doubtless related to the facet of mobile television to which I will now turn: policy. It is fair to say that mobile television has not been centrestage in digital television policy until now. In Australia we can precisely identify the moment when mobile television became a mainstream object of policy and legislation discourse—the media reforms of 2006.

The federal government's March 2006 discussion paper on media forms, *Meeting the Digital Challenge*, was the first serious policy consideration of mobile television, which was mentioned a number of times³³, foremost that:

from 1 January 2007, the restrictions on the services that apply to a holder of a datacasting transmitter licence will be substantially lifted, enabling an expanded range of services such as subscription-TV and niche (narrowcast) FTA [free-to-air] channels, including for mobile television receivers, to be delivered over the spectrum channels currently set aside for datacasting.³⁴

Mobile television was included in the government's preferred options for new digital services on broadcasting spectrum, namely:

- (i) Two reserved digital channels of terrestrial spectrum would be allocated as soon as practicable in 2007 in markets for new digital services.
- (ii) From 1 January 2007, subject to licence requirements, options for these services may include subscription TV services, FTA niche 'narrowcasting' services, as well as interactive and short video or 'datacasting' services, whether delivered to fixed or mobile television receivers.

- (iii) This would provide opportunities for new innovative digital service options of interest and value to consumers, rather than services that mirror traditional television services ...
- (vi) The Government would consider what, if any, obligations or restrictions should be placed on operators of these new digital services and the manner in which the channels should be allocated.³⁵

The government also pointed to the potential use of new compression technology standards (such as MPEG-4), which '[d]epending on the types of services offered enable in the vicinity of 30 channels to be provided over this spectrum'.³⁶ Given its view that such 'services have the potential to contribute to greater choice and diversity and to provide extra content and services for viewers that do not replicate traditional television services', the government signalled it would lift datacasting restriction and make channels available for these.³⁷ To tie these new channels to the goal of encouraging take-up of digital television, one channel (which later became known as channel A) would be reserved for 'in home' digital free-to-air services, capable of reception free of charge on digital television receivers. The government stated that the Australian Communications and Media Authority (ACMA) would be asked to commence work on technical and commercial issues, and also to consult with stakeholders.

In July 2006, the government announced its new framework, followed in mid-September that year by the introduction of the relevant legislation into the parliament. In the main, the framework and legislation followed the lines laid out in the *Meeting the Digital Challenge* discussion paper. For my purposes here, the interesting difference was the prominence accorded mobile television in how the government marshalled its arguments and presented the benefits of its package to the general public and critics of the reforms:

By next year, a range of new services including free-to-air, in-home, digital only channels or even perhaps "snack" television, small segments of TV content delivered over a mobile device much like a mobile phone, could be

available,' Senator Coonan said ... 'This is great news for consumers ... With these new services we hope to make the digital experience in Australia more attractive for consumers so we can energetically drive take-up of digital television in Australia.'³⁸

What was instructive about the scarcely one month between the legislation's introduction and its passing was the debate that ensued. What emerged in the public domain, especially through the scandalously telescoped Senate committee examination of the Bills³⁹, were a number of important insights into mobile television, its prospects and its place in the larger setting of digital television policy, and media law and policy generally.

There was widespread confusion about what mobile television actually was, and what programs and services it would really offer. The main problem here was the novelty of mobile television and its still experimental status worldwide. While the early visions of mobile television had modulated into mentions of 'snack TV', or 'snack content' (as the minister put it), in an attempt to grasp what might be specific and also commercially viable, the medium was still clearly in its infancy—and what was available was not self-evidently compelling let alone revolutionary. This is a typical problem, of course, in policymaking: arriving at an understanding of how a new technology or service works, how people are using it, and what its implications might be for policy, with the technology at a very early stage of its career.

This prematurity of the technology was combined with a lack of reliable, authoritative information on or analysis of the technology. Most tellingly, while the government had decided that mobile television would add substance, or at least gloss, to its media reform package, it presented very little information in its policy or legislative documents. Indeed the Senate committee hearings, with supplementary questions on notice, became a crucial way for parliamentarians and the public alike to grapple with mobile television. And, of course, the great weakness for any policy rationality or effectiveness in this approach is one familiar to students of regulatory 'capture'. The only actors presenting any rounded perspective, or substantial information, on mobile television in the public domain were the

telecommunications companies, Telstra and Hutchison. The regulator (ACMA) and the Department of Communications, Information Technology and the Arts (DCITA) offered additional minor insights, but for the most part the senators were left in proverbial darkness to divine enough about mobile television to proceed with fundamentally important decisions on media policy.

Despite this lack of information on mobile television, important discussions unfolded. One topic that recurred was whether mobile television would contribute to the policy objective of increasing digital television take-up. I will not discuss this matter here, except to note that the issue of encouraging take-up of technology has often been a problematic theme in Australian policy discussions (mobiles as much as digital television). What I do wish to spend some time discussing is the question of how, if at all, mobile television would contribute to goals of sustaining and increasing media diversity.

Recall that a central criticism of the government's media reforms was that removing, or even fundamentally altering, cross-media changes in the manner proposed, would lead not to an increase of competition and diversity but in fact the opposite. A number of critics—including the Labor, Democrats and Greens political parties, and the Nationals with respect to rural and non-metropolitan areas; newspaper publishing interests such as Fairfax; and commentators, notably Eric Beecher⁴⁰, Jock Given⁴¹ and Franco Papandrea⁴²—contended that cross-media restrictions still actually promoted rather than restricted diversity, and that given the concentration of Australian media, especially the still privileged position enjoyed by free-to-air television broadcasters, it was not yet time to liberalise such regulation. A motif in the Senate inquiry was the discussion about to what extent the creation of new media platforms, especially the internet and blogs, but also now the government's proposal to allocate new kinds of licences for expanded forms of datacasting and mobile television, had greatly enhanced media diversity. Much scepticism was expressed by submitters to the inquiry, and by witnesses to the hearing, regarding the prospect of the new licences as playing anything more than a marginal role, at this point of time, in achieving the goal of media diversity. This critique was memorably captured in Fairfax Managing Director James Hooke's throwaway line, that, pace scholars of popular culture's democratic possibilities, 'the mere fact

that someone will be able to see *Dancing with the Stars* on a mobile telephone device is not diversity'. Hooke's view, shared by quite a number of those prominent in the media reform debates, was that the availability of new spectrum, including channel B, 'does not actually deliver the diversity dividend that everyone said was essential for this legislation to pass'.⁴³ Fairfax's argument here was specifically aimed at what they saw as the legislation's favouring of the free-to-air broadcasters:

What is being created here is the greatest delivery of new television spectrum in 50 years, and new entrants will not be encouraged because the people who will have the vested interest in bidding and bidding the highest price for this are the incumbents already in free-to-air television ... for them the marginal cost of adjusting their content to send it through digital television, through mobile television, will be the lowest. In our view that does not produce substantive diversity.⁴⁴

The ensuing discussion between Hooke and Labor Senator Stephen Conroy is especially illuminating. Hooke argues that the mobile television channel, channel B, is crucial to the balance of the government's package because 'channel B is the only source through which new content will have a distribution channel'.⁴⁵ Hooke reasons that diversity only comes about if new content is generated: 'Yes, there is a diversity of reception point, of handheld device and of screen size, but there is no diversity in the content'. At this point, I would question whether it is so easy to draw a distinction between device and content, especially as with new technologies come new sorts of cultural forms and consumption, as I have indicated above. Nonetheless the debate about competition in and diversity of content is a very important one—and one which the Australian Competition and Consumer Commission (ACCC) signalled would be its prime focus in its August 2006 *Media Mergers* paper.⁴⁶

The argument about diversity, of course, is a feature of the contemporary policy landscape that appears in ideas about markets, and how to understand and regulate them. Here, those taking an interest in mobile television and how it fitted into digital television policy

debates overall found themselves ill-equipped when it came not only to basic information about the medium, but also important detail about the government's policy proposals.

The basic problem in the government's proposal about mobile television, à la channel B, was two-fold. Firstly, as we have seen, the government was conjuring up the spectacle of channel B making a decisive addition to media diversity. Its argument was that the two new channels were offsetting, or at least ameliorating, the basic flaw in their media package—namely the reluctance to offer a fourth channel (or otherwise genuinely open up free-to-air broadcasting in Australia to competition). Secondly, it was unclear what the arrangements were for awarding the licence for channel B. There is the threshold issue already mentioned of whether the free-to-air broadcasters should be permitted to bid for channel B, or whether this should be reserved for new entrants. Then there is a set of issues that began to be debated in September–October 2006 about how to ensure that channel B would not become a 'bottleneck' facility.

With spectrum still a relatively scarce resource, despite claims of the land of plenty ushered in with new digital technologies over the past fifteen years, channel B would be the only dedicated mobile television broadcasting conduit. It is true, of course, that any mobile carrier with a third-generation network is potentially able to broadcast to any customer, as Telstra, Optus, Vodafone and Hutchison are doing now; to do this is effectively to 'unicast', but with present and projected networks in the near future this does not allow substantial growth in audiences because the popularity of such mobile television services would quickly lead to congestion (and indeed this was a recurrent theme of concern in the Senate hearings).⁴⁷ In addition, while channel B can be 'multiplexed', or divided in blocks to allow a number of channels, it appears that it would be optimal for just one party to be awarded the licence and operate the service. From the perspective of say an existing television operator, or aspirant entrant such as Fairfax, this raises the prospect of one party with broadcaster interests gaining a stranglehold on mobile television. From the point of view of the telecommunications companies with some interest in broadcast but with principal interest lying in mobile and convergent online media, this raises the spectre of a competitor taking over channel B as a defensive manoeuvre in these skirmishes (as Hutchison

argued in the Senate inquiry).⁴⁸ From the stance of channel and program operators, and media producers, the issue is one of access to channel B—raised by a set of stakeholders, including the ABC and Community Broadcasting Association of Australia. Will channel B offer open access on reasonable and fair terms to those wishing to provide channels and programs via mobile television?

In its discussion paper, draft legislation and accompanying documentation (such as explanatory memoranda and second reading speeches), the government provided little detail on what its stance on access arrangements would be. This may have been merely an oversight, but I am inclined to read it against the history of struggles over the creation of significant new communications networks and infrastructure. The question is how to balance the appropriate incentives towards and returns from those investing in, establishing or operating networks, and the wider economic and social benefits that derive from others being able to access and use such infrastructure. We see this in the case of telecommunications, where access has been a strategically crucial site of contestation and regulation about how markets are shaped, and the forms competition takes. In 2006–07, we have seen Telstra fight a pitched battle with the federal government and the ACCC over plans to upgrade the nation's broadband infrastructure, declaring that it would not undertake such an expensive project without guarantees that any access regime would be in its favour.⁴⁹ In April 2007, the Labor Party tried to address this impasse by announcing an election promise to create a new open-access independent broadband network funded from both public and private investment. This brought a response from the Howard government, with Minister Coonan reopening negotiations with Telstra—though with no result at the time of writing in June 2007.

The government kept its cards up its sleeve on access as well as licensing arrangements for channel B, indicating when asked that it would take advice from the ACCC and ACMA. Strategically what this enabled the government to do was have its media reform legislation passed, without this being dependent on a fully informed, comprehensive debate about mobile television. This approach might have the danger of leaving the government with a potential mess on its hands—passing legislation without figuring out how the market for mobile television might work, or even what the problems with its

allocated spectrum might be (such as coverage issues, especially outside capital cities).⁵⁰

As it turned out, the government did provide some more detail in the final legislation on the licence allocation and access arrangements for mobiles. Both channel A and B datacasting transmitter licences will be allocated as separate, national licences for ten years, with the possibility of a five-year renewal. Licence holders must commence a service within eighteen months, unless given a longer period by ACMA. In relation to channel B, the legislation provides that licensees may provide datacasting services either under the *Broadcasting Services Act 1992* (BSA), another licence allocated by ACMA under the BSA, or a service provided in accordance with a class licence under the BSA.⁵¹ The crucial restrictions are that licensees cannot provide any services that cut across the other forms of digital television broadcasting. Outlawed are commercial broadcasting and in-home subscription broadcasting services (except that channel B commercial TV services may be retransmitted to a handheld device in relevant licence areas) to domestic digital television receivers. Commercial television and national broadcasters can control a channel B broadcasting licence, but only if it is not used to provide services to domestic digital television receivers. Details of the arrangement were then subject to consultation through ACMA in late 2006 and early 2007.⁵²

Through amendments to the *Radiocommunications Act 1992* (Cth), the new legislation also sets out the outlines of an access regime, stipulating that a person is not eligible to apply for a channel B data transmitter licence unless they have submitted an access undertaking acceptable to the ACCC. The access undertaking needs to provide for access to services that facilitate the transmission of content services.⁵³ The ACCC proceeded to consult on the details of the access regime, including the issues that it may raise and how it should be administered. Its December 2006 discussion paper asked for comment, for instance, on the merits of two possible models of access undertaking. The first is the 'empty channel' model, where the licence holder could undertake to allocate the right to provide content services using either 'a portion of the transmission capacity of the datacasting transmitter; or a certain number of sub-channels that do not already contain programmed content'.⁵⁴ The second option

is the 'resale' model, where access to sub-channels with programmed content could be offered, which the access seeker could combine into 'a competitive domestic or mobile TV service'.⁵⁵

By March 2007, neither the ACMA or ACCC consultations had concluded, and so crucial detail on mobile television arrangements were still not decided. The government's safety mechanism giving leeway and some comfort for these decision-making processes was to gain assent for the legislation on 14 October 2006, but to delay its proclamation until it took further advice.⁵⁶ In any case, the legislation was finally proclaimed in early April 2007.

Conclusion

In Australia, as elsewhere, mobile television is now inescapably part of the mediascape of digital television. Those interested in the future of television, and media generally, can no more overlook television's mobile and portable trajectories, than they can wish that the internet would settle down. As I hope I have conveyed in this chapter, I think mobile television is not only intriguing and significant in its own right, but that it is also instructive for citizens, users, cultural producers, scholars and policymakers alike.

The career of television around the world took certain forms over a roughly fifty- to sixty-year period from the 1920s or 1930s through the 1980s or early 1990s. It became a central cultural technology in many countries, associated very closely with particular social and gender arrangements, with leisure practices and popular cultural forms, and with enormous importance for questions of politics, citizenship and the public sphere. For some time, this settled image of television has been blurred, unfocused, reframed, cut up and remixed. The digital transformation of television is one prevalent way of approaching these changes. We now need to consider how mobile technologies fit into, qualify, modify and challenge television's digital turn.

It might be objected that mobile television is still so new that it is too early to discern what sorts of forms it engenders, and what sorts of audiences will seek it (or vice-versa). A contrary view, however, is that we might also see an opportunity here, informed by traditions of the social studies of science and technology, to explore a technology, and medium, in the process of becoming, before it is black-boxed and taken for granted. There are quite concrete things

we can try to find out about mobile television that we just do not know, having instead to rely on the hagiographic press releases of the technology's promoters.

When it comes to questions of policy, the need to think about mobile television as part of a broader reconfiguration of television in light of technologies and convergence is ineluctable. I have discussed how mobile television played a central role in the 2006 Australian media reform debates. While the Australian government pushed mobile television to the fore as an emblem of its creation of new channels, to open the television environment to new players, there are many questions that remained unanswered. For instance, how will the dedicated mobile channel arrangements work? How will they relate to free-to-air and subscription television using other spectrum? What are the prospects for mobile television, as it is currently taking shape in Australia, to contribute to greater media diversity and competition, let alone new avenues of cultural expression? What relationships will there be between those mobile channels using broadcast spectrum and mobile channels offered over the 3G network (by Telstra's NextG network or Hutchison's 3)? What will be the implications for the cultural economy of mobile television—will it offer new models for financing and supporting cultural production and distribution (as was hoped, for instance, of broadband in the early 2000s)?

While all these questions will need searching inquiry and debate, there is one thing that is clear: discussions of digital television now need to embrace fully the prospect of mobile television. In this regard, what mobile television makes glaringly obvious is that Australia can no longer defer a comprehensive overhaul of broadcasting and telecommunications legislation that brings the laws together in a consolidated Act. In a sense, however, this is rather obvious. What is more difficult and even less clear in its implications is how digital television policy can adequately encompass the unfolding, popular yet spasmodic, fragmentary and contingent forms of 'unofficial' mobile television, based on the convergence between internet protocol and mobile platforms. This also is a crucial task, for which our current laws, policy frameworks and institutions leave us even less well equipped.

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CHAPTER 3

From Technological Abundance to Commercial Monopoly in Australian Pay TV

Key Relationships in Institutionalising Subscription Television

Rodney Tiffen

Introduction

The thirty-first of July 1995 was a turning point in the development of pay television in Australia, one that encapsulated where power lay in the emerging system. On that day, Rupert Murdoch, on a brief visit to Australia, ordered his officials not to sign the agreement that Foxtel had agreed with Australian Information Media (AIM), the news channel that had been set up by the ABC in partnership with Fairfax newspapers.¹ The media scuttlebutt is that Murdoch was annoyed when news of the impending agreement was leaked to the Fairfax papers and not to his own, and then decided to cancel the agreement. The purported explanation appeals to journalists' sense of irony and immediacy.

While the story is probably true, a more complete explanation would need to go back at least one step with Murdoch knowing that now was a good time to make such a move. The driving force for the

ABC to be involved in subscription television had been David Hill, who was forced to resign the previous November. His successor, Brian Johns, had been in the job less than six months and was far less interested in pay TV. He later described both pay TV and the international service Australia Television as large distractions from his commitment to renewing the national network.²

The ABC had been divided over the move into pay TV, with a substantial constituency inside the organisation worried that such a commercial venture would either directly or indirectly pollute the public broadcaster's mandate. There was also a faction of pragmatic worriers who thought it would impact adversely on the ABC's finances. Finally, the Labor government itself was divided on the ABC's involvement. Prime Minister Keating was a strong opponent, seeing it very much as driven by Hill's egomania.³ As Murdoch probably anticipated, his axing of the ABC brought expressions of regret but little active opposition.

So rather than simply a momentary impulse, Murdoch's action should equally be seen as exhibiting a cunning grasp of the strategic moment. But a complete explanation needs to go still another step back to where power was invested in the new system, and how its implementation was making a mockery of the policy decisions enacted earlier.

The development of pay TV policy was one of the most convoluted, indeed absurd, policymaking processes that Australia has ever witnessed.⁴ In the final version though, the Keating government had seemingly been forced to accept a role for the ABC. Even though the prime minister and some other central ministers had been strongly opposed, a combination of the minor parties (Australian Democrats and Greens) plus a strong constituency of Labor backbenchers had forced the ABC's inclusion. The final decision mandated that there would be digital satellite delivery of ten new channels, with two new owners having four each and the ABC being offered two: one for children's programs, the other for news. The ABC was also to be given \$12.5 million to develop the new services.

Very quickly the policy came unstuck. Instead of satellite delivery, a frenzied competition between Telstra and Optus broke out, both laying cables in the same areas of the largest capitals. There were anyway great uncertainties about how quickly the Australian

public would take up pay TV, and the early companies in the field faced formidable obstacles. As well as their huge start-up costs, the pay TV operators faced another restriction on their already problematic ability to raise revenue. The federal government had perversely ruled that the infant industry could not accept advertising revenue until 1997, so as to reduce the damage to the entrenched free-to-air networks.

In December 1994, the ABC's AIM was established and granted a licence to transmit. Using the government grant and money from equity partners, it engaged more than 100 people and created a digital news production centre. It attracted a stable of distinguished journalists and worked out routines to produce a high-quality 24-hour news channel. At this time there were three companies offering pay TV services to the Australian public—Australis Media, Optus Vision and Foxtel (then comprising Murdoch and Telstra, Packer being linked with Optus Vision at the time).

Perhaps strangely, the new operation had been launched without any contracts being signed. After Murdoch's veto, the other two operators also changed their attitudes to working with the ABC, saying they could get cheaper services elsewhere. By the time the news channel's scheduled start date of 15 September was reached, it was clear that it was a content provider without any means of delivering its product. It closed on 28 September.

The closure received modest and momentary media coverage, but little penetrating analysis. Much of the commentary concentrated on the ABC's apparent folly. There was little critical attention to how the will of the parliament had not been followed. It was seen as idealistic policy having to give way to commercial reality.

In some ways this exercise of veto power was peculiarly Australian. It reflected the ambivalence regarding the role of the ABC, and the power of the major moguls and Telstra. The protracted and confused nature of the policymaking which subsequently left a policy vacuum, with key developments being decided solely by the 'market-place', was also characteristic of the Australian politics of deregulation during this period. After the initial announcement in 1991 that pay TV would be introduced, the Labor government went through five different policy positions in thirteen months, changing its position on such sensitive issues as the favoured mode of delivery and the

rules about ownership, especially the role of the free-to-air networks and the ABC.⁵ There followed the farce of the auctioning of the licences and the embarrassing reversal of policy on microwave delivery of TV. Following these debacles, the government's major priority seemed to be to avoid further embarrassments. These early years were marked by enormous commercial failures and shifting business alliances⁶, and a slow take-up rate by Australian consumers.

However, Murdoch's axing of the ABC is also revealing in regard to universal issues in the multi-channel environment, the institutionalisation of subscription television and the nature of power in the new industry. A content provider is powerless if the hardware controller denies it access. This power is completely unrelated to consumer preference. Indeed it is the power to prevent the audience ever exercising such a preference.

There have been two main discourses surrounding pay TV in Australia, both deterministic and both obscuring, in extreme form even denying, the role of policy in influencing the nature and quality of subscription television in a particular market. The first was the promise of abundance, a technologically driven cornucopia; the second was that market forces would prevail, and because of the limited size of the Australian market this would naturally lead to a monopoly, and nothing more can be expected. The first downplays the importance of economic factors, in particular ignoring the costs of supply to a more fragmented audience. The second takes the absence of government intervention as constituting a 'free market' and, by ignoring key gatekeeping monopolies in the system, does not countenance how policy could aid a better functioning market. By setting up a dichotomy of either government-controlled or free market, it ignores how different institutional configurations distribute power differently and lead to different market outcomes.

The core argument of this paper is the importance of institutions. Technology sets limits on what policies can be adopted and what the medium can deliver. Within those limits, however, how markets are structured greatly affects the programming delivered and the choices available to viewers. One strand in the debates surrounding the changing of broadcasting policies and the onset of the new multi-channel environment has been to concentrate on the special mission of public service broadcasting over and above what market forces can

deliver.⁷ The focus here, however, is on how policy choices structure markets, of how the consumer can be short-changed even when the mantra of market forces is being invoked.

The chapter proceeds firstly by charting the nature of the multi-channel environment that television has entered. So many of its assumptions are different from when TV began that it is no exaggeration to say we have entered television's second age. Two key relationships in the institutionalisation of subscription television are then examined—those between consumers, delivery platforms and pay TV operators; and that between pay TV operators and channel owners. These are crucial to the possibilities of competition and consumer power in the new environment. The high degree of vertical integration in pay TV in the US and in Australia brings acute complications, some of which are then considered.

Television's Second Age—Pay TV and the Multi-Channel Environment

Although the first transmissions were made as far back as the 1930s⁸, television became a major part of social life in most advanced democracies during the 1950s. Half a century later, the multi-channel environment and the prospect of ever more radical changes to come constitute not merely the maturing of an industry, but a second age of television in which qualitatively different assumptions operate.

There were important variations between countries in the mix of public service and commercial television, and the rights and obligations of broadcasters, in the first age of television, but several important assumptions were common in most democracies:

- Transmission would be analogue terrestrial and because of spectrum scarcity only a few channels could exist in one geographical area, and they could reach only a limited distance.
- There would be only a very limited number of channels, not only because of spectrum scarcity, but also because this was more culturally and economically desirable.
- The state should be centrally involved in determining the structure of television, because broadcasters had privileged access to a scarce public resource, the spectrum, and because of

its cultural and political power, television should be treated as a 'public good'.⁹

- One task of television was its role in promoting and defending national culture, and the regulation of television was tied up with the advancement of national aspirations.¹⁰
- Television could be financed only through state subventions (either from consolidated revenue or through a licence fee) or by advertising.
- Whatever technological and policy settings were in place, there would be stability with only incremental and marginal changes.

Stressing these commonalities is not to minimise the differences in institutional structures. These ranged from a predominantly commercial system in the US to public service broadcasting monopolies in most western European countries, and mixed models in Britain, Japan, Canada and Australia.¹¹ There were also differences between countries which treated the spectrum as a property right, such as the US and Australia¹², and those which regulated spectrum use among a series of programmers, such as Britain's ITN and the elaborate Dutch structures.¹³

However, in all advanced democratic countries there was a presumption of state involvement. When not a state monopoly, all countries had special regulations regarding private ownership of television channels: most forbade foreign ownership; limited the number of stations that could be owned; and/or imposed limits on cross-media ownership. All had some laws about TV content: what was prohibited (some types of violence, sex and blasphemy); what was prescribed (news, children's programming, national content); and what was regulated (advertising time).

Everywhere, of course, policy settings interacted with institutional logic and the voracious demands of television often led to outcomes not expected by the regulators. In Australia's case, for example, the regulation demanding a quota of domestically produced drama interacting with commercial television's wish for cheap and continuing supply led to the soap opera *Neighbours*, which proved a great hit elsewhere, particularly the UK. Moreover, the portfolio of ideals that TV stations were expected to produce were often

framed too vaguely to allow enforceable sanctions, except where transgressions were tangibly measurable such as excessive advertising time. Nevertheless, the crucial point is that the first age of television was one of extensive regulation, and while particular regulations were frequently contentious, the idea of state regulation itself was not.

Following a series of technological advances and changing policies, none of the original guiding assumptions now exists unchallenged.

- Transmission can be by cable and satellite as well as terrestrial means.
- Transmission will be digital rather than analogue.
- The number of channels available has increased enormously.
- Television can be supported by direct subscription as well as by the state and advertising.
- Because of satellite, the limits on the distance which a channel can reach have all but disappeared.
- Change will be continuing, and whatever policies are adopted now will only be temporary as technologies keep developing.

Because the new delivery technologies of cable and satellite have coincided with the rise of pay TV, it is natural to think of them going together. But in fact any delivery system can go with any funding system.

The three sources of television revenue carry contrasting advantages and disadvantages. The first and most common in English-speaking countries is through advertising. The implicit equation is that viewers pay for the TV programming by buying the products advertised. This produces incentives to attract high ratings and thus responsiveness to audience wants. Its disadvantages are that depending on market structure, it produces no institutional incentives towards excellence or catering to minority audiences.

The second means of financing is by the government, either through licence fees or from consolidated revenue. This can allow television to pursue policy objectives, such as promoting ideas of cultural excellence, but when there is a government monopoly it can lead to political subservience. Moreover, funding levels are subject to

political manipulation. The basic problem is that in the funding mechanism there is no incentive for ensuring responsiveness to public tastes.

The third means is by subscription. This establishes the most direct relation between the audience and what it consumes. Its key disadvantage now is that viewers have become accustomed to thinking of television as free. Traditionally, terrestrial television was free to air, and the technology was not available to discriminate between subscribers and free riders, but with digital transmission and encryption technology it could also now be via subscription. Digitisation has also considerably expanded the number of terrestrial channels available in one area. Although digital terrestrial transmission will never match the number of channels available via cable or satellite, the extra available channels can be received at much less expense to the householder. It is not a path that Australian policy-makers have chosen to follow, however.¹⁴

The first Community Antenna Television (CATV) systems were built in mountainous and rural regions in the late 1940s. Legend has it that the system of transmitting from a local point with good reception via cable to individual households was developed by retailers wanting to sell more TV sets. For decades cable remained a relatively insignificant means of supplementary transmission where terrestrial transmission was problematic.¹⁵ By the late 1960s, many were speculating on cable's potential, including the first of several false dawns proclaiming its interactive capabilities.

According to Vogel, the American cable industry entered its second phase from the mid-1970s, when for the first time satellites allowed nationwide signal distribution.¹⁶ This allowed cable stations in different locales to simultaneously show the same program. Satellite was used to transmit to the local cable station which then transmitted to subscribers. From this period also grew the development of dedicated cable channels, and so eventually cable took a greater share of viewers from the major free-to-air terrestrial television networks. The first and most important of these early channels was HBO, still 'one of the most profitable television businesses in the world with its own highly successful business model. It does not run advertisements but makes money by charging for prized content such as *Sex in the City* and the *Sopranos*'.¹⁷ The number of such

national channels, ranging from Ted Turner's all-news channel CNN, sports channels such as ESPN, the Disney channel for children and so forth, grew from twenty-eight in 1980 to seventy-four by 1989.¹⁸

Vogel cites a third era beginning in 1996 with the deregulation of telecommunications, ushering in a period of mergers and digital services, including more bundling and corporate attempts to embrace convergence—the triple play of television, telephony and broadband. One characteristic of this period is the growing size of the main corporate players, especially because of the involvement of telcos. However, it has also brought more competition. The cable industry in America was built upon a series of local monopoly franchises. Even after deregulation, the cost of installing a new network—plus programming arrangements—protected the incumbents against competition. In the second half of the 1990s, cable monopolies were challenged firstly by telcos trying to expand their business arms. Then, after some false starts, both the improved capacities brought by digitisation and the decreasing size and expense of satellite dishes made subscribing to satellite services directly an increasingly possible option for viewers.

The US is one of the few countries where there is the strongest competition between cable and satellite providers, much to the chagrin of the cable operators who dislike any challenge to their cosy monopolies. The conflict became public in a spectacular way on 4 February 1997 when Murdoch announced he would contribute \$1 billion to Echostar, an emerging satellite service. News Limited 'launched a vitriolic populist harangue against the monopolistic cable companies and said satellite was the future'. The next day cable stocks lost more than \$1 billion in market value. The cable operators, including Murdoch's friend John Malone, were furious. Because News Limited was already overstretched financially, because his partnership with Echostar was not working out, and because of the fierce reaction of the cable industry, Murdoch retreated.¹⁹ Eventually Murdoch did get control of an American satellite station, DirecTV. But in 2007, in order to get John Malone out of the News Limited share registry, where his holding of just under 20 per cent potentially threatened Murdoch family control, he sold it, and Malone, the cable king, godfather of the cable industry, now became the champion of satellite.

Different countries have invested very differently in these two delivery technologies. Each has its own advantages. Cable involves heavy installation costs and is best suited to densely populated areas, with large numbers of subscribers in close proximity to each other. Once the costs of installation have been met it is able to carry even more channels than satellite, with the possibility also of two-way interaction. In turn, the great advantage of satellite is the huge footprint it can reach. Once the satellite is successfully launched, the cost of adding new subscribers by installing a dish is relatively cheap. It is a matter of policy as well as geography, however. One would predict that Britain should be more suitable for cable, but satellite, especially driven by Murdoch's Sky services, has had considerable first-mover advantages.

One of the key differences between the first and second ages of television is that policymakers then thought they were fixing policy settings for the foreseeable future. Moreover, none of the participants in contemporary debates imagines that new policies will last for generations. Already on the horizon are both internet broadcasting and the personal video recorder (PVR) or TiVo—'smart' VCR technology which will allow daily downloading of up to sixty hours of programming.²⁰ In the US, 'Cablevision has developed technology that allows each subscriber to record and play shows from personal storage space on servers in its network. The economics favour this, since customers won't have to replace failing hard drives—or buy digital recorders in the first place'. There are unresolved legal issues, but 'almost every cable operator has said that if Cablevision wins, they will launch the same service'.²¹ While the original VCR allowed some 'time shifting' in viewing, the new technologies challenge the whole notion of 'channels'.

The second age of television has a very different policymaking ethos. Partly this is brought about by changes in technology and the changes in commercial realities that they bring. Several advocates of deregulation have argued, as Adam Singer has, that 'the traditional model, using scarce publicly owned air-waves for the benefit of society, does not hold up, once all scarcity is removed'.²² Graham Murdock has correctly countered that 'the organization and ethos of public service broadcasting was always the product of cultural strategies and political requirements as well as technical considerations'.²³

Nevertheless, it is also true that the rationales for regulation need to be more precisely argued in an age of abundance. However, in nearly all democracies, governments have refrained from taking the final step away from seeing television as a public good. The Australian Competition and Consumer Commission (ACCC) noted that the presence of public broadcasters in nearly all OECD countries 'may be interpreted as evidence that the market outcomes from FTA broadcasters may not be adequate in themselves to satisfy policy objectives'.²⁴

While these questions arise partly from intrinsic media considerations, they have in all countries, especially Australia, been caught up with changes in telecommunications.

The two decades between 1980 and 2000 saw all the European PTTs (Post, Telegraph and Telephone organisations) move from being publicly owned utilities to profit-oriented public companies freeing them up to invest in commercial television services. They have been particularly active in new services delivered by cable and satellite, both of which are dual technologies used for both telecommunications and television.²⁵

They come also from more general political currents. Governments in some countries have been less willing to fund public service broadcasters both because of general fiscal stringency and because of political displeasure with them, which helped create a market for ideologies questioning the very rationale for such broadcasting. Moreover, there was not only a general anti-regulatory ideological current in democratic politics in the 1980s and 1990s, but also one that made it hard for governments to assert with confidence any higher purposes beyond market forces. With Prime Minister Thatcher asserting there was no such thing as society and President Reagan stating that government was the problem, not the solution, the age of the BBC's first head, Lord Reith, was well and truly over. It was not hard then to imagine an American Federal Communications Commission (FCC) official describing televisions as like toasters with pictures.

This free-market enthusiasm fed into the optimism about the fruits of technological change. As always, there was a strong theme of determinism running through public debates about technology. Ever since the computer revolution, there have been prophets saying how the technological changes will usher in a more utopian age. Professor Tom Stonier was perhaps the most optimistic of all, stating that

just as the industrial revolution eliminated slavery, famine and pestilence, so will the post industrial economy eliminate authoritarianism, war and strife. For the first time in history, the rate at which we solve problems will exceed the rate at which they appear. This will leave us to get on with the real business of the next century. To take care of each other.²⁶

The Economics of the Multi-Channel Environment— Springsteen's Law

Technology does not dissolve the laws of supply and demand. The multi-channel environment fragments the audience. The inevitable consequence is that less money can be spent per hour of programming. Free-to-air television was always a voracious medium, and while the celebratory market rhetoric of broadcasters always talked of meeting public demand, the other, less publicly stressed side of the equation was achieving cheapness of supply. The multi-channel environment accentuates this many times over. We might call it Springsteen's Law: if there are fifty-seven channels, there will be nothing on.

Some other factors mitigate this apparent bleakness. To some extent the multi-channel environment also expands the audience. Increasing internationalisation expands the total audience to some extent, although international distribution was already built into quite a bit of television production. The multi-channel environment may also expand the audience by increasing total viewing by households because of expanded choices, especially outside the traditional hours of peak viewing.

These sources of expansion do not come close to meeting the diminution of numbers from say a five-channel environment to a

fifty-channel environment. So what provides the content of these channels? The main entertainment channels of pay TV can be described as an 'after-market', where programs originally shown on free-to-air TV are recycled several times over. Indeed, whereas the program for free-to-air TV notes which programs are repeats, the Foxtel program highlights which few are being shown for the first time. This has been a boon to the TV networks and movie studios, who have been able to sell again programming they had already realised profits upon. It does not necessarily augur well for strong investment in quality programming in the future.

In addition, the limited channels available on free-to-air TV meant there was often a logic of exclusion of programs of minority taste on commercial channels. This no longer applies in the same way. So while, for example, soccer or basketball did not attract a sufficiently large audience to justify their coverage in a five-channel market, they do so when there are dozens of channels. There are severe cost constraints on such productions, but they do offer some expanded choices.

Similarly the multi-channel environment does change some of the relationships in the TV supply chain. Together these relationships affect the quality and diversity of programming, the responsiveness to audiences and the power of different players. The ACCC distinguished several players and stages in the pay TV supply chain: rights suppliers and content suppliers; channel suppliers; wholesale pay TV operators; retail pay TV operators; distribution and reception.²⁷

One area where the multi-channel environment does liberalise the supply chain is in the relationship between content suppliers and channel operators. A vibrant and innovative television production industry depends on whether program-makers are able to sell their efforts in a competitive market to the channels that might carry them. Is there scope for independent producers to grow and flourish, or are they inhibited by a monopoly market?

In the history of television, the major networks typically had an advantage in their dealings with program-makers. In America, the networks established a system of program procurement 'that shifted most of the risks onto external producers—and placed most of the profit potential in the networks' hands'.²⁸ Similarly in Britain one of the incentives for setting up Channel Four in the way done was the

feeling that the BBC and ITN were too much of a closed shop for program-makers.

With the multitude of channels offered in pay TV, it would seem that this oligopsony would not apply. However, the problem is more complex. With so many niche channels, there are not always several alternative buyers, especially if the program-maker wants a global distribution deal. For a nature documentary maker, for example, their relationship with Discovery Channel may be crucial. Apart from aspects of price, number of repeat screenings and distribution in different markets, there may be areas where the channel is able to extract an advantageous deal. Nevertheless, although cost constraints are often overpowering, in the new environment hardware is often chasing software, and there is slightly greater leverage for content providers, depending on other institutional configurations.

The argument of this chapter is that institutional configurations are crucial in ensuring competition and consumer choice. In particular monopoly and vertical integration are in two relationships. One is that between the consumer, the delivery platform and the pay television service. The other is between the pay TV service and the channel controllers. These will be considered in turn.

Delivery Platforms, Pay TV Operators and Consumers

Basic to any discussion of subscription television is the infrastructure through which it is delivered. No matter how many channels the infrastructure can deliver, if a single gatekeeper controls access to it, and there is only one delivery system, the potential diversity may not be realised. For the consumer, there is an initial decision about purchasing equipment, either a satellite dish or a cable connection. Most of the time, however, a decision to connect hardware is tied to a subscription to a service. Especially if there are not checks and balances built in elsewhere, this effectively means that a monopoly in hardware also becomes a monopoly in software, in the provision of services.

The dominant model in Australia and most other countries is one of extreme and rigid bundling. The business model that prevails is one where people must purchase a basic package, and then pay extra for premium services. This is rather like a customer going into a supermarket to buy cornflakes, and being told that to purchase that

product they must also buy shoe polish, dishwasher detergent and honey. It may well be that some sort of à la carte channel choice would be more attractive to potential viewers than the enforced omnibus consumption they must currently indulge in. This has recently become a political issue in the US, where FCC Chair Kevin Martin believes tiers (premium services) are a rip-off, and wants consumers to be able to buy channels one at a time.²⁹

The previous paragraph refers to bundling of channels, but bundling in the provision of services is also an important issue in pay television. In America, the rise of the internet and digitisation, plus the liberalising intent of *Telecommunications Act*, led to a new era with cable companies hoping to move into telephony, and telcos into cable TV, and all accompanied by a new series of mergers. 'It was as if no single company wanted to be left without a partner in this new and uncertain age.'³⁰ Similarly in Australia, according to the ACCC, 'a key issue is that Telstra's dominance in telecommunications markets and Foxtel's dominance in the pay TV market can act to reinforce each other'.³¹

Indeed it is competition between telecommunications carriers that accounts for Australia's peculiar pattern of pay TV infrastructure. Former Telstra CEO Frank Blount confirmed this in 1997: 'The decision to go into pay TV was based on the need for Telstra to defend its telephony business after it learned C&W Optus was targeting its customers with a combined pay/television cable'.³² After the initial policy debates assumed pay TV delivery would be by satellite, Optus and Telstra engaged in frantic competition, both cabling the same areas, their choice of location driven by the wish to nullify the other, especially in Telstra's case. Thus the Telstra cable passes 2.5 million homes, and Optus 2.2 million homes, and the two distribution networks are 80 per cent overbuilt.³³ Both telcos then stopped laying cable, and no new cable has been laid since. Even so, in 2002 52 per cent of pay TV subscribers received pay TV by cable and 46 per cent by satellite (2 per cent by microwave)³⁴, suggesting that subscription rates in households served by cable are around four times those which are not.

The ACCC goes to considerable lengths to argue the merits of infrastructure competition.³⁵ It cites several authorities to show that countries which have strong competition have the best and cheapest broadband access, and that Australia has lagged here. The

competition between cable and satellite which has developed in the US is not possible in Australia³⁶, as the same company owns both the cable and the satellite. Moreover, unregulated competition between Telstra and Optus did not lead to the optimal rollout of cable—if it had been directed by policy, the same investment could have resulted in almost twice as many households being connected.

The ACCC also notes the limits of competition in infrastructure as a satisfactory means of competition in pay TV.³⁷ ‘The cost inherent in these practices make it too expensive for consumers to buy pay TV services from two or more suppliers or to switch frequently between suppliers.’ It also recognises ‘the costs of switching to another pay TV operator’.³⁸ If a household wants to change subscriptions, if there is an identity between delivery platform and pay TV service, then this is a major and expensive operation, involving disconnecting and reconnecting to the infrastructure.

Even recognising this, the ACCC’s hopes of competition seem romantic. The major textbook *Entertainment Industry Economics* comments: ‘Cable systems, by their very nature, operate in a way that is pretty close to what economists might define as being a natural monopoly: a market in which there is room for only one firm of efficient size (because its average cost continues to decline as its scale increases)’.³⁹

Channel Controllers and Pay TV Operators

Where there is a monopoly delivery platform, and a coincidence between it and the pay TV service, then it creates a monopsony in the relationship between the pay TV service and content suppliers, specifically the channel controllers. It is not a completely one-sided power relationship if the channels are known to, and popular with, the audience. But it is a lopsided relationship. A fair price becomes almost impossible to determine. Certainly there is no market mechanism to arrive at it. Nor is there necessarily any role in which consumer preferences will be decisive in such negotiations.

However, the situation is more complicated than this because in nearly all pay TV markets there is vertical integration, and companies that are pay TV operators also have a direct interest in some of the channels they carry. This means that the arbitrariness of the monopsony pricing process is also overlaid by ulterior interests, where

the buyer has an interest in some channels succeeding and others not.

Murdoch has been on both sides of such transactions. In Australia, as cited at the beginning of this chapter, as the access controller he excluded the ABC news channel from Foxtel. In the US, as content provider he was excluded first by Time Warner, and then by others. Part of his motive for going into satellite in 1997 was that he felt that Time Warner had double-crossed him, that they had shaken hands on a deal to carry his new Fox News Channel in New York and then reneged and refused to run it at all.⁴⁰ After his satellite announcement many other cable operators openly blackballed him and halted negotiations to add Fox channels.⁴¹

The pioneer of this vertical integration in the cable industry was Murdoch's friend, and later rival, John Malone. As cable expanded from the late 1970s, Malone was worried that he had signed up many channels to cheap contracts but knew there would be the pressure of price rises when it came time to renew them. He decided the best way to tackle the problem was to start also owning channels, 'to own the pipe and the water flowing through it'.⁴² One of his earliest and most successful investments was the Discovery Channel.

Multiple System Operators (MSOs) like Malone's TCI were increasingly important in the US structure, which was a series of local monopolies, and the key to financial viability for a new channel was to have a sufficient number of local systems carry it. 'Getting TCI to carry a new channel almost guaranteed its success.' But equally the implied threat by the biggest cable company not to carry it was a potent one. 'He demanded that cable networks either allow TCI to invest in them directly, or they had to give TCI deep discounts on price since TCI bought in bulk.'⁴³ It allowed Malone to play rivals off against each other; for example, squeezing Ted Turner's CNN on price by threatening to drop it when NBC said it would start a news channel, a venture it dropped when Malone stuck with Turner. As part of the deal he also made Turner agree to make his new classic movie channel only available to cable operators, and not to wireless and backyard satellite outfits.⁴⁴

Like many Davids, Malone had turned into Goliath, and his manoeuvres often merged into bullying. The largest home shopping channel found it could no longer get access to TCI systems once

Malone started his own.⁴⁵ In 1991 the Learning Channel, aimed at kids, was put up for sale by its financially troubled owner. Several bidders emerged, with one, Lifetime (owned by the ABC network and Viacom) offering \$38.9 million and Malone's Discovery Channel offering \$30 million. Lifetime made an in-principle agreement to buy the Learning Channel, but on the same day Malone's TCI announced that it would stop carrying the channel, citing a slip in quality. The TCI move made Lifetime drop its bid and put a chill on other possible bidders. Discovery purchased it for \$30 million.⁴⁶

In 1996 the popular sports network ESPN, owned by the American ABC network, in turn owned by the Disney Corporation, was wanting yet again to increase its rates and also to make cable operators carry its new ESPN2 network, which specialised in extreme sports. Malone reacted to this and other attempts by cable channels to increase their rates by reversing the process. 'He put programmers on notice that instead of their charging TCI's cable systems for their content, the channels would have to start paying TCI for getting access to their cable dial. Murdoch's Fox News Channel had already begun paying as much as \$13 per subscriber to be carried on cable systems.' 'TCI announced that it would be kicking off channels that don't pay in order to make rooms for new ones that do', and several of the most popular channels were removed. 'TCI customers around the country howled. Letters poured in to local franchises. ... Once again, Malone had raised the ire of the public. ... It was hard to underestimate the hatred that subscribers reserved for their cable operators, particularly for TCI.'⁴⁷

Just as the supermarket analogy was used for the consumer wanting to purchase a particular item, but finding he or she also had to buy others, this situation is analogous to a supermarket refusing to carry certain lines, either unless the supplier agrees to let them become part-owner, or behaves differentially according to whether they have an interest in the product or not. Both the US and UK have sought to stop vertically integrated channel suppliers and pay TV operators from engaging in unfair practices.⁴⁸ But 'one of the main deficiencies of access arrangements is that they do not change the underlying incentives of a firm not to provide fair, timely and non-discriminatory access to its upstream inputs when the firm also competes in downstream markets that rely on those inputs'.⁴⁹ The

cases involving John Malone starkly demonstrate the gatekeeping monopoly power of the pay TV operators; the arbitrariness of pricing; the potential for blackmail; and last but not least that consumers are hostage to corporate negotiations based on ulterior interest.

Media Blood Sports

The ulterior interests and mixed motives that vertical integration can lead to were fully on display in the battles over television football rights and the fate of Channel Seven's failed pay TV sports channel C7. The first notable move in the contest for the Australian Football League (AFL) television rights, for the five years starting with season 2007, came in late 2005 when Channels Seven and Ten joined together to defeat the incumbent consortium of Nine and Ten. Then, in a dramatic countermove that December, Nine greatly increased its bid. Several observers saw this as the last great gambit by Kerry Packer, who died just after Christmas, to cost his rivals money. Undeterred, Seven and Ten went ahead with a much more expensive bid, the AFL benefiting considerably from Packer's ploy.

While the total package was settled early in 2006, a new series of issues then arose about its internal arrangements. The guiding assumption was that in order to receive other money to offset the huge fees they had paid to the AFL, and to protect their audience and advertising shares, Seven and Ten between them would not want to televise more than five games per round, but their obligation to the AFL was to televise all eight. In 2006 and some preceding seasons, the other three games had been televised by Foxtel on a dedicated Fox Footy Channel, owned by Fox Sports, which also made repeat broadcasts of all the other games. When no agreement had been reached by the end of the 2006 season, Foxtel dramatically closed its Fox Footy Channel the day after the AFL Grand Final, dismissing its staff. A third Fox Sports channel soon took its place.

As negotiations dragged on, various possibilities were floated, such as giving some games to SBS and even to community channels, such as TVS Channel 31 in Sydney.⁵⁰ In the end it was clear that some games at least would have to go to pay TV. This carried several complications because Foxtel was one-quarter owned by Publishing and Broadcasting Ltd (PBL), owner of the vanquished incumbent, the Nine Network, and Fox Sports was half-owned by PBL, its partner

News Limited owning the other half. Although the bargaining which is inherent in such transactions makes it hard to determine the truth of particular claims, the free-to-air networks charged that Foxtel had paid \$34 million in 2006, but only wanted to pay \$21 million in subsequent seasons for the same three games.⁵¹

In February 2007 the AFL arrangements were finalised, and most commentators proclaimed Foxtel the winner as it achieved its wish to televise live four games a round, plus some other benefits, for \$50 million a year plus promotional activities.⁵² The victory was partly a tribute to Foxtel's tough negotiating skills—and some questioned whether it would have bargained so tenaciously with PBL—but it also flowed from the structural situation. It was later revealed that apart from raising the price, Kerry Packer had, according to Seven's barrister, 'put a poison pill' in the AFL negotiation, one that 'Seven would be forced to swallow' and that would allow Foxtel and its partners 'to make a killing'. PBL had stipulated that they could only licence the pay TV rights to Foxtel. Subsequently,

the AFL had told Seven 'with some force' that contractually it would not be possible for Seven to sub-licence the pay TV rights to a channel market, such as a revived version of Seven's C7 channel. 'My clients have been made, as a condition of buying the free to air rights, to acquire a right to sub-licence the pay rights to a monopolist who can sit tight and say, "I am not going to pay and there is no one else you can sell these rights to"'.⁵³

This was not only giving the pay TV operator Foxtel the rights to televise the AFL, but in effect giving them veto power over which channel they would be shown on. ESPN, the American sports channel, currently carried by Foxtel but with little or no Australian content, had shown some interest in pursuing the pay TV rights 'if the price was right'.⁵⁴ This bid did not eventuate but potentially it can be seen that it may have put ESPN in a vulnerable position when it came time to renegotiate access with Foxtel if the latter was displeased.

The PBL poison pill became public knowledge because it was part of the testimony at what was an even greater complication in the

negotiations—that at the time, Seven, headed by Kerry Stokes, was suing News, PBL, Telstra, Singtel Optus and the National Rugby League (NRL) for the collapse of C7, its pay TV sports channel. Seven had earlier settled the actions against the AFL and Ten, who were included in the original statement of claims. So while these negotiations for AFL television rights were going on, a court case relating in part to the last issuing of those rights was also proceeding, and that legal suit greatly increased the antagonism between the participants. It was one of the biggest civil suits in Australian business history, with Seven initially suing for compensation of over \$1 billion dollars. It was also one of the most complex and expensive, with twenty-seven barristers involved and initial estimates of the legal costs at between \$150 and \$200 million dollars.⁵⁵ The hearings for this case began in September 2005 and ended in September 2006.

As of February 2007, no judgment had yet been delivered by the judge, Sackville J, but whatever the outcome the hearings have given a great public exposure to the inner workings of the Australian media industry. The closing submissions alone ran to 4500 pages. However, the disclosure was still less than comprehensive. While Stokes, head of Seven, was subjected to fifteen days of cross-examination, News did not call Lachlan Murdoch or Jim Blomfield, the head of Foxtel at the time, who had told Telstra executives that News wanted to ‘kill C7’, and PBL did not call James Packer, even though, according to Stokes, Packer had said to him: ‘I’ve come to tell you that we’re going to take the AFL rights off you. We’re all going to get together to take those rights. We don’t really want to do it, but News are making us’.⁵⁶ Seven even charged that Packer’s diary had been altered, because it contained only twelve entries for all of November and December, apparently an appointment only about once every five days for this high-powered executive. Moreover, as a result of the discovery process, Seven produced 4009 emails from the relevant period, Telstra 1749, Optus 574, but News only 49 and PBL/Nine only 30.⁵⁷

Foxtel had interests as the main pay TV operator, with the AFL a major carrot with which to entice subscribers, but two of its owners also had interests in the Fox Sports channels. This raised the issue of whether Foxtel’s interests and the Fox Sports channels always aligned. It had certainly led to different financial outcomes for the various parties: ‘Every new customer signed up to Foxtel in 2001 cost the pay

TV network \$162 ... (while) PBL made a marginal return of \$141 per new subscriber and News, which exerted management control over Foxtel, made a positive marginal return of \$244'. While Foxtel itself only started to make a profit after ten years, Fox Sports had already long been profitable. In his testimony, the head of Telstra, Dr Ziggy Switkowski, said he thought Fox Sports was overpriced. 'The overpriced Fox Sports channels guaranteed profits to PBL and News Ltd at the expense of Telstra and Foxtel.'⁵⁸

Moreover, the Federal Court heard evidence suggesting that News Limited and PBL would not permit Foxtel to carry the Seven Network's C7 channel under any circumstances.⁵⁹ 'Yesterday's hearing focused on how Foxtel, despite the fact that it had calculated it was cheaper and more profitable to do a deal with Seven to get the AFL on pay television, chose not to take up a C7 service.' Macourt of News Limited said that 'he had had "every intention" of preventing C7 being taken onto Foxtel at that time'. Later

he said he 'simply did not recall' a draft Foxtel proposal in June 1999, devised by chief executive Tom Mockridge, which showed that if Foxtel took up the C7 service it would add net present value to Foxtel of between \$28 million and \$70 million. ... Mr Macourt agreed that in March 1999, Mr Mockridge was 'fobbing off' attempts by C7 to get on to Foxtel. A note written by Telstra executive Danita Lowes described her failed attempts to discuss the Seven offer. 'I again asked Tom ... if we could discuss the offer from Seven,' she wrote. 'Tom, in his nastiest voice, said, "your request has been noted"'.⁶⁰

However, the AFL negotiations seem a model of simplicity compared to the tangle of interests involved in the NRL negotiations of December 2000. The key document here was a handwritten fax sent on 9 December 2000 by Philip (News) to Akhurst (Telstra), which 'lays out the content of the C7 bid, less than a week after the confidential bid was lodged with the NRL. It makes it clear that until Stokes's C7 pay TV operation came along on 5 December with a bid of \$43 million per year, Fox Sports (half-owned by News Limited, of which Philip was a director) had been hoping to pick up the rights for

\$31 million a year'. Eventually, on 13 December, Fox Sports won the rights with a bid of \$45 million a year. At the time Philip was both a director of Fox Sports and also on the NRL Partnership Executive Committee. This was because following the Super League war of 1997, News owned half the NRL. In effect, the News Limited executives, Macourt and Philip, were representing both the buyer and the seller of the rights. According to Macourt's testimony, 'whatever money came out of Fox Sports went into the NRL and we owned half of both businesses, so it went from one pocket to the other'.⁶¹ In sum, News Limited had an interest in the sport being televised, the sports channel on which it would be shown and the pay TV operator on which the channel would be broadcast. It meant that its competitor's 'confidential' bid was going straight to News, and News would decide which company, itself or its competitor, should succeed.

After C7's sporting rights expired, Optus dropped it from its cable offerings. Foxtel and Optus obtained ACCC approval for their content-sharing agreement on the grounds that Optus pay TV was a failing company. Two weeks after that agreement C7 closed. The outcome left both Fox Sports and Foxtel dominant in their respective domains.

Conclusion

John Malone, starting from a small base, built his business up to become the largest cable operator in America, but he 'never pretended to be the best cable operator. TCI built wealth and made its shareholders wealthy by investments and complex financial engineering'.⁶² When later he became a focus of political criticism, he resented the way he was criticised simply for being big. Rather he saw his job as 'Working on behalf of public investors to maximize their wealth, period' and 'in our society frequently that leads you in the direction of trying to become as monopolistic as you can'.⁶³ Moreover, 'he hadn't mustered some of the most impressive profit margins in the business by coddling the subscriber base'.⁶⁴ In other words, the key to success in subscription TV depended less on satisfying consumers than on building commercial relationships, especially monopolistic arrangements.

Australian pay TV has also developed a monopoly structure. Although late in developing, with some notable early casualties, and

still with a relatively low penetration rate, the industry has now consolidated with one dominant player, which has enormous financial, political and broadcasting power behind it. This is in direct contrast to the early rhetoric about what pay TV would bring. There was talk of new players, of diversity, of endless choice, but instead monopoly has developed, a monopoly consisting of the strongest existing players.

The C7 case suggests that part of the reason for the slow development is that some of the key parties gave a higher priority to establishing monopoly control than to growing the industry. This is suggested by the way News Limited in particular preferred to have Fox News over what would have been a much higher quality ABC news service, and would not countenance C7 being on the network even if it was a more attractive option than Fox Sports.

Monopoly owes less to Australia's small size than to policy. Monopoly power, vertical integration, the veto power of gatekeepers, the ability to block competitors, and the lack of mechanisms to give market rewards to the preference of consumers—these are the dominant characteristics of how pay TV has developed in Australia.

The key potential advantage of subscription television—the direct relationship between viewer and program or program provider—is not realised in the way that pay TV has been introduced in Australia (and indeed in most other countries). The rigid bundling model that prevails does not allow individuals to pick and choose the individual channels they want. Moreover, given the primitive state of monitoring viewing habits among pay TV viewers, and the very small scale of viewing among the fragmented audience, there is probably limited extra reward for higher rating channels.

Government policy decisions and the talk of pay television being a natural monopoly betray a confusion between the provision of infrastructure and of services. Because of the government's failure to see its own role in ensuring the workings of market forces, what may be a natural monopoly in providing infrastructure has been turned into a monopoly on providing services where none needs to exist. Government regulation could make cable or satellite a common carrier, where service providers can access the technology for a fee. Similarly, consumers could pay a basic connection fee for access to the delivery platform, and then fees for various channels or packages

of services. Under such a model, it would be much more possible for a diversity of service providers to emerge. A minimal conception of the government's role is not necessarily the best way to enhance the growth of markets.

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Notes

- ¹ Inglis, pp. 353–4.
- ² *ibid.*, pp. 353, 596.
- ³ *ibid.*, p. 283.
- ⁴ Westfield; Minehan.
- ⁵ Tiffen.
- ⁶ Minehan; Westfield.
- ⁷ See, for example, Tracey; cf Jacka.

- 8 Given; Murdock.
9 Küng-Shankleman.
10 Hilmes, 'TV Nations', p.1
11 Tiffen and Gittins.
12 Streeter.
13 Smith.
14 Given.
15 Parsons and Frieden.
16 Vogel, p. 266.
17 Van Duyn and Chaffin.
18 Robichaux, p. 105.
19 *ibid.*, p. 183.
20 Hilmes, *The Television History Book*.
21 Multichannel News Staff.
22 Singer quoted by Murdock, p. 195.
23 Murdock, p. 195.
24 Australian Competition and Consumer Commission, p. 59.
25 Murdock, p. 191.
26 Barr, p. 5.
27 Australian Competition and Consumer Commission, p. 4.
28 Hilmes, 'US Television in the Multichannel Age', p. 67.
29 Multichannel News Staff.
30 Robichaux, p. 127.
31 Australian Competition and Consumer Commission, p. 39.
32 *ibid.*, p. 84.
33 *ibid.*, pp. xv, 6.
34 *ibid.*, p. 5.
35 *ibid.*, pp. 34–44.
36 Hilmes, 'Cable, Satellite and the Challenge of Digital Media', p. 15.
37 Australian Competition and Consumer Commission, p. 82.
38 *ibid.*, p. xxvii.
39 Vogel, p. 271.
40 Robichaux, pp. 185–6.
41 *ibid.*, p. 188.
42 *ibid.*, p. 59.
43 *ibid.*, p. 86.
44 *ibid.*, pp. 88–9.
45 *ibid.*, pp. 93, 111.
46 *ibid.*, pp. 110–11.
47 *ibid.*, pp. 173–4.
48 Australian Competition and Consumer Commission, p. 85.
49 *ibid.*, p. 28.
50 Day.
51 Chenoweth and Main.
52 Wilson.
53 Chenoweth and Main.
54 Chong.

- ⁵⁵ Moran, 'Lawyers in C7 Case Castigated'.
⁵⁶ Chenoweth and Moran.
⁵⁷ Moran, 'Policy Limits Email Trail @ News and PBL'.
⁵⁸ Main, 'Sport Key to Pay Profit'.
⁵⁹ Chenoweth.
⁶⁰ Main, 'News Man Unaware of Foxtel Veto'.
⁶¹ Main, 'Just the Fax, Judge'.
⁶² Robichaux, p. 249.
⁶³ *ibid.*, p. 106.
⁶⁴ *ibid.*, p. 94.

CHAPTER 4

Traditional Media Buys Online Not All Good News for Audiences

Tim Dwyer

I see a lot of challenges ahead. Am I worried? Of course, we should all be worried. Powerful economic forces that favor consolidation are converging with regulatory policies that pave the way. They could yet carry the day. But I also see opportunity and the good news is that we still have a chance to avoid all this.¹

Introduction

We are witnessing constant, and at times rapid, transformations in media industries brought about by digitisation, convergence, interactivity and the general business operations of global media corporations. These developments are reconfiguring personal, local, regional and national media spaces and audiences. The way we use media is changing.

Recent amendments to media ownership laws in Australia is yet further proof that powerful corporations will continue to lobby and apply pressure to liberalise public interest protections to suit their own particular interests.

But the changing shape and contours of the media environment leads us to focus our attention on the nature of the media worlds people inhabit, and on the character and role of audience/consumer formations. It is important to do this because these audience/consumer formations constitute the basis of engagement with the social and cultural world, with politics, commerce and culture.

In this chapter I want to argue that we all need to have a critical alertness to the bigger picture where digitisation and convergence are being used by media corporations to redesign the terms of people's engagements with the media. In this process, place-based audience formations like publics and communities are being supplemented with, and in some cases replaced by, internet-based global consumerist alternatives, virtual communities and social networks, often linked to services, brands and product flows.²

And the prospect of bringing audiovisual material and targeted advertising together with social networking is undoubtedly an area that is being pursued by Google and other corporations. Evidence of this trend can be seen in the announcement of a billion dollar alliance between News Corporation and Google in 2006. The deal was an agreement making Google the exclusive provider of search and keyword-targeted advertising for News Corporation's Fox Interactive Media group, the entity responsible for managing News Corporation's growing international stable of online sites.³ Similarly, the acquisition of YouTube by Google in 2006 for A\$2.2 billion (US\$1.65 billion) in stock positioned the search leader for further advances into the emerging market for video advertising, a market dominated to this point by Yahoo! Inc.⁴

As a consequence of the rise of 'search' businesses like Google, eBay, MSN, Yahoo! and Amazon, the advertising industry has been forced to respond to these altered practices by more strategically matching fragmenting audience consumers to goods and services through specific media providers.⁵ Existing computer giants such as Microsoft, Intel, Cisco, IBM and Apple are an important part of the mosaic of change too. Their vast investment strategies have an impact on the direction and shape of new media developments as social shaping of technology theorists have argued.⁶

Traditional media have evolved to the point where online platforms are now integrated and necessary components of their

businesses. Therefore, the line between digital broadcasting and the internet is no longer so clearly demarcated. Arguably the future of broadcast television is the arena where the social and cultural impact of convergence and digitisation on traditional media is most obvious.⁷ For the last half of the twentieth century, broadcast television was the giant of the media world. It was the medium that we talked about around the mythical 'water cooler'. It was the medium we turned to when an international crisis threatened, and it played a key role in editorialising significant events related to party politics and the public sphere more generally. Broadcast television, whether commercially or nationally funded, particularly in relation to news and current affairs programming, performed a public service role.⁸

It follows, as Nightingale has argued, that the future of television as a public communications system with benefits for audiences may be jeopardised by pressure on the television industry from advertising, as much as from the proliferation of interactive and mobile media. The pressure from advertising is linked to that industry's segmentation and targeting practices, which contribute to a situation where little commercial value is attached to broadcast TV's loyal older and very young audiences.⁹ These loyal but vulnerable audiences tend to be under-served: traditional TV's dependence on advertising revenue forces it to provide programming that delivers the audiences advertisers want; while its more dependant and loyal audiences find less and less acceptable viewing that is available.¹⁰

A consequence is that one of the most pervasive aspects of the emerging mediascapes is a significant alteration to the relationship between audiences and media service providers. In the past audiences were packaged and traded alongside the advertising spots or spaces a medium offered, but media content was delivered to audiences at a reduced cost or free, thanks to advertising. The value of advertising spots was directly related to the size and composition of the audiences they could deliver; this trade generated the revenue that funded content production as well as its distribution costs. It also created a situation, now increasingly seen as problematic by media industries, where audiences expect that when they turn on their television or radio, or access the internet, they should automatically be able to access media services. If audience expectations of free services could be changed, then media companies could offset the

increased production costs associated with generating content for the new multi-platform environments and their requirements for diverse content.

The acquisition of MySpace by News Corporation from InterMix Media in 2005 for approximately A\$770 million (US\$580 million) is a live case study in how these dynamic relations between audiences, advertisers and vertically integrated media corporations are evolving. The problem for media corporations is one of putting in place the right mix of user-generated and corporately controlled content for an optimised audience experience, and through this to eventually generate shareholder returns. But this is no easy matter of hitting on the best 'business model': there are many interrelated factors which render this moving target problematic. It's a complex new juggling act, on the one hand, to shape, direct and maintain these vast audience aggregations and to have them work towards a profitable bottom line, while on the other, not to 'frighten the horses'; to interfere with the utility and pleasurable engagements that sites like MySpace offer audiences would be to undermine their popularity.

Dismantling Ownership Rules

The pressure to liberalise existing media ownership rules has been a leitmotiv of media policy debates in Australia, the UK, the US and other comparable democratic nations for over a decade. These pressures continue unabated. In a development of historical import, in 2006 the Howard government significantly amended cross- and foreign-ownership restrictions that had been in place since 1987. This signals a new era of media concentration and further reduction of diversity in viewpoints and opinions.

After a short and carefully stage-managed industry consultation process in 2005–06, a 'one size fits all' deregulatory framework that limits ownership to 'two out of three' categories of traditional media of radio, TV and newspapers was passed by a Senate controlled by the ruling Liberal/National Party coalition. This new rule was coupled with numerical limits of a minimum of four separate media ownership groups per market in regional areas, and five in metropolitan areas. In effect, the rule was implicitly conceding that there would be adverse political, economic and cultural effects from concentrated ownership.

Throughout their first decade in power, the government's rhetoric for justifying the removal of the cross- and foreign-media ownership rules often invoked references to notions of 'not being left behind' in the global technology race, or assertions that 'cross-media restrictions prevent alliances between traditional media outlets and new media outlets'. These were grossly misleading statements because cross-media rules were only ever intended to restrict concentrated ownership in specific mass audience traditional media—TV, radio and newspapers. They were never meant to cover other traditional media such as magazines or pay TV, nor did they apply to new media of the internet, telecoms and their various bandwidth-seeking devices. Two major new media alliances in Australia, ninemsn and Yahoo!7, have been in place for several years now and brought together Publishing and Broadcasting Ltd's (PBL) Nine Network and Microsoft and the Seven Network and Yahoo!. These 'old' and 'new' media platforms are in the business of cross-leveraging branded content in a mutually advantageous way.

It is noteworthy that the first developments in the wake of the removal of the cross- and foreign-media reforms were not the awaited media merger and acquisition feeding frenzy. Rather, the key moves were characterised by opportunistic debt refinancing based on the share price bubble, courtesy of the government's legislative package. Predictably, when the share prices rose in the wake of the passage of the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth), Australia's largest media corporations were able to take advantage of the situation and go ahead with rehearsed set moves.

Undoubtedly these were only the preliminary strategic moves on the ownership chessboard. So we saw PBL announce a deal selling off half of its television and magazine business, raising A\$4.5 billion in capital in anticipation of the new rules.¹¹ Specifically, PBL would receive the A\$4.5 billion of cash from the sale of 50 per cent of PBL Media (the purpose-built joint-venture vehicle), which covers the Nine Network and associated TV licensee companies, ACP magazines, carsales.com.au and ninemsn, to the US private equity firm CVC Asia Pacific. Of this amount, A\$3.8 billion is to be debt funded by the new business.¹² While some media industry commentators consider that PBL will retain control through its half share of the media assets, they also note the high likelihood that, over the longer term,

there will be adverse effects on both employees and audiences since CVC's shareholders will demand that the business extract efficiencies wherever possible.¹³ In a corporate culture where news and current affairs programming is already no longer a priority, costly, well-resourced news and current affairs programming will be a key casualty.¹⁴

News Corporation bought a self-described 'strategic' 7.5 per cent stake in Fairfax for more than A\$360 million ahead of the implementation of new ownership laws. Financial commentators expressed several views: that the investment was related to a possible alliance with Fairfax of online assets, and that it was strategic positioning to have a say in future takeover plays, as both a buyer and seller. Macquarie Media group bought a strategic 14.9 per cent, A\$170 million stake in Southern Cross Broadcasting, the owner of some highly profitable AM-band talk stations in Melbourne and Sydney, the Ten Network's regional TV network, and the production house Southern Star, among other assets. Should these groups merge on lifting of the rules, it would create Australia's largest radio group.

Television group Seven Network Ltd secured a strategic 14.9 per cent stake in West Australian Newspapers Holdings Ltd, the maximum the existing law allows until proclamation of the new Act, when a 19.9 per cent stake will be permissible under the Corporations Law prior to any takeover bid being launched. Soon after these events, and also cashing in on the share price bubble created by the imminent introduction of the new laws, Independent News and Media, the Irish parent corporation of APN News and Media, already with a 41 per cent controlling interest, indicated its intention to implement debt financing arrangements with US private equity firms, to move to a position of full ownership and control, subject to shareholder approval.

In another important move, read as a version of the PBL/CVC Asia Pacific play, Kerry Stokes's Seven Network struck a A\$4 billion deal with the world's largest private-equity group, the US-based Kohlberg Kravis Roberts. Again, like the Packer deal, a 50 per cent share of the company was sold off to create the vehicle 'Seven Media' (the 14.9 per cent stake in West Australian Newspapers Holdings Ltd is held by Stokes interests outside the new joint venture company). Seven received A\$3.2 billion, comprising A\$2.5 billion of debt

underwritten by a group of banks, and A\$735 million as funded by the private-equity group investors in Seven. And as with the PBL/CVC Asia Pacific deal, the new equity is held in convertible notes until the new laws removing cross-media restrictions take effect.¹⁵ Critical News Corporation newspaper editorials, reflecting their disadvantaged position in the media ‘reforms’, noted, on the one hand, the continuing protectionism on the government’s part of incumbent free-to-air TV providers, and, on the other, predicting less diversity of choice, local content and overall quality of programming as the businesses were squeezed to repay debt.¹⁶

Many media analysts have long considered that a logical consequence of repealing the cross-media rules would be the acquisition of the Fairfax group by a media corporation no longer prevented from expansion into newspapers. PBL, and to a lesser extent the Seven Network, have often been touted as likely acquirers. In the event, Fairfax made a pre-emptive defensive move and initiated a merger with the Rural Press group creating Australia’s largest media group—it holds more than 240 regional, rural and community publications, nine radio stations and the leading New Zealand internet site TradeMe, as well as twenty agricultural titles in the US. The total deal was valued at around A\$9 billion (including A\$2.3 billion in debt). It remains to be seen at this juncture whether a company of this size is beyond the clutches of News Corporation, PBL Media or Seven Media.¹⁷

Rationales for Plurality and Diversity

Despite the at times indirect connection between ownership and content, there has been longstanding international support for the proposition that plurality in ownership is more likely to promote diversity of opinion than other, non-structural approaches to regulation. In other words, structural limits on the number of media outlets owned by one proprietor has been regarded as a precondition for achieving a diverse range of viewpoints in Australia and a range of other democratic nations, including the UK and the US.¹⁸ It has also been assumed by parliamentarians and policymakers that concentrated ownership confers power on owners to sway governments; this kind of influence can be in relation to either their media or non-media assets.

In the context of the Australian media ownership reforms it is significant that both the UK and US prohibit full print-broadcast cross-ownership. But in fact there has been significant liberalisation and consolidation *within* single media sectors in both these countries. In a sense this is a predictable feature of the market logic of 'neo-liberal globalisation'.¹⁹ As Bettig and Hall argue, 'media concentration is an ongoing trend that follows the predominant tendency with capitalism toward centralization of economic power in the hands of oligopolies'.²⁰

In the lead up to the historic repeal of Australia's media ownership laws, the Media Entertainment and Arts Alliance (MEAA) teamed up with the online investigative journalism outlet Crikey to survey working journalists on critical issues likely to affect them. Premised on an understanding that a useful litmus test of the likely impacts of media ownership deregulation was to ask the profession itself for its views, specific findings included:

- 82 per cent believed the changes to the media laws will have a negative impact on the integrity of reporting
- 85 per cent said the changes will reduce diversity
- 87 per cent were opposed to the removal of cross-media laws
- 74 per cent were opposed to the removal of foreign ownership restrictions
- 53 per cent said they were unable to be critical of the media organisation they work for
- 38 per cent said they had been instructed to comply with the commercial position of the company they work for
- 32 per cent in print media (34 per cent in TV and radio) felt obliged to take into account the political views of their proprietor
- 63 per cent believe Australian media companies/owners have 'too much influence' in deciding how Australians vote
- 71 per cent said media companies/owners have 'too much influence' in determining the political agenda.²¹

Yet it remains unclear to what extent diversity in media ownership actually resonates as an important public policy issue within the wider community. While diversity in ownership is subject to ongoing debate in political and academic circles, there is relatively little

research, in Australia at least, as to whether concentration in media ownership matters to the wider community, or indeed whether the wider community perceives a strong correlation between ownership concentration and lack of diversity.

In *Content, Consolidation and Clout: How will Regional Australia be Affected by Changes in Media Ownership?*, the authors found that, at least in respect of regional media, issues of media ownership per se are less important to people than the quality of journalism and the relationship between local media outlets and local power elites.²²

In Australia, many, although not all, of the major media organisations supported the removal of the long-standing laws limiting concentration of media ownership.²³ The few larger corporations opposing the reforms, including News Corporation, did so on the basis that the proposed changes were *insufficiently* deregulatory, and thus unable to deliver the radical changes that would permit them to acquire *any* media assets they wished. On the other hand, smaller independent media groups were able to distinguish between their own commercial gain and a wider public interest served through access to diverse news and information resources.

For example, in their submission to the 2006 Senate Inquiry into media ownership reform, the lobby group Independent Regional Radio (IRR) saw the proposed amendments that were passed by the parliament as fundamentally flawed, arguing that the provisions relating to regional media should be deleted. Focusing on the impact of the proposed changes in regional areas, IRR opposed relaxation of cross-media ownership restrictions in regional markets on the grounds that:

- no public benefit can be demonstrated by the government
- removing the restrictions will reduce the existing diversity of both ownership and content wherever mergers occur
- removing cross-media restrictions would almost certainly enable one media group to dominate and exploit a market without the possibility of competition by another group on equal terms
- power would be conferred on a single media proprietor with multiple influential media outlets to set the news and current affairs agenda within its market and to influence public opinion, especially on matters of local interest and issues of concern.²⁴

Against this background of consolidating traditional media ownership, a process of acquisition and building new media assets has been a primary objective of media corporations. I want to consider this process in, mostly, the Australian context, although of course the corporations involved are global players, and in most instances purchases of media assets will have industry and audience implications at a number of levels: internationally, nationally, regionally and locally.

Acquiring Online Assets

There were a significant number of purchases of online media assets by traditional media corporations in the period 2004–06 (see Table 4.1). In terms of a specific trend, this resurgence in the acquisition of online sites from approximately 2004 onwards is well beyond the period usually seen as the ‘dot-com’ boom and bust era, 1995–2001. In other words, there has been a more recent spike in acquisitions from 2004, even though over a longer time scale, from around the turn of the century, there has been a continuing pattern of both ‘old’ media and larger internet corporations investing in ‘new’ media assets.

The buying up of these ‘B2C’ (business-to-consumer) and ‘lifestyle’ content sites are part of an audience aggregation strategy to enhance the attraction of the traditional media’s online presence, as seen, for example, in the ninemsn or news.com.au portals. They can be interpreted as ‘value-adding’ to the ‘plain vanilla’ news, information and other programming brands already available in ‘full service’ portals, as visitors navigate through their online malls.²⁵

Online classified businesses have been a key category for traditional media to buy into and to extend their own assets. For example, realestate.com.au is a survivor of the 2000 tech wreck and is 58.4 per cent owned by News Corporation. Realestate.com.au is claimed to be News Corporation’s most profitable online asset in Australia and is reported as having increased its share price by 70 per cent in the 2005–06 period. Real estate classified sites are reliable cash cows for traditional media: they are businesses built on enhancing existing print media assets, or in some cases have been acquired outright. This explains Telstra’s acquisition of 51 per cent (A\$342 million) of the Chinese real estate site Soufun. Soufun has a large audience in

China—some 40 million users and 400 000 advertisers—and apparently is seeing revenues double annually.²⁶

Table 4.1: Selected Online Acquisitions by Traditional Media Corporations, 2004–06

B2C Category	Online Business	Acquiring Corporation	Estimated Amount (A\$million)
Local search	True Local	News Corporation	15
Social networking	MySpace	News Corporation	770
Mobile content	Jamba	News Corporation	250
Employment classifieds	Simplyhired	News Corporation	4.5
Games	IGN Entertainment	News Corporation	854
Mobile marketing	5th Finger	PBL/ninemsn	na
Content provider	HWW	PBL/ninemsn	14
Employment classifieds	seek.com.au	PBL/ninemsn	285
Car classifieds	Carsales.com.au	PBL/ninemsn	270
Holiday bookings	Stayz	Fairfax	12.7
Auctions	Trade Me	Fairfax	675
Relationships	RSVP	Fairfax	39
Classifieds	Trading Post	Telstra	636
Real estate classifieds	Soufun	Telstra	342

In the twelve months to July 2006, it was reported that News Corporation had outlaid A\$1.5 billion on ‘new breed’ internet companies, ‘including online communities devoted to gaming, sports and movies, plus a startling eruption of youthful energy known as MySpace’.²⁷ This is a huge sum. However, compared with the total market capitalisation of News Corporation of around US\$55–60 billion, it’s a small percentage overall. A corporate explanation offered by News was that the ‘combined sites will also provide a powerful cross-promotional opportunity for Fox’s television and film content and enable the company to more efficiently introduce new products and services using its enhanced web presence’.²⁸

News Corporation also bought the US internet games company IGN Entertainment for A\$854 million (US\$650 million). Under the deal, IGN and its many associated properties, including IGN.com,

GameSpy, FilePlanet, Rotten Tomatoes, and TeamXbox, have been folded into News Corporation's Fox Interactive Media division.

Prior to entering into the private-equity joint venture with CVC Asia Pacific in late 2006, PBL bought a further 2.7 per cent of seek.com.au for A\$35.2 million, taking its controlling stake to approximately 27 per cent in the local employment classifieds leader. In late 2003 seek.com.au had sold a quarter of the business to the Packer family (PBL) before floating the company, which is now reported to be capitalised at around A\$1 billion.

These acquisitions are indicative of the shift in advertising from traditional media to online media and the decline in newspaper readership from the end of the twentieth century. And while overall newspapers and free-to-air TV are expected to continue to have the lion's share of total advertising spend dollars until around 2010, after that time their combined clout is predicted to be outpaced by new media. Most of this growth will of course come from the online sector, with the internet in Australia expected to represent around 13 per cent of the total advertising market by 2010, when it is estimated it will be worth A\$1.78 billion.²⁹ However, the global ramifications for *classified* advertising are even starker, as this snapshot of acquisitions testifies. One estimate has it that a quarter of print classified ads will be lost to online media in the next ten years. Overall, when considered globally, newspapers claimed 36 per cent of total advertising in 1995 and 30 per cent in 2005, and it's predicted this will become 25 per cent by 2015.³⁰

During the period 2004–06, there have been many mergers and acquisitions of valuable sites by new media corporations in the online space. Any list of acquisitions will be necessarily incomplete and only a snapshot of the wider canvas, but it is worth briefly noting some of the more interesting buys:

- social bookmarking site Del.icio.us sold to Yahoo! for US\$41 million
- photosharing site Flickr sold to Yahoo! for US\$54 million
- popular blogging site Weblogs, Inc sold to US internet giant AOL for around US\$33 million
- in-game advertising company Massive sold to Microsoft for US\$500 million

- 5 per cent of online content aggregator AOL sold to Google for US\$1.35 billion
- social networking/content aggregator YouTube sold to Google for US\$1.65 billion.

These purchases signal both shifting new media industry practices and audience usage in the mediascape. For example, in adding social bookmarking and tagging site Del.icio.us to its social computing portfolio, Yahoo! was aiming to extend and further cement its connection with new media audiences. The attraction of tagging is that when enough people tag particular sites, then the ‘collective intelligence’ of audiences is mobilised—and commodified. For a corporation like Yahoo!, the main drawcard is that it can boast to advertisers that its audiences have a richer and more satisfying experience.³¹

From Free Social Network to a Colossal Marketing Machine

In an interview for *Wired* magazine about MySpace, it was suggested that Rupert Murdoch was betting on ‘transforming a free social network into a colossal marketing machine’.³²

Indeed, News Corporation has signalled that it will use MySpace to deliver its own branded TV and movie programming on demand. However, by its own admission, News is not entirely clear of the trajectory of that outcome. At the time of writing, MySpace had 125 million registered users with localised sites in the US, the UK, Australia and Ireland, and was about to add France, Germany and Japan. Now while News knows it is dealing with a dynamic set of relations between audiences, advertisers and MySpace within a US\$70 billion dollar corporate empire, *exactly* how they will make it generate the kind of revenues that justify the A\$770 million investment is another matter.³³

But how can we best describe MySpace? This was how *BusinessWeek* put it:

With a heavy focus on music, it has become a part of daily life for teenagers and young adults nationwide. Members create highly personalized home pages loaded with message boards, blogs, photos, and streaming music and video.

People use it to stay in touch with friends and meet other people. Driven by the expressiveness of its members, the social-networking site has emerged as an important channel for online advertising. TV shows and new music are often debuted on MySpace.³⁴

And it's not just the younger demographic either: some professors have MySpace profiles too! Rosenbush argued that MySpace had succeeded where others 'have generated buzz but then failed' because of its origins in the LA music and club scene, and precisely because it was not 'concocted by Silicon Valley tech types or New York bankers'. He suggests that MySpace set out to be exciting and the early users included actors, models and musicians.³⁵ It is also the case that bands have become successful through making available their music and video clips for free, without the need for a recording contract. Clearly, it's also explained by Metcalfe's Law—the value of a network increases proportionally with the number of users.

Although Murdoch and others at News Corporation insist they do not know how they will get a return on their investment, or what the precise 'business model' will be, some within the News empire have their own ideas. Jeremy Philips, an executive vice-president for strategy and acquisitions, argues the merits of the MySpace acquisition in terms of a '2 legs' analysis: in his view the MySpace business sits between a leg for content and one for distribution, the traditional areas of the News Corporation business. He suggests it's neither completely one nor the other; rather, it shares aspects of both: it is a media platform.³⁶ In other words, there is a *content distribution* strategy logic for a large media corporation like News, where they can leverage a multitude of branded proprietary content and their audience platforms. In short, it forms part of an integrated strategy to keep up with the media consumption patterns of young audiences—particularly in the 15–25 year old demographic. *Wired* offers this explanation, and it's worth quoting at some length:

Think of MySpace as an 80 million-screen multiplex where YouTube videos are always showing ... There may not be a working band or musician left in the English-speaking world who doesn't have a MySpace profile. Ditto

comedians, artists, photographers, and anyone else trying to catch the public eye. Why is Disney promoting *Pirates of the Caribbean: Dead Man's Chest* on a News Corp. site? Because that's where the viewers are. And that's what a platform is: the place you have to be. MySpace is doubly important to an old media armada like News Corp. as it navigates the infinity of distribution channels created by broadband, mobile devices, and search engines ... Umair Haque, who runs the trendy London media consulting shop Bubblegeneration Strategy Lab, puts it succinctly: 'MySpace's challenge is to do for branding what Google did for ads—to create a hyperefficient form of interaction.' In plain English, audiences create hits. Make that happen more quickly, cheaply, and reliably, and you have a philosopher's stone for media: a Net-fuelled word-of-mouth machine. 'You'll see us morphing from a content company into a marketing company,' Levinsohn (who came up with the plan to buy MySpace for Murdoch) says, 'a youth marketing company especially, because that's where everything starts. No one is going to be able to control the flow of content the way we used to. MySpace gives us the ability to look inside and understand how hits get created'—that is, to spot micro-niches, track early breakouts, and identify hot IM buzzwords as they bubble up.³⁷

In 1997, Pierre Lévy coined the term 'collective intelligence' to refer to the capability of large audiences to influence media output.³⁸ The dramatic rise of search engine businesses and social networking only reinforces this pattern. He also proposed that we are living through a technological evolution that will result in diminished dependence on 'molar' technologies (like mass broadcasting or the Hollywood studio system). For Lévy this will lead to the replacement of that dependence by user/audience participation in 'molecular' communication environments like internet-based weblogs and email, in mobile phone-based forms like text messaging or picture phoning, or in game-based environments where system users routinely create new communicative forms in the process of engagement.

These developments have important implications for how audiences access and participate in new media, and therefore for how political processes occur in society. A new media context where audiences themselves decide what stories will be made and how they will be told increases the possibility that stories that question established interests may gain currency and result in destabilising social or political action, regardless of whether those stories are true or not. But equally, such contexts could mean that truth claims of established interests are unchallengeable regardless of their reliability. As Castells has argued, with a process where digital media amplify and deepen the pre-existing sociocultural shift from place-based affiliation to 'networked individualism' there are fewer non-digitised public spheres where truth claims can be publicly contested.³⁹ The corollary is that established interests hold a much more powerful position than single consumers and citizens.

Digital News and Information Genres

Behind new developments in delivering audiovisual content to audiences over the internet are important questions in relation to the availability of diverse, meaningful sources of information, which remain critical in a healthy democracy. Even though the technological characteristics of media provision and consumption are changing, few would dispute that news and information are privileged genres and that they remain the responsibility of our parliaments, corporations and civil society groups. Dessauer has reviewed the growth of internet use in the US (faster than any previous medium) and the increasing use of news on the internet.⁴⁰ Her findings were mixed and it was too early to make conclusive statements: some benefits include the broadening of the definition of 'news' and formats, mobility, and news delivered in a 24-hour cycle. But there are also detriments, mainly arising from the repurposing of news brands originating from traditional media outlets.

A key question for twenty-first century citizenship is whether new information and communication technologies (ICTs) are leading to a splintering of civic discourse or revitalising public-sphere communication by allowing new forms of information provision. Many websites use RSS (Really Simple Syndication) feeds to alert us to news from our favourite websites. In this context of changing business

models and methods of audiovisual delivery, matching the regulatory frameworks governing network ownership and content provision structures with audience needs requires a new perspective. Arguably this issue is even more acute in rural, regional and remote communities, who traditionally have less service options than metropolitan areas, and where concentration of ownership can be more consequential.

While some commentators suggest that internet diversity constitutes an alternative to existing media power, others argue that claims about the diversity of opinion in new media are greatly overstated. In fact, a number of studies have shown that most news content on the internet is repurposed or supplied by traditional media sources.⁴¹ This should be a matter of concern for governments and civil society groups wishing to promote diversity of opinions and viewpoints in new media.

Yet debates over the implications of online news formats are dividing expert commentators. Turner has argued that online journalism remains an elite, individualistic pursuit, lacking sufficient audience reach or the pro-social objectives of public service broadcasting.⁴² By contrast, Dennis argues that 'the Internet has greatly benefited journalism by allowing for the development of new media, whether websites, cable outlets, or so-called web TV alongside traditional media that have cautiously used it as a platform'.⁴³

If it is the case that younger audiences' media consumption is shifting dramatically then this is a major concern for all democracies.⁴⁴ In particular, it raises concerns about the power and influence of new online media and the functioning of contemporary plural nation-states. The Carnegie Foundation's study 'Abandoning the News' has provided forceful data for advocates of media liberalisation. After all, how can you argue against data that in effect is saying this is how younger US audiences (18–34 year olds) are using media today, and that they will soon have a greater influence on media industries? The Carnegie study showed these audiences (more than 50 per cent of this age cohort) are accessing internet portals (for example Yahoo! and MSN) and local TV newscasts more frequently than network or cable TV websites, traditional newspapers, cable TV general news programs, national TV network newscasts, newspaper websites or local TV station websites. Considering current trends in

media consolidation and globalised consumption habits, Australian audiences will resemble their US counterparts even more in the future. As Clark quite rightly asks: 'Where will young people be kept informed about a range of political, social, health, education and international news in an increasingly fragmented media landscape, where recognised benchmarks for fairness and accuracy are regarded as vestigial organs of a past era?'⁴⁵

Over the longer term we need to track how changing media-delivery modes will affect the important policy settings of universality, equitable access and service provision to diverse publics. Traditionally, the model of professional news interpreters/makers (journalists) has dominated both commercial and public-service news media provision. Now, hybrid forms delivered over broadband internet networks that mix those earlier forms with netizen/blogger modes of practice are creating new audiences. The implications of these developments for the provision of news and information content in democracies are potentially far-reaching.

The complexity for regulatory agencies arises from the wide variety of news formats and services on the internet, and their different levels of mediation and general 'trustworthiness': online news (run by both traditional media outlets and 'new' media owners); internet radio news; expert organisation websites; expert and opinion blogs; audio and video podcasts; SMS (Short Message Service) news alerts; and RSS feeds. In the public sphere the provision of 'trustworthy' news has historically been an important issue for democratic governments, policymakers and regulators. And these changing categories of news raise a series of issues, including: Will policy and regulation be able to apply this notion to these different internet formats and technologies? What important roles do news and information formats have in this public-sphere space? And, what is the future of community and alternative media within new mediascapes?

An Evidence-Based Approach to Media Ownership Reform

If, as the data clearly shows, media consolidation and concentration of ownership is an ongoing feature of our mediascapes, how should policymakers respond? An important contribution to be made by an evidence-based approach to policy reform will be to recognise these

trends, and recommend that appropriate measures are taken to maximise the diversity of available sources of media content. These measures may be a combination of the regulatory levers that have been traditionally used by governments, as well as newer approaches.

There is no doubt that the rise of the internet is changing how news and current affairs information is accessed. Yet that access needs to be considered in light of the evidence in relation to ownership of the most-used new online media. The major incumbent media operators (in broadcast and print) are also the owners of the most-frequented websites and portals. As Sparks notes, 'offline media across the spectrum from print to broadcasting have strong online presences'.⁴⁶ Similarly, opinion polling in Australia shows that of the 25 per cent of people who regularly use the internet to obtain news and current affairs, around 90 per cent of them rely on websites controlled by or associated with traditional media sources.⁴⁷

A poll of Australian audience opinion by Roy Morgan Research in 2004 asked the question: Which one media is your main source of information on Australian and international news and current affairs? Television was the most-used source for both Australian and international materials, with 56 per cent and 66 per cent respectively of those surveyed naming this medium. The internet was used by 3 per cent of those polled for Australian news and current affairs, and by 5 per cent for international news and current affairs.⁴⁸ Another Morgan poll in March 2006 revealed that 'when Australians go online for news their main sources are Fairfax or News Corporation, the two giants of print media in Australia'. The next two most-visited sites were those of the free-to-air networks, ninemsn and the ABC. Morgan reported that 'the news arm of Internet portal Yahoo!, Yahoo! News, was a distant fifth'.⁴⁹ Another interesting statistic is that 'three main traditional media companies control more than 70 per cent of the internet news sites—Fairfax (35 per cent), News Corporation (25 per cent) and PBL (13 per cent)'.⁵⁰

At this stage in the evolution of Australian media it is reasonable to conclude that news and information delivered by free-to-air TV, radio and newspapers are still the most popular sources, and therefore justify continued ownership restrictions in some form. The evidence is that the removal of the former rules and the consolidation

of existing owners across multiple platforms will further concentrate cross-media ownership, reducing the diversity of news sources available to audiences.

The battle over media ownership continues in the US. In 2006, an alliance of public interest groups filed their submission to the Federal Communications Commission's (FCC) Review of the Commission's Broadcast Ownership Rules. Specifically, the alliance filed comments in relation to three main rule-making areas: on the Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; and on the Definition of Radio Markets. These organisations argued that, jointly, they were dedicated to 'increasing the diversity of voices in the media' and saw their role as being to 'promote a free and vibrant media, full of diverse and competing voices, which is the lifeblood of America's democracy and culture, as well as the engine of growth for its economy'.⁵¹

The immediate past history of ownership policy formulation in the US is relevant to Australia's current debate. The US Court of Appeals for the Third Circuit had reversed the Commission's decision in its 2002 'Biennial Regulatory Review pursuant to Section 202 of the Telecommunications Act of 1996'. In that controversial decision the Commission significantly relaxed rules regulating multiple and cross-ownership. The court remanded the rules to the FCC for further review in *Prometheus Radio Project v. FCC*.⁵² The *Prometheus* case held that the FCC had erred in its review of ownership regulations because it had applied a presumption in favour of eliminating or relaxing the rules. The *Prometheus* submitters argued that it was the FCC's role to undertake reasoned analysis, not to simply consider competition effects but to examine 'whether the public is actually being served by a diversity of voices and whether the current rules at least help to maintain those voices'.⁵³ Clearly, this advice needs to be applied in the Australian context by our media policymakers and regulatory authorities.

In support of their arguments, the alliance of public-interest submitters marshalled a range of evidence on media usage by the wider public (not just younger audiences) that indicates a dependence on traditional media. They relied on studies undertaken for the National Association of Broadcasters and the Radio-TV News

Directors Foundation (RTNDF), demonstrating that the majority of people receive their news from local television. The RTNDF study found that 'people like traditional media ... and that prediction of the imminent demise of traditional news media are premature. That is especially true for local television'.⁵⁴ They cite another study conducted by the Consumer Federation of America, Consumers Union and Free Press indicating that 'newspapers and television are the overwhelmingly dominant sources of national news and information, while reliance for local news is dominated by local television, local newspapers (daily and weekly), and local radio'.⁵⁵

Conclusion

In this chapter I have argued that there is a resurgent trend for traditional media corporations that had a dominant role in the last century, including for use by advertisers, to expand their businesses into the online space. The account presented here concerns a familiar process that we usually refer to as 'capitalist accumulation'. The updated description in the context of intensifying internet protocol networks and e-commerce is 'digital capitalism'.⁵⁶ In this period of ascendant neo-liberalism, corporations in communications media markets are exploring new ways of amassing audiences for the purposes of building and maintaining profitable consumer media cultures. Marketisation of access and use and 'networked individualism' are the hallmarks of these developments.

So on one level the buying up of these online assets is a 'more of the same' strategy for media conglomerates. After all, corporations such as Google or News Corporation have deep pockets to use in buying assets from various convergent sectors where they perceive there to be benefits. And it's evident that there is both uncertainty and innovation in the way that convergence and digitisation are being used by media corporations to redesign the terms of people's engagements with the media. MySpace, Google Video, YouTube and the full range of interactive e-commerce sites that people engage with suggest an ongoing tension between the 'segmenting' and the 'society-making' tendencies in media industries.⁵⁷ Equally, access to news and information forms are undergoing related transformations linked with audiences' changing usage of new media technologies.

The implications of traditional media more intensively integrating with online media are 'not all good news' for an informed, mainstream citizen audience. In the Australian context, as traditional media corporations reconfigure themselves as digital and convergent business operations, and build their online consumer malls, the bottom-line demands of global private-equity capital are unlikely to allow much scope for thoughtful news journalism, or other forms of more questioning information programming. In these circumstances, the policy response by governments and their regulatory agencies needs to be underwritten by an evidence-based approach in the public interest; recognising that media consolidation will have adverse effects on 'democracy maintaining' news and information genres, on localism, and on diversity in general. Therefore, the onus must fall on our legislators to develop public-interest legal frameworks in consultation with the wider community.

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Notes

- ¹ Copps, pp. 124–5.
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- ³ Schulze.
- ⁴ Sorkin and Peters.
- ⁵ Spurgeon.
- ⁶ Williams; Winston; Sørensen and Williams.
- ⁷ Nightingale and Dwyer.
- ⁸ Nightingale.
- ⁹ Turow.
- ¹⁰ Napoli.
- ¹¹ PBL.
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- ¹³ Day, 'Cashed-up PBL Starts Deal Frenzy'.
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- ¹⁸ Doyle; Dwyer et al.; Hitchens.
- ¹⁹ McGuigan.
- ²⁰ Bettig and Hall, p. 16.
- ²¹ Roy Morgan, 'Journalists Strongly Oppose Government's Media Laws'.
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- ²⁴ Independent Regional Radio, p. 3.
- ²⁵ Burton.
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- ²⁹ Sinclair.
- ³⁰ 'More Media, Less News'.
- ³¹ Li.
- ³² Reiss.
- ³³ In relation to News Corporation's return on investments in the new media landscape, and in particular, MySpace, Rupert Murdoch is reported as saying: 'We'll figure it out': *ibid.*
- ³⁴ Rosenbush.
- ³⁵ *ibid.*

- 36 Reiss.
37 *ibid.*
38 Lévy, p. 41.
39 Castells, p. 129.
40 Dessauer, pp. 121–36.
41 Doyle; Calabrese and Sparks; Downie and Macintosh; Bolton.
42 Turner, pp. 135–47.
43 Dennis and Merrill, p. 165.
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45 Clark, pp. 103–15.
46 Calabrese and Sparks, p. 310.
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48 *ibid.*
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CHAPTER 5

Programming Your Own Channel

An Archaeology of the Playlist

Teresa Rizzo

Introduction

Over the last decade television viewing has radically changed. This change can be characterised in different ways. One way to do so is that whereas once viewers were bound to watching programs at a particular time in their living rooms, today they are able to create their own niche channels to be viewed at their choice of time and place. An under-analysed aspect of this change is the 'playlist'. Traditionally the playlist is a scheduling application as well as a practice that has been used by programming departments in television and radio for decades. It is used to create a running order of programs, including promos and adverts, as well as controlling the delivery of those programs at the scheduled time. Today, however, playlists are just as likely to be created by viewers as they are by programming departments. The playlist has become ubiquitous, as it is now a fundamental programming application on a range of viewing platforms that enables viewers to create their own schedules and even their own channels. Personal Digital Recorders (PDRs) such as the Foxtel iQ and TiVo, portable viewing devices such as iPods and

do-it-yourself online TV channels such as YouTube: Broadcast Yourself all enable viewers to download, upload, program, schedule and create their own personal channels using playlist applications. This chapter reads changes to television as a technology and cultural form through the notion of the playlist. It shows how the playlist enables viewing practices that are significantly different from those that emerge in relation to broadcast television.

This chapter examines the role of the playlist and the implications of the changes in three sections. The first section examines the playlist's uses and its place in programming departments of television and radio, as well as its adoption by internet sites and new viewing devices. In doing so it also examines how new uses of the playlist challenge viewing practices associated with broadcast television such as temporal viewing, mass audiences and the centrality of the television in the home. It examines how new digital forms of television engender a spatial mode of viewing, customisation and personalisation, and mobile modes of viewing. It does this through three case studies: the Foxtel iQ, YouTube: Broadcast Yourself and the Apple iPod. These changing practices also call into question the understanding of television and planned flow as theorised by Raymond Williams. Therefore, the next section looks at how relevant the concept of flow is to new forms of digital television and offers an alternative notion of flow developed through the work of Gilles Deleuze and Félix Guattari. In one sense it may seem peculiar to take up the theory of flow in relation to the playlist as many television theorists have found the concept of flow problematic and question its usefulness. However, in a certain sense the playlist, and the new media technologies that use the playlist, create a unique type of flow. As a result this chapter will return to Williams's concept of flow as a starting point for identifying and mapping out these specificities. The third section investigates what happens when programming, scheduling and in some cases production are taken out of the hands of television institutions and put into the hands of the consumer. This shift has profound implications for how television and television viewing have been understood. Rather than producing viewers who are caught up in broadcast flow, the televisual experience becomes one of co-participation and interactivity. Finally, the chapter draws some conclusions about what occurs when viewers have control over media texts.

Case Studies

Before taking a close look at the three case studies, I will give a very brief background to the playlist. The playlist has its roots in radio and television. In radio it became common practice with the introduction of the top forty hits in 1950 on KOWH Omaha. The notion of creating a playlist of popular songs was adopted as common practice across the US and often determined the success of a station.¹ In television, the playlist is an application used by schedulers to order the day's programs, including the breaks. Every second must be accounted for in order for programs to air on time. If tapes are used, the playlist controls the precise cueing for seamless transitions. However, today most programs are digitised; in this case the playlist controls the running order of the programs cached. In a digital environment the playlist moves beyond the broadcast and becomes a common tool for the viewers to program their listening and viewing preferences on a range of platforms. I will now take a look at the different ways the Foxtel iQ, Apple iPod and YouTube use playlists before analysing the implications of this shift for television.

Foxtel iQ

The Foxtel iQ is a PDR that works in conjunction with a multi-channel system. It works in a similar way to the popular TiVo in the US. What is most interesting about PDRs such as the iQ and TiVo is that their ability to time-shift encourages viewing practices that are vastly different from broadcast television's appointment-based or temporal mode of viewing. By a temporal mode of viewing I am referring to the practice of tuning in at a specific time to watch a particular program such as the evening news, or an allocated time slot aimed at a particular group such as children. PDRs, on the other hand, produce what Karen Lury calls a spatial mode of viewing. What Lury is referring to by a spatial mode of viewing is a move away from tuning in to watch a program at a specific time, towards a multi-channel environment in which you locate your favourite channels to see what they have on offer.² The emphasis here is on the channel as a place to visit rather than tuning in to watch a program that runs at a specific time. This is the same kind of logic associated with the internet, where users visit their favourite sites looking for something of interest.³ For Lury this

sense of place is produced by specific promotional and scheduling practices such as repetition, theme-ing and branding. These promotional practices also encourage viewers to feel that they are in control of programming. PDRs tap into and extend the kind of spatial viewing Lury associates with a multi-channel environment because they produce a sense of a personal channel. In order to understand how this occurs it is necessary to describe the iQ in detail.

PDRs such as the Foxtel iQ and TiVo are basically hard drives connected to the television that enable viewers to time-shift in a number of ways, including recording while watching another channel, rewinding while watching a program and fast-forwarding up to the point of delivery without the use of tapes. What is interesting about these PDRs is that they operate in conjunction with an Electronic Program Guide (EPG). This makes them simpler to use than a video or DVD. The EPG enables the viewer to record programs without knowledge of their time and date. The only information viewers need is the name of the program: the PDRs will then automatically search for the time and date and record the program, adjusting for any scheduling changes if necessary.⁴ They can be programmed either to record every episode of a series or only one program. Most interestingly, the EPG assists the viewer to create a personal playlist from the pool of programs they have recorded, which can then be watched at the viewer's convenience. Viewers can create a playlist in a similar way a television scheduler does, by ordering programs into a full night's viewing. However, it is more likely that the playlist will be used to dip in and out of programs.

Interestingly, because of the specific way the iQ records and stores programs, copyright issues become less of a concern. According to Matt Carlson, PDR technology challenges core television practice in four main ways:

the reliance on scheduling to create flow, the 'bargain' whereby viewers watch commercials as well as programming, the necessity of third-party ratings to support audience metrics and set advertising prices, and the airing of unprotected, copyrighted materials without mass copying.⁵

Copyright becomes less of an issue primarily because the recorded material is stored on a hard drive that only works when connected to a Foxtel cable or satellite. In addition, the iQ makes this material difficult to mass-produce because there is no function to burn DVDs. In essence, the only means of accessing the recorded programs is through the iQ itself.

The iQ extends the kind of spatial mode of viewing promoted by a multi-channel system in two significant ways. Firstly, it makes time-shifting incredibly simple, doing away with any need to watch programs at scheduled times. Instead, viewers are able to create a personal playlist of programs they can watch at any time, in any order. This could mean anything from collecting a whole series and watching them all at once—in a sense creating your own themed viewing—or it could mean watching a program ten minutes after it starts, because it is more convenient. By creating a playlist of personal viewing choices, scheduling and programming is taken out of the hands of the programmer and placed into the hands of the viewer. This means that viewers become more than just viewers as they now have the ability to reschedule programs in whichever way they choose. They behave more like computer users because they actively engage in structuring their entertainment desires. This is a radical shift in the way we understand both television and television viewing.

Secondly, the ability to create your own playlist of programs results in a high level of personalisation. Pay TV's use of theme-ing can be understood as a gesture towards personalisation because of the way it addresses fan audiences. However, use of the EPG to create a personal playlist goes much further. By having control of programming and scheduling and creating a playlist that specifically caters to a viewer's personal taste, what begins to emerge is a personal channel; that is, the channel I have created by selecting the programs I want to watch and scheduling them in the order in which I want to watch them. This form of personalisation is very different to broadcast television's focus on mass audiences as it is based on customisation, personalisation and individualisation. This indicates a shift in the locus of control from broadcast television to the user. International organisations such as TV-Anytime are responding to the demand for greater user control by working towards an interoperable system

where users have the ability to transfer preferences (metadata) from one PDR to another, as well as from one platform to another.⁶ This would mean, for example, transferring playlists from your television set to your mobile phone or to your computer. In effect users could watch their playlist of programs on any chosen platform; so although I may record all episodes of a television series on my PDR I can access these on my mobile phone. These kinds of viewing practices call into question the centrality of broadcast television as the main means of understanding television and television viewing as they do away with appointment viewing and shift control from programming and scheduling departments to users. The next two case studies will take a closer look at personalisation and mobility.

YouTube: Broadcast Yourself

YouTube takes the notion of a personalised channel even further than the iQ. It invites users to create their own channel, one that is capable of containing numerous playlists. YouTube works as an umbrella platform that can support an infinite number of channels with an infinite number of playlists. Playlists in YouTube are made up of video clips that have either been uploaded by the user or have been sourced from clips other users have uploaded. For example, as a user I might set up a playlist that focuses on a specific interest of mine. When I encounter clips that match that specific interest I add them to that playlist. Playlists range from the standard and generic such as 'My Favourites' and 'Most Viewed' to the extremely specific and customised. Examples of these niche playlists include the 'Cute Cats' and 'Funny Cats' playlists made up of nothing but clips of cats doing cute and funny things. These playlists can be kept private, shared with a select group of friends or made public. Someone with an interest in cats might search for playlists that focus on cats. In this respect, like PDRs, YouTube breaks with the kind of temporal viewing associated with broadcast television as users visit their favourite sites or trawl unfamiliar sites to see what is on offer.

In his study of the way DVD use breaks with the kinds of viewing practices related to broadcast television, Rob Cover argues that forms of co-participation are important elements of the democratisation of media texts.⁷ For Cover, the popularity of the DVD is evidence of a cultural desire for interactivity, customisation and control over the

media texts. These desires, he argues are linked to 'a desire for democratisation of the media process, by which I mean the desire or demand of audiences for co-participation in scheduling, timing, controlling, viewing and engaging with media and entertainment'.⁸ Cover's argument is highly pertinent to do-it-yourself television channels such as YouTube because, through the kinds of creative uses of playlists mentioned above, they enable co-participation in scheduling, timing, ways of viewing and the creation of personalisation.

Do-it-yourself channels such as YouTube take co-participation further than DVD culture or PDRs as they encourage users to become producers. They not only enable users to take control of scheduling and programming by creating their own playlists, but they also enable users to produce, upload and share programs. This is a significant way in which YouTube differs from broadcast television, where there is a clear distinction between producers and consumers. If enabling viewers to take control of the programming and scheduling is a radical shift in television, then enabling viewers to take control of the production process is even more so. In addition, this level of co-participation in textual production resonates well with Cover's notion that democratisation of the media stems from a desire for co-participation. This desire for democratisation of media texts, where viewers have increasing control, can be seen as a continuation of a process that began with VCR use. As Cover argues:

While the VCR presented new opportunities for the increased control over 'media time', the DVD is the most recent evidence of this demand, and not only expands on the possibilities invoked by time-shifting the media process, but demonstrates the strength of the cultural desire to locate media practices within the diverse sociality of the everyday.⁹

To this I would add two things. The first is that I understand YouTube to be a continuation and an extension of these desires for control. Secondly, I would point out that personalisation and customisation in the case of sites such as YouTube do not result in social isolation, but rather the opposite; they encourage sharing and tap into the desire for communities. My personal playlists, made up

either of programs I produced or programs I gleaned and put together, are ultimately there to share with others. My preferences, my personal likes and choices are a means of connecting with others with similar tastes. In this way the playlist is a social, interactive tool that produces a multiplicity of connections. Finally, YouTube not only supports a spatial mode of viewing that can be highly personalised and social but it also takes viewing out of the home. As a user I can log on to my personal channel, upload, download and create playlists anywhere in the world—as long as I have a stable internet connection. This idea will be developed further in the next case in relation to the iPod.

Apple iPod: Mobility

The Apple iPod enables users to download a range of different types of media, including music, audio and visual podcasts, television shows, movies and photographs. What is also interesting about the iPod is that increasingly television stations are making more and more shows available as downloads through iTunes. This addresses issues of intellectual property by making these programs legally available. While this practice is far more widespread in the US, it is becoming increasingly popular in Australia. In the US, iTunes Music Store offers television shows from ABC, NBC, MTV, ESPN, Sci-Fi Channel, Comedy Central, Disney, Nickelodeon and Showtime, among others.¹⁰ While somewhat fewer, Australian examples include the ABC's *Speaking in Tongues* with John Safran and *Chaser's War on Everything*, and Channel Ten's *Rove Live*, as well as programs from Showtime Australia and National Geographic. However, online TV channels such as ReelTime Broadband have a rapidly increasing range of films and television shows available for download.¹¹ What is highly significant about the iPod, in relation to new forms of television, is that as a portable device it enables the user to watch programs not only anytime, but also anywhere. The iPod not only resonates with a spatial mode of viewing and is highly personalised but it takes television viewing outside of the home. If, as Cover suggests, new forms of digital television address a desire to assert control of media texts, then it could be said that the iPod (along with multimedia-enabled mobile phones) does this by addressing the desire for mobility in viewing.

Mobility is becoming an ever-increasing aspect of viewing. Up until recently the television set has been most often conceived as a domestic object situated in the home.¹² For example, Lynn Spigel's work on the introduction of the television in the family home reveals the extent to which magazine advertising influenced this idea. As she puts it, 'The home magazines helped to construct television as a household object, one which belonged in the family space'.¹³ According to Spigel, television was promoted and understood as something that would bring the family together. She states that 'The emergence of the term "family room" in the postwar period is a perfect example of the importance attached to organizing household spaces around ideals of family togetherness'.¹⁴ Today this notion of television and the family seems outdated, not only because television sets situated in bedrooms often serve as a way of creating separate spaces for children and parents, but also because an increasing amount of viewing occurs outside the home.

Mobile viewing devices such as the iPod reflect a changing use of time and space. If, in post-war western society, broadcast television connected with the family unit and a temporality based on the separation between work and family life, mobile viewing devices are a symptom of the erosion of both of these. As Cover notes, 'the experience of television culture is much less built around "family time" than in a period in which the cost of technology required televisuality to be centred in the family room'.¹⁵ These changes in family structure and time are what, for Cover, produces the desire to assert control over media texts in the form of interactivity, customisation and networking. In addition, as the nine-to-five work life is replaced with a twenty-four-hour/seven-day week, the temporality of broadcast TV is out of step. Internet sites such as YouTube, which bring viewing into the work environment, as well as cafes, hotels and anywhere with computer access, respond to these changes and desires. This notion is taken further by the iPod.

Customisation and personalisation go hand in hand with mobility in relation to the iPod. While the iPod may need an internet connection for downloading programs, once downloaded they can be viewed anywhere without a connection. In this way mobility is intrinsically tied up with personalisation. For example, as I prepare for an overseas trip I not only pack the usual travelling paraphernalia

but I also update my iPod, making sure it contains a vast array of listening and viewing material including over 100 audio lectures, a dozen Australian Film Television and Radio School short films, six feature films, several popular television series, documentaries, video interviews, music clips, music, a calendar, addresses and photographs. The iPod outstrips in-flight and hotel in-house entertainment, including pay-per-view, because the choice of programs reflect my specific preferences. It is customised to my tastes and interests to a high degree; of course, this is limited by what is available and released.

Each of the above case studies is exemplary of a particular kind of shift from broadcast television to new forms of digital television through the democratisation of the playlist. The PDR is exemplary of the way programming and scheduling enters the domain of the user rather than being something that belongs exclusively to television institutions. The ability to time-shift and reorder a program is central to this shift. YouTube takes this kind of co-participation further as the playlist enables users to create their personalised channels. It also enables users to connect with other users with similar interests and share files by sharing playlists. The iPod is exemplary of a kind of customisation that revolves around mobility and media-rich content. (While mobile phones offer similar opportunities, they are not the focus of this chapter.) The playlist is used to create the ultimate personal viewing experience as it allows users not only to be highly selective with the media they import but also to carry that media with them in their pocket or handbag. Together these studies pose a challenge to how television has been understood by demonstrating the rapid and extreme changes occurring in television through digital technologies.

Flow

This section examines the concept of flow in relation to new forms of digital television and develops an alternative notion of flow drawing on the work of Deleuze and Guattari. It proposes that new media technologies that use playlists create a unique type of flow. For this reason this chapter returns to Williams's concept of flow as a point of reference. For Williams, flow is the defining feature of broadcast television. As he puts it:

In all developed broadcasting systems the characteristic organization, and therefore the characteristic experience, is one of sequence or flow. This phenomenon, of planned flow, is then perhaps the defining characteristic of broadcasting, simultaneously as a technology and as a cultural form.¹⁶

Williams's concept of flow has been an important aspect of television studies since the late 1970s. It has allowed for new ways of theorising television programming and scheduling, and their effects on audiences. John Corner points out that flow is a concept that has a number of uses in television studies dating back to Williams's seminal 1974 work *Television: Technology and Cultural Form*.¹⁷ It can be used to describe a constant outpouring of images and sounds from channels into homes, as well as a high level of continuity in the organisation of genres and formats, including breaks. For this reason the concept of flow has been deployed in a number of different ways and has provoked strong debate. Theorists such as Rick Altman, John Fiske and John Ellis have on the one hand adapted the concept and on the other criticised Williams's original construction of the concept. Corner identifies two main problems with the way flow has been deployed. The first is 'the problem of essentialism, whereby use of the idea of flow, wittingly or not, produces in the analysis an essential television artefact along with its related experience'.¹⁸ The second is 'the confusion about whether flow is primarily disorientation or some kind of politically suspect meta-meaning'.¹⁹ This is in part a problem that comes from Williams's work, as at times he appears to put forward several apparently incongruent descriptions of flow, which blur into each other—a fact that can be seen as a problem in the theory.²⁰

For the purposes of this discussion, we will briefly establish some key aspects of Williams's theory, focusing on his notions of distribution or program and sequence. Williams's ideas about distribution and programming are illustrated in Table 5.1.

This table demonstrates how for Williams the idea of the program changes from pre-broadcast to broadcast regimes. In the pre-broadcast regime the program is comprised of discrete units or acts. Williams refers to the theatre and the music hall as examples. In

a broadcast regime the program becomes a technology of sorts made up of a series of timed units distributed across a schedule. The dominant challenge here is to gain the right sense of balance and proportion for, say, an evening's viewing. Williams also refers to an extended service arrangement where balance and proportion are distributed across a range of channels, enabling a focus on specific interests and interest groups.

Table 5.1: Williams on Distribution and Programming

Pre-broadcast	Broadcast	
Occasion (theatre, music hall)	General service	Extended service
Discrete units	Distribution at program level: series of timed units	Distribution at channel level: niche channels
	Mix and proportion	Alternative programs

See: Raymond Williams, *Television: Technology and Cultural Form*, Routledge, London, 1990, pp. 88–9.

Any discussion of Williams's notion of distribution and program should be supplemented by a discussion of his ideas about sequence; see Table 5.2.

Today's advertiser-driven, commercial, multi-channel media environment is different to the one Williams wrote in, and it can be easy to overlook the way Williams grounds his discussion of flow in particular ideas about sequence. His first sense of sequence, sequence as program, implies a specific arrangement of and approach to timing, organisation and viewer experience. There are discrete program units on the one hand and interruptions on the other. In the second sense of sequence, sequence as flow, the approach to timing, organisation and viewer experience is very different; for instance, audiences are enticed to watch an evening's viewing rather than a specific program. These two senses of sequence are not mutually exclusive; they co-exist and the second is an extension of the first, where the ongoing schedule is experienced as flow. In today's terms we might understand this kind of organisation as the packaging of programs that seem to fit well next to each other so as to encourage audiences to stay tuned.

Table 5.2: Williams on Sequence

	Sequence as Programming	Sequence as Flow
	Published information regarding a series of timed units	Clandestine 'planned flow'; sequence transformed by other kind of sequence resulting in 'real flow', real broadcasting
Experience	Watching the news, a play, football	'Watching television' or 'evening's viewing'
Interval	Interval as interruption. True intervals noted or marked between discrete program units	Non-definite (absence of definite intervals) or unmarked intervals; interval as interstitial, space of trailers, adverts and promotion to sustain flow
Unit	Program series of timed sequential units	Flow series of differently related units; planned in discernable sequences that override particular program units
Timing	Declared	Real but undeclared
Organisation	Declared organisation	Real internal organisation something other than declared organisation

See: Raymond Williams, *Television: Technology and Cultural Form*, Routledge, London, 1990, pp. 86–97.

When Williams speaks of a sequence as flow he is not simply referring to the programs that are advertised to the public but also to the material scheduled during the breaks, including advertisements, trailers and promos. For him this is a kind of clandestine schedule not made available to the public yet essential to the creation of flow. The different sequences made up of advertised programs and the breaks produce a sense of flow, even though they may be made up of disparate elements. For Williams, flow does not produce a unity of meaning but a unity of tone or, as Williams puts it, 'a flow of images and feelings'.²¹ Flow is a sensation that is designed to keep viewers watching. This notion conjures up a passive homogenised audience sitting in the living room with little control over how they watch television. For this reason the concept of flow has often been perceived as negative for the power it supposedly asserts over viewers. Today,

television stations are very sophisticated at creating a flow of images, sounds and feelings designed to draw audiences in and keep them watching. For example, as a way of trying to hang on to its audience at the end of a film, the Foxtel movie channel Showtime frequently condenses the credit sequence into the bottom half of the screen and runs interviews relating to the making of the film in the top half, thus entertaining viewers at a time they might be inclined to channel surf.

Recently the concept of flow within broadcast TV has been critiqued in relation to new kinds of viewing practices emerging out of digital forms of TV. For example, in his essay 'Changing Channels', Cover questions the centrality of the broadcast model that Williams (and a large section of television studies) relies on. Cover wonders 'whether the notions of broadcast and scheduling are still seen as too firmly central to the very idea of television'.²² His concern has to do with a gap between the centralised notion of television distribution 'and the interactive, networked, digital experience of everyday media'.²³ Furthermore, he is interested in 'what new digital forms of television program distribution mean for broadcast scheduling and thereby for the concepts [*sic*] of flow as an ongoing significant motif in television studies, and whether such ideas are necessarily out-of-step with contemporary cultural arrangements'.²⁴

While I agree that new digital forms of television do not fit well with Williams's notion of flow, I am hesitant to reject the notion outright. As stated earlier, the playlist seems to create a type of flow (which I explore below). Rather than dismiss the idea of flow, what I would argue is that a digital environment requires a different understanding of flow than that associated with broadcast television. Instead of relying on a notion of flow that is defined by a one-way process that draws audiences into its stream, what is required is a theory of flow that can account for an interactive and productive engagement. Deleuze and Guattari offer such a concept of flow.

According to Rob Shields, within social theory the concept of flow is most widely known from the work of Deleuze.²⁵ For this reason it is worth considering Deleuze and Guattari's concept of flow in relation to new forms of viewing associated with digital television. Deleuze and Guattari's concept of flow is extensive and will only be partially covered here.²⁶ The differences between Williams's concept

of flow and Deleuze and Guattari's concept of flow are illustrated by Table 5.3.

Table 5.3: Williams Versus Deleuze and Guattari on Flow

	Planning	Product	Relation to break
Williams	Flow product of organisation by broadcasters	Productive of identity/ sameness/ unity of tone, feeling and image	Break coded as negative: loss of viewer; seeks to conceal break/ harness to flow
Deleuze and Guattari	Flow product of connections or acts of territorialisation and de-territorialisation	Productive of difference and singularity/ multiplicity	Break or interruption coded as positive; break creates flow

Following on from this table, I want to highlight three points to do with connection, interruption and heterogeneity.

For Deleuze and Guattari, flow occurs when different kinds of 'machines' form connections.²⁷ When Deleuze and Guattari speak of machines they are not referring to technology or mechanisms but bodies, institutions and discourses. As Ronald Bogue explains, for Deleuze and Guattari the voice can be understood as a machine, which interrupts at the same time as laying the foundation for structural order of language.²⁸ Furthermore, machines only work when they are connected to other machines. In the case of the voice it connects with language to produce speech. To explain how machines work through connections, Claire Colebrook uses the analogy of a bicycle. She writes:

Think of a bicycle which obviously has no 'end' or intention. It only works when it is connected to another 'machine' such as the human body; and the production of these two machines can only be achieved through connection. The human body becomes a cyclist in connecting with the machine; the cycle becomes a vehicle.²⁹

As Colebrook goes on to explain, different kinds of connections produce different kinds of machines. In an art gallery the bicycle could become an art object. In the same way, the human body could

become an artist when connecting with a paintbrush. For Deleuze and Guattari these connections produce, above all, material flow.³⁰ This concept is particularly useful for thinking about the kind of relations that are possible between institutions, users and applications such as the playlist. If we understand the playlist to be a kind of machine that is made up of different kinds of connections then we can start to think about the different kinds of flows it produces and what it is about these flows that engage users. Deleuze and Guattari offer a much broader way to think about television viewing than the viewer/broadcaster relationship.

As well as forming different kinds of connections, for Deleuze and Guattari flow is marked by constant interruptions. Rather than rendering machines unproductive, these interruptions have the opposite effect. In fact, interruptions are essential for machines to work well and for flow to be produced.³¹ For example, traffic flow is dependent on the constant interruptions of traffic lights, stop signs, roundabouts and give-way signs. Without these interruptions there would be gridlock. Interruptions in flows also create a multiplicity of connections. The World Wide Web is an example of a machine that works through constant interruptions, where these interruptions form new connections and new flows. By clicking a hyperlink the flow between the user and a particular space is interrupted by another space. These interruptions are essential for the Web to work well as they create an infinite number of connections and flows. Deleuze and Guattari's work transforms what we might think about the break and flow from a negative to a productive thing.

The product of connections and interruptions in Deleuze and Guattari's terms is heterogeneity. According to Bogue, flow as conceived of by Deleuze and Guattari enables and produces difference or heterogeneity.³² Flows for Deleuze and Guattari should not only be seen as the product of homogenising strategies in which everything is made the same, or identical. Rather, flows are always the product of prior processes and connections whose intermixing arises in unique and singular flows that tend to favour difference. This becomes a key issue when we compare and contrast Williams's and Deleuze and Guattari's theories.

According to Corner, broadcast flow, as conceived of by Williams, enables and produces the experience of unity. He states that 'flow is

essentially experienced as a kind of entity holding together local disparities, it presents a mode of higher unity'.³³ Unity is achieved through the sublimation of difference and heterogeneity. In this sense, it could be said that while broadcast flow enables unity, it inhibits difference. Corner here is referring to the way a variety of sequences, made up of different programs including the breaks, produce the experience of unity rather than fragmentation. One way this unity and the exclusion of difference is manifest is through the way broadcast television flow addresses a mass homogenous audience passively watching. This is not to say that audiences do not participate in television in different ways, such as appearing on television shows, being inspired to take action or through educational programs. However, the production of broadcast flow arises not out of these practices but out of scheduling and programming practices in which viewers do not participate. In this respect they are passively drawn into and caught up in a one-way flow they have very little control over.

One way in which Deleuze and Guattari's notion of flow is interesting is that it offers a framework in which to think about interactivity. It is difficult to conceive of how Williams's notion of flow could account for interactivity. Unlike broadcast flow, which is one-way from the television to the viewer, Deleuze and Guattari's concept of flow is an interactive process. The new digital environment breaks with this form of viewing. What occurs instead of flow is interactivity. Interactivity could take the form of activities such as the recording and reordering of scheduled programs and the downloading and uploading of programs. This idea of flow is markedly different to that conceived of by Williams in relation to broadcast television because it can account for an interactive process rather than a passive one.

The Playlist and Flow

My premise is that while much television studies sees us living in a post-flow era, the playlist nevertheless does define particular kinds of flow. The purpose of this section is to tease out this proposition, and demonstrate the distinctive kinds of flow that emerge with and alongside the playlist. Having used Deleuze and Guattari's conception of flow to renovate our understanding of flow, I now want to look at how this different understanding of flow relates to the kinds of contemporary uses of the playlist. I will do this by revisiting the case examples

we looked at earlier. In broad terms, each of our case studies illustrates different ways in which users create their own flow with the playlist. Each of these flows is closely linked to practices of interactivity.

If in broadcast television programmed breaks are central to the creation of a kind of flow that seduces the viewer, then the PDR's ability to skip the breaks undermines this kind of flow. Broadcast flow here is replaced by active participation as the viewer uses the remote control to watch selectively. Julian Thomas has demonstrated that the remote control can be understood as an early tool for an interactive viewing experience. Thomas states that

the remote control is best understood not as an accessory device, peripheral and functionally unnecessary in the television broadcast system, but as a distinct, proliferating technology for television use, and one that has become central to the continuing attempts of users to organise and control television.³⁴

The remote, for Thomas, is a way of asserting control over the viewing experience. What is interesting about the playlist is that it is a new kind of interface for the remote. It turns the remote into a device that is used for more than channel surfing or the selection of items from a menu such as brightness and volume; it turns it into a compositional tool with the possibility to create new kinds of flow. The kinds of flow created are generated in other, more complex ways than simple flicking channels. This is partly due to the memory storage facility of the PDR and the way it automatically scans the EPG for preselected material. On one level the PDR can be understood as an extension of the VCR in that it enables time-shifting practices. However, it is also different to the VCR not only because no tapes are necessary, but also because it can easily be programmed to locate and record programs without the user having to know the time and date. I can set my machine to locate and record every episode of *Curb Your Enthusiasm* without having to know the times they are scheduled. If I then watch the episodes every Friday night I have created my own viewing schedule and my own flow, which in conjunction with skipping the breaks is based on engagement and interactivity.

In relation to YouTube, the playlist enables the user to create an interactive flow in two interesting ways. Firstly, flow is created by viewing playlists, either your own or another user's. This activity may appear to create or simulate the same kind of flow that broadcast television does. The difference is that viewing playlists is not simply a matter of switching on and tuning in. It requires a search, find and download type of activity where the user is in control of navigating their viewing experience. This activity can be extremely absorbing in a way similar to that of broadcast flow, but the experience is more demanding of the user. The user is not making a selection from 100 channels but following links that can lead to millions of choices. The kind of engagement required is investigative and deductive because the broadcast experience is embedded in a hypertextual environment. Thinking about this experience in relation to Deleuze and Guattari's understanding of flow, what becomes apparent is that with each connection emerges a multiplicity of new connections and it is up to the user to make sense of them.

The second way flow is created is through the activity of creating playlists, where either from uploading or downloading programs the user is involved in a particular 'creative' process.³⁵ Users are engaging in practices previously belonging to program executives and schedulers; that is, selecting and ordering programs. This may take the form of well thought-out themes, or it may be randomly picked clips. Either way flow emerges from an interactive and creative process. Moreover, these activities are about creating flow and having control over the process of flow. I will take up this point again in the conclusion.

There is something about the iPod being a highly personalised and customised viewing device and having mobility that makes it quite a unique object. In several ways the iPod is similar to the Walkman and the Discman. To begin with, like the Walkman, its primary function is as a player, not a recorder.³⁶ Secondly, it is a personal listening and viewing device rather than a social one. In this respect, like the Walkman it has been derided as an antisocial device that allows 'individuals to block out the world, to literally "tune in and turn off"'.³⁷ However, with its eighty gigabit memory, the iPod's capacity far outstrips that of the Walkman. In addition it can carry a much greater range of media such as video, audio, photographs and

notes. These two points of difference are significant because they enable much greater personalisation and customisation. Rather than carrying your preferred tape or CD with you, the iPod enables you to carry thousands of songs, as well as a number of other audiovisual materials to choose from. The iPod not only allows the user to carry a great range of material but also enables switching between ‘entertainment’ and ‘office’ functions.

What makes the iPod more than a hyped-up Walkman and gives it the ability to create and direct a number of different flows is the way it interfaces with iTunes. Through iTunes this material can be rearranged—without the tediousness of fast-forwarding and rewinding—then accessed via playlists. As a user I might make up particular playlists for particular occasions, events and situations. These could include a playlist made up of music or a lecture series to walk to, a meditation playlist, or a video playlist to watch on public transport. Users create playlists with certain ideas in mind—themes, musical styles and eras, lecture series, radio programs and so on—which create unique kinds of flow.

The above comments relate mainly to iPod as a device and its connection to iTunes as a playlist tool. However, this is only part of the picture as far as flows go, because what is unique about iPod/iTunes is the way they enable users to monitor a number of feeds that they have subscribed to. Each of these feeds represents a flow that the user ‘tunes’ into (although the software automates the work of monitoring and updating). Each user is thus through their subscriptions connected to multiple flows. These connections and flows are different to broadcast television because they are asynchronous; facilitated by RSS (Really Simple Syndication) protocols, they continue to flow when the user is not there. This takes us into the world of what has been termed Web 2.0. I won’t go into the specifics of Web 2.0 and RSS technology, but suffice to say that this represents a new field of flows that the user interacts with. The remnants of the broadcast system remain because iTunes is continually trying to push material to you through suggestions and advertisements, but the main form of engagement is dominated by a find-and-pull dynamic where the user searches for media. While the iPod can be accused of being a very antisocial device that cuts off the user from the rest of the world, its interface with iTunes makes it a very social device.

Therefore, what becomes important is a network of connections. Without these connections the iPod would indeed be little more than a hyped-up Walkman.

Conclusion

Throughout this discussion of the playlist, and of Williams's theory of flow, what has become apparent is that what is needed is an account of what users do with flow rather than how flow is created in television as part of the logic of sequence. In this respect, Deleuze and Guattari's understanding of flow has provided some interesting ideas for a revised idea of flow, suitable for the playlist. In the previous section I sought to outline some of the distinctive kinds of flows that emerge with and alongside the playlist.

Thinking about flow in this sense does not only relate to what users do, but also to the shape and cultural form of television in a digital environment. It is easy to conceive of television as something permanent and immutable, particularly in relation to the way it has been understood as a one-way process—something we watch and get caught up in, something we have very little control over. It could be argued, as Cover has done, that broadcast television has been the central way in which we have defined and understood television.³⁸ But with digital technology television is mutating in a number of different directions. These processes involve the shifting of practices, moments of decision and powers from one domain to another. This has profound implications for how television is understood.

The democratisation of the playlist is an interesting barometer of this shift, as only a short time ago it was restricted to the domain of television institutions but has now become a common tool that enables user control over media text. Within television the playlist has played (and continues to play) an important role in the production of broadcast flow. Because the function of the playlist is to order and deliver programs within a temporal order, it is central to the production of planned flow as outlined by Williams. Within a broadcast context the playlist connects with and assists in the creation of a temporal mode of viewing, where viewers tune in at specific times in order to watch their favourite shows. In this way it connects with a mass audience. It enables a kind of flow that produces unity and erases differences. Within digital television (which in this chapter

encompasses the internet, including iTunes/iPod, and broadcast forms) the playlist has a different function and produces a different kind of flow. As an application the playlist has encouraged new forms of interaction, where the possibilities have not been exhausted yet. Interoperability or the transfer of metadata from one platform to another is one such possibility. It also produces a kind of flow that resonates with Deleuze and Guattari's understanding of flow as defined through interruptions. The constant interruption of programmed schedules that PDRs rely on, the jumping from site to site that YouTube encourages, and the literal shifting from music to lectures to films to photographs, calendars and so on that the iPod enables, produce flow as interruption. This kind of flow is predominantly about heterogeneity. Coming to terms with these new forms of flow represents a new challenge for television studies and television institutions, including the legal discourses surrounding them.

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Notes

- ¹ Brewster and Broughton, pp. 39–40.
- ² Lury, pp. 15–37.
- ³ This is similar to the logic used by advertising search engines. Christina Spurgeon argues that new search media are successful because they rely on users actively searching for what they want. For example, Google is successful with advertising because it relies on a 'consumer preference for using the Internet to find and then "pull" information, rather than select from what is "pushed" to them': Spurgeon, p. 53.
- ⁴ The iQ has had problems adjusting to changes in programming. I understand that TiVo, on the other hand, does not have these problems.
- ⁵ Carlson, p. 104.
- ⁶ For further information on TV-Anytime, go to <http://www.tv-anytime.org>
- ⁷ Cover, 'DVD Time', pp. 137–47.
- ⁸ *ibid.*, p. 138.
- ⁹ *ibid.*
- ¹⁰ See <http://www.apple.com/itunes/videos>
- ¹¹ McIntyre; Timson. In a joint venture with online content distributor ReelTime, Yahoo!7 is offering pay-per-view computer and iPod downloads of new season programs. As Yahoo!7 has acquired the non-exclusive internet rights to Nine and Ten's new season programs, there is a possibility that these programs could be available online before they are broadcast on television.
- ¹² There are exceptions; one of which is that at the same time as the home theatre is becoming increasingly popular, public screenings on massive screens are gaining momentum. For example, screenings of major sporting

- events such as football's World Cup attract huge crowds. Public screenings in bars of cult television shows such as *Buffy the Vampire Slayer* have also become common events. Most recently, bars have introduced YouTube highlight nights. Public screenings have also long been common in many Third World countries, where not everyone owns their own television set.
- ¹³ Spigel, p. 76.
- ¹⁴ *ibid.*
- ¹⁵ Cover, 'Changing Channels', p. 15.
- ¹⁶ Williams, p. 86.
- ¹⁷ Corner, p. 60.
- ¹⁸ *ibid.*, p. 68.
- ¹⁹ *ibid.*, p. 69.
- ²⁰ *ibid.*, pp. 68–9.
- ²¹ Williams, p. 92.
- ²² Cover, 'Changing Channels', p. 10.
- ²³ *ibid.*
- ²⁴ *ibid.*
- ²⁵ Shields, p. 1.
- ²⁶ Deleuze and Guattari argue that every machine 'is related to a continual material flow (hylè) that it cuts into ...', *Anti-Oedipus*, p. 36.
- ²⁷ Deleuze and Guattari, *Anti-Oedipus*, pp. 1–9; Deleuze and Guattari, *A Thousand Plateaus*, pp. 26–38.
- ²⁸ Bogue, p. 88.
- ²⁹ Colebrook, p. 56.
- ³⁰ Shields, p. 2. Deleuze and Guattari's philosophy has gone the furthest in developing what we might call a sociopolitics of flow. Another way of thinking about flow in their work is that it is the product of acts of reterritorialisation and deterritorialisation. These concepts, as elaborated in their book *Anti-Oedipus*, relate to the development of empires and specifically the capitalist state that must decode flows of labour and money and organise them around the objective of capital. For example, the industrial age deterritorialised workers from agricultural labour and reterritorialised them into factory labour. As Eugene Holland points out, in Deleuze and Guattari's follow-up work, *A Thousand Plateaus*, the notion of deterritorialisation is at the heart of the more general politics of flows: Holland, p. 59.
- ³¹ Deleuze and Guattari, *Anti-Oedipus*, pp. 1–9.
- ³² Bogue, p. 93.
- ³³ Corner, p. 62.
- ³⁴ Thomas.
- ³⁵ The creative process in many cases includes practices such as scripting, shooting and editing.
- ³⁶ Both devices can be used to record with added attachments; however, this is not their primary function.
- ³⁷ Du Gay et al., p. 91.
- ³⁸ Cover, 'Changing Channels', p. 10.

Part II
Copyright Law

CHAPTER 6

What Are You Missing Out On? Big Media, Broadcasting, Copyright and Access to Innovation

*Kathy Bowrey*¹

Introduction

Copyright is not usually cited as the main reason for the slow development of digital broadcasting services in Australia. Flawed government policy is generally taken to be the main reason.² However, copyright is represented as part of the package that helps media empires and the entrepreneurs behind the next killer apps turn the internet into a clunky, permission-driven, grey-box experience—frustrating the delivery of all the new, nifty, portable and empowering consumer electronics which could give us flexible, on-demand access to programs and films.

We are provided with glimpses of what could eventuate, given the right celestial alignment in the universe—where technology, industry, government policy, legislation and the public interest work together to support a competitive marketplace rich in new, innovative media services and experiences. But contemporary copyright plays a spoiler role. Copyright law, in alliance with Big Media, frustrates access to IceTv³, TiVo and the next generation of personal video

recorders (PVRs) and ad-skipping tools.⁴ Copyright systematically removes timely access to hotly anticipated new-release television programs via YouTube and MySpace, making us wait for them to re-emerge much later, in a controlled time slot, on free-to-air television.⁵ Copyright also frustrates those who are happy to pay, right now, for downloads of these shows from an Australian iTunes store. Some of these TV shows have been available for purchase by US consumers from their iTunes store for some time.⁶ We have learnt to fear the next generation of unwelcome technological protection measures, restrictive high-definition formats like Blu-Ray, and pushes to legislate for broadcast flags and like initiatives.⁷ The impression given is that the law will continue to be out of step with delivering the potential of the new technologies and confound consumer expectations of easy access to content on demand well into the future.

This chapter takes concerns about the negative influence of copyright on innovation and access to new media services seriously. However, my interest is not in proselytising the evils of Big Media⁸, or analysing the evidence of global media's capture of the policy agenda.⁹ With broadcast copyright this often feeds into a presumptive siding *with* the 'true' innovators, the technology/consumer appliance industry, and *against* the evil monopolists—the 'old-media' content interest.¹⁰ This is an unhelpful dichotomy given the vertical integration and diversity of media portfolios today¹¹, and the high-tech collaborations being developed across the computer industry, appliance makers, the entertainment industry and electronic games.¹² It also ignores the significant power exercised by new media darlings like Apple Computers¹³ and Google.¹⁴

The discussion of copyright and digital broadcasting is all too present-minded and too focused on current external influences on the law, and especially US influences and comparisons. What is missing is a broader sense of context and reference to continuity within the category of copyright as it has, and continues to, develop in relation to innovation. What is currently missing from the literature is an account of the connection between the historical development of the categories of copyright law and the muted prospects for digital delivery we have come to anticipate.

This chapter addresses the contemporary Australian situation by reconsidering the past of broadcast copyright—its introduction

into the *Copyright Act 1968* (Cth) and jurisprudential development in case law. This jurisprudence is important because, though perhaps too obvious to mention, it is still primarily the development of exclusive rights to copyright subject matter that establishes the means by which media owners effect control over access to their programs in Australia today. For example, without this foundation, the much debated effects of the new, complex anti-piracy provisions are non-sensical.

The analysis is in two parts. The first part considers how broadcast copyright and related rights were conceived. The second part addresses what this means for access to innovation today.

The Conception of Broadcast Copyright in Australia

Legislative Development

A technologically determinist reading of copyright's history suggests that the arrival of a new and distinctive technology instigates a legal response in the form of new copyrights. A new law is justified as a management tool to optimise the economic climate for the successful dissemination of the new technology. New copyright laws police the unrestrained copying of new commodities that undermine the profits (for some) that were anticipated from the new form of manufacture/service, and perhaps imperil investment in its further dissemination. Copyright is also asked to protect the new 'conduits' for the dissemination of innovation. These two related but distinctive rationales can lead to differentiations in the nature and quality of copyright awarded to original works (literary, dramatic, musical and artistic), and to the other subject matter (sound recordings, broadcasts, film and so on).¹⁵

By the 1920s the commercial potential of broadcasting was coming to be understood, and this interest was added to international copyright conventions in 1928.¹⁶ However, given there was already protection of the underlying literary, dramatic, musical and artistic works, law reform was not a high priority. When it came to considering the need for new copyrights in sound recordings, films and broadcasts in 1951, the UK's Gregory Committee justified a distinction between 'original' works and those only deserving 'ancillary' rights.

At the best, the record or film has called forth in its production a measure of artistic skill, but there is always a great measure of what is only technical and industrial in its manufacture ... these 'contrivances' (are not) original works.¹⁷

Another point of distinction for 'industrial products' was the collective conditions of their production, with the new subject matter involving coordination of many, differently skilled efforts (for example, producers, directors, cameramen, sound technicians, effects and so on). It was recognised that there may be a high degree of skill and perhaps artistic judgment involved in aspects of the production; however, acknowledging such a range of talent was rejected as 'not practicable'.¹⁸

Rejecting the original quality and skill of the labour involved as a defining contribution to these new commodities left the main reference point of the right as the mere technological artefact. Thus, in relation to broadcasting it was the cost of infrastructure and transmission that was considered as the primary economic interest at stake, and the *raison d'être* of protection. The Gregory Committee noted that additional to any copyright in the individual items that go to make up those television programs,

it is not, in principle, very different from that of a gramophone company or a film company. It assembles its own programmes and transmits them at considerable cost and skill ... it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.¹⁹

The focus of the right was expressed in relation to protection of the broadcast signal, to prevent filming of broadcasts and subsequent rebroadcasting.²⁰ There was, unsurprisingly, little anticipation of the development of technologies and related industries that would enable greater access to cultural products, overcoming the spectrum limitations of analogue broadcasting and the deterioration in quality that occurs with analogue copying.

The Australian Copyright Law Reform Committee of 1959, known as the Spicer Committee²¹, was sceptical of some of the reforms to the

UK *Copyright Act 1956*. In particular it noted that, compared with the *Copyright Act 1911* (UK)²², the new drafting had created an unprecedented focus on the enumerated ‘exclusive rights’ of the owner. This drafting change ‘directs the mind *to the* infringer—to the things which must not be done without the owners’ consent—rather than to the owner and what is comprised in his ownership’.²³ The Spicer Committee had no problem with adding protection against unauthorised broadcasting of original works²⁴, but it struggled with how to differentiate the award of copyright to broadcasts which lacked material form and logically exclude rights in other spectacles and performances that were ‘transitory in nature’.²⁵ Nonetheless, following the UK move, it recommended that a right be given to broadcasting authorities to protect against the pirating of their broadcasts.²⁶

The Copyright Bill emerged close to a decade later. The time gap between the 1956 UK legislation, the 1959 Spicer Committee and the 1968 legislation was explained with reference to its controversial nature. In introducing the Second Reading of the Bill, Attorney-General Bowen noted an ‘avalanche of complaints and criticism which fell on (government)’. He defended the legislation as ‘a reasonable compromise’ of conflicting interests.²⁷ It is worth noting that the US averted some of the controversy over broadcasting interests by not recognising a right in the broadcast signal *per se*.²⁸

It was controversial legislation because in relation to the new Part IV rights²⁹ precisely what was protected, and why these interests needed protection, remained substantively unclear. Discussion in the House focused on ‘the entirely new footing for copyright’³⁰ and the ‘unresolved’³¹ nature of the new rights. There were doubts raised about comparative benefits to overseas media organisations and questions about the implications for local production. The failure to offer anything in this bargain to the authors, playwrights and composers ‘who have done the constructive work’³² underlying the sound recordings and broadcasts was by far the most contentious part.

Academic reception of the legislation matched that in the parliament, with Sawyer suggesting Part IV of the legislation should have been called ‘Special Copyright’ or ‘Limited Copyright’ because the rights have ‘no relationship to the general principles of copyright law, and are unintelligible unless put in the context of the complex commercial arrangements which they serve’.³³

In reviewing the debates today, it is clear that lawyers and politicians thought the rights 'unintelligible' because they were so loosely related to traditional legal justifications for the origins of private property and the presumed individualistic property foundations of copyright.³⁴ The need to stop free riding by piracy touched a nerve but in relation to broadcasting, given the lack of widespread access to home recording equipment at the time³⁵, and restrictions on access to broadcasting spectrum³⁶, combating piracy would have been a tenuous justification. The legislation was not seen to benefit creative people who are 'the life blood of progress in the music and writing worlds'³⁷, but chose to support 'the big companies and the monopolies that have exploited the creative works of composers and writers (and) ... had massive returns'.³⁸ It was argued that this unprincipled legislation reflected the interests of those 'likely to have access to the corridors of power'.³⁹

Broadcast Copyright in the Courts

It is one thing for media organisations to lobby for particular law reforms. It is another thing to have those rights favourably interpreted by the courts, who need to reconcile the legislative policy with the language of the legislation and established methods of legal reasoning.

In 1998 the High Court in *Phonographic Performance Co of Australia Ltd v. Federation of Australian Commercial Television Stations*⁴⁰ considered the relationship between the s. 31 exclusive right to broadcast original works, and the copyright awarded to the broadcaster in s. 91. It was found that the rights awarded in Part III and Part IV of the Act existed independently and concurrently.⁴¹ However, it was not until fifty years after the first television broadcast in Australia, and almost forty years since the passage of the legislation, that the courts had the opportunity to deeply reflect upon the origins and intent of broadcast copyright in *The Panel* cases.⁴² Perhaps in light of the legislative history it is not surprising that Finkelstein J would observe: 'It is usually apparent whether a particular work may be the subject of copyright. ... There are, however, *some exceptions*, and this case deals with one of those exceptions. This appeal is concerned with copyright in a television broadcast' (emphasis added).⁴³

The Panel litigation revolved around possible infringements by Network Ten's *The Panel* program by copying and rebroadcasting segments of Channel Nine programming. The segments were incorporated into *The Panel* chat and commentary, and Channel Nine shows and stars were generally subjected to derisory treatment. While Network Ten had possible defences of insubstantial taking⁴⁴ and fair dealing (criticism and review⁴⁵ and/or reporting the news⁴⁶), the proceedings required some definition of the basic unit of the protected broadcast, so that these tests could be applied to the segments used by Network Ten.

Interpretations drew upon various tortured attempts to make sense of the amalgam of provisions pertaining to broadcasting in the Act.⁴⁷ However, overall there were two possible interpretations—a formalist/purposive view and a physicalist view. The formalist interpretation looks beyond the materiality of the broadcast signal to award copyright to the form/purpose of the broadcast, read as television programs. The physicalist interpretation awards protection to the material provision of a service, with copyright attaching to the transmitting or communicating of signals.

At first hearing, Conti J, citing the Gregory Committee, favoured a purposive view of the protected broadcast, stating that

the only feasible candidate must be a television broadcaster's programme, or respective segments of a programme, if a programme is susceptible to subdivision by reason of the existence of self contained themes. Moreover in the case of commercial television, an advertisement should logically be treated in the same way as a separate programme, particularly given the difference in theme, the circumstance of discrete production, and the factor that the intellectual property rights involved in any one advertisement would be often complex.⁴⁸

The problem with this approach is that it leads to an unstable scope of protection that tends to conflate the protected broadcast with a presumed underlying dramatic content, narrative or theme.

On appeal the Full Federal Court preferred a physicalist view:

A television broadcast is defined by reference to the visual images that are broadcast ... in my opinion, ... there is copyright either in each and every still image which is transmitted or in each and every visual image that is capable of being observed as a separate image on a television screen.⁴⁹

The majority of the High Court then rejected this on the grounds that:

The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability of the result obtained in the Full Court, and a close consideration of the text of various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed.⁵⁰

The physicalist approach favoured by the Full Federal Court leads to a definition of the protected broadcast 'evacuated of any reference whatsoever to anything ... which could be an object of aesthetic or critical attention or evaluation'.⁵¹ It awards excessively strong protection of images and sounds broadcast compared with that accorded to the Part III original works, regardless of the point, skill or costs associated with their assemblage. Accordingly, the High Court found that:

Where the 'subject-matter' of copyright protection is of an incorporeal and transient nature, such as that involved in the technology of broadcasting, it is to be expected that the legislative identification of the monopoly ... and its infringement ... of necessity will involve reference to that technology. But that does not mean that the phrase 'a television broadcast' comprehends no more than any use, however fleeting, of a medium of communication. Rather, as the Gregory Report indicated, protection was given to that which had the attribute of commercial significance

to the broadcaster, identified by the use of the term 'a broadcast' in its sense of 'a programme'. In the same way, the words, figures and symbols which constitute a 'literary work', such as a novel, are protected not for their intrinsic character as the means of communication to readers but because of what, taken together, they convey to the comprehension of the reader.⁵²

The High Court's determination thus was that the protected broadcast involves *more than* a singular image and relates to *programs* (which are stated as not the same as a dramatic work, but described in terms of segments, items and themes). However, the court then deferred definition of the relevant units of programming 'of commercial significance to the broadcaster' to a factual determination of infringement by the Federal Court.

The Full Federal Court then proceeded to determine infringement without endorsing any particular criteria for determining a unit of programming. In reflecting upon the test of whether a substantial part was taken, Hely J cast doubt on the assistance to be provided by a consideration of whether the two works were in competition, as one work may not be a substitute for another, yet unfair advantage of the plaintiff's skill and labour may still have been taken. He concluded that

the fact that the *Panel* Segments were used by Ten for the purpose of satire or light entertainment [and therefore comprised a different object or purpose to that of Nine] strikes me, with respect, as throwing little, if any, light on whether the parts taken were a substantial part of the source broadcasts.⁵³

The judicial 'solution' to the definition of broadcast copyright provides us with little practical criteria for resolution of the basic issue at stake: what are the limits to the protected broadcast, or, as the Spicer Committee noted, 'what is comprised in [t]his ownership'? It remains particularly unclear what kind of use would *not* be of commercial significance to the broadcaster, even though the High Court confirmed that the requirement in s. 14 that the taking be of a

substantial part means that it does not follow that *any copying* will infringe.⁵⁴

As an exercise in legal reasoning, *The Panel* cases engage in 'hiding the ball'. The Federal Court and High Court judges simply pass the broadcast ball along one of the two likely trajectories, bolstering their choice with reference to the chosen meandering path that crosses the related broadcast sections in the Act, even though no obvious preferred view can be said to leap out. As Pierre Schlag argues in his article 'Hiding the Ball', the whole charade rests on suppressing recognition of the plurality of potential meanings and resisting inquiries into ontological questions about law.⁵⁵ To end *The Panel* dispute with recourse to a factual determination of the protected program to be made at the lower level, implies that the identity of the broadcast ball is readily apparent to appropriately trained personnel, without any need to clearly define anywhere the objective characteristics to be applied to recognise the qualities of this particular kind of ball. In this inquiry, what the law continually evades is a discourse about the nature of this commodity and its need for protection, notwithstanding judicial notice that it is all about the 'commercial significance' of the segments broadcast.

The Propertisation of Media Audiences

Critiques of 'consumer society' suggest that the expansion of copyright subject matter is not about protecting investment in innovation. What copyright facilitates is the advance of capitalist relations into new fields of social life. In other words, new additions to copyright subject matter create the 'culture industry', to support and supplement the existing trade in manufactured objects and to advance commodification into other domains. In our economy there is an insistent 'need to generate a constant stream of unique (if often similar) products with a severely limited life span'.⁵⁶ What drives desire for these new products, and especially for more 'ephemeral' cultural products, is the messages contained in their marketing. Consumption choices primarily reflect purchaser receptivity to the 'symbolic meaning' of the commodities, as ascribed to them through their particular advertising and marketing.⁵⁷

Commercial mass media is a major mechanism for stabilising the serial production of new meanings for products and services, and

hence it is fundamental to creating/marketing new needs. Thus, as well as focusing on the importance of protection of the value of the new media conduits, commodification critiques infer we should look to the way copyright accommodates the creation of rights *in the production of mass audiences*. Copyright and broadcasting regulation assembles audiences that facilitate the marketing of goods and services.

Who owns and has access to mass communications media becomes central to the capitalist's risk-management strategy because it increases political and economic power generally. Media concentration, vertical integration and diversification further increase access to investment capital, global market power, and national and international political influence. This combination of tools and powers allows for 'an unprecedented degree of potential control over the range and direction of cultural production'.⁵⁸ The messages conveyed by film, radio and television are essential to create 'symbolic' meanings for consumers. They drive passions and fashions, and suggest identities to be fulfilled through consumption.

Copyright awarded to 'other subject matter' is slightly different from the copyright awarded to works, because of the way these media forms facilitate consumption more broadly. Defining *the property owned within the new subject matter* is not the main game and the lack of a clear definition of these rights would not for the most part create any significant problems. It is not really necessary for a media proprietor to define or own the media spectacle they create as a form of property within copyright. What is more important to them is to protect the dynamic of assembling audiences, to on-sell to advertisers and invent and reinvent demand for more and more products and services.

It is clear from the legislative history that broadcast copyright was never clearly understood within copyright principles. However, its fundamentally featureless shape—waving between its technical characteristics as a signal, and artistic pretensions as a dramatic work—makes sense once it is understood that the real object of regulation is *not supposed to be the broadcast* at all.

As s. 91 of the *Copyright Act* makes clear, what is protected in copyright is primarily determined with reference to a right to service an audience as made possible in accordance with a licence awarded

under the relevant broadcasting regulation, and as refined by various content regulations. This means it is the audience assembled to receive a mass media service that is the interest at stake in broadcast copyright. These audiences are not demarcated by copyright, but by broadcast regulations that create limits—geographically, culturally and in line with other particular political interests and objectives that affect what can be broadcast, to whom, and when.⁵⁹

By using the power to grant media broadcast licences, and the power to create copyright in the content broadcast, the state creates a legal capacity to ‘own’ these audiences of consumers. This, of course, entails the right to directly communicate ‘content’/advertising and marketing to ‘the public’. Thus it could be argued that in advanced capitalist societies, what copyright primarily creates is not an exclusive right to own content *or* the means of distribution of content to audiences. What copyright supports is the production of desire/demand for the actual cultural products broadcast, as well as for the other diverse kinds of manufactured objects and services advertised to the public via the mediums of commercialised mass communication.

This reasoning leads to a rejection of the view that copyright expands into new subject matter as we come to appreciate new forms of cultural practice and creativity. There is little intrinsic value or motivation to be ascribed to the cultural goods and services produced, because the greater number of them are manufactured and marketed in light of market survey information about the character of the mass audience, and their potential viewing, listening and reading choices.

The construction of the audience-as-market and as-consumer has meant that the relationship between producers and their audiences is increasingly commercially calculative, rather than premised on disinterestedness. Moreover, it is argued that the significance of the already existing relationships between members of the audience is seen to have diminished; that is, they are designated as a set of individual and equal consumers, who are organised as a serial rather than an associative community.⁶⁰

The media and medium's value is not calculated in terms of discrete units of content, but in terms of exhibition value and franchise longevity.⁶¹ Thus it is no surprise that in considering rights in broadcasts, there was a reluctance to engage in a discourse about the creativity, originality and authenticity of mass media. The argument that such new endeavours deserve a copyright on the grounds of their originality misses the point, and a focus on copyright law revolving around the foil of creativity only diverts us from studying the more important economic relations and conditions for consumption that broadcast and copyright regulations make possible.

There is support for this reading of broadcast copyright from the judicial development of the exclusive right to perform and broadcast works to 'the public'. In the *Telstra music-on-hold* case⁶², the High Court affirmed the view that the private setting of receiving a communication was irrelevant to it being a communication 'to the public'. Dawson and Gaudron JJ endorsed the relevant object of the exclusive right as the 'copyright owner's public'. This is judged by reference to the question, 'Is the audience one which the owner of the copyright could fairly consider a part of his public?'.⁶³

The distinction between what is 'in public' and what is 'in private' is of little assistance in determining what is meant by transmission 'to the public'. The transmission may be to individuals in private circumstances but nevertheless be to the public. Moreover, the fact that at any one time the number of persons to whom the transmission is made may be small does not mean that the transmission is not to the public. Nor does it matter that those persons in a position to receive the transmission form only a part of the public, though it is no doubt necessary that the facility be available to those members of the public who choose to avail themselves of it.⁶⁴

It did not matter to copyright law that the public may not have even wanted to receive the transmission.

The valuable asset created by the investment in broadcast technologies remains primarily the creation of mass media audiences

for particular kinds of programming and advertising. This is conventionally measured in terms of program statistics—ratings, demographics, market trends and so on.⁶⁵ However, copyright also facilitates the production of subsidiary markets of audiences, such as the private audience for a video screening in a hotel⁶⁶, or receipt of music-on-hold services. Copyright expands its ambit to include all forms and scales of audience, capable of a marketing definition of interest to advertisers, and formulated so as to permit extraction of a fee.

With digital distribution and the ability to stream on demand to an ever increasing range of media platforms, the technological specificity of copyright provisions designed for an earlier age of mass media communications became a limitation on the ability to control and direct cultural production. The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) thus repealed the earlier definition of broadcast that pertained to wireless broadcasts, replacing it with ‘an extended, technology-neutral definition which means a communication to the public within the meaning of the *Broadcasting Services Act 1992*. ... The communication right is not limited to specific technologies. The definition of “communicate” makes it clear that an electronic transmission may occur via a combination of delivery mechanisms’.⁶⁷ This amendment affirms the capacity to treat all potential consumers/audiences as the media owner’s property, regardless of the medium of communication.

The Public Interest and Copyright

Though there is still a passing reference to the public in copyright legislation, this is merely as constituted as a potential collective to be acquired by existing media proprietors, marketed to and on-sold to advertisers. There is no space for a proper consideration of the ‘public interest’ *within* copyright itself because the media owner’s private interest is seen as mutual with serving the public interest, by servicing the provision of media products, services and advertising to them, by whatever means of delivery chosen. To the extent that it matters at all, the public interest is really presumed to be catered for by the broadcasting regulations and by reference to the specific licensing conditions of the broadcaster. But there is no public interest to be found contained in the application of copyright broadcast itself.

Further, everyone is presumed to fall within at least a few demographics of interest to media owners and marketers. As such it is not possible to conceive of a legitimate public interest in receiving material outside of established media market dynamics, such as content obtained at the user's direction and obtained for free. User initiative in servicing personal consumption choices can only be seen as anarchy and deviancy.

What this Means for Access to Innovation Today

The history of copyright shows that throughout the nineteenth century new rights were added in response to industry lobbying, to facilitate control over industry development and expansion. However, there was little standardisation of the rights until the collation of the various industry-specific Acts in the 1911 revision.⁶⁸ The 1968 reforms further universalised these rights, while providing for industry and technological specificity for Part IV subject matter. Limits to the new copyrights were considered a necessary 'compromise', given the diverse interests at stake and the problem of there being no fundamental principle agreed upon, on which such rights could be more broadly based.

Compare that history with the origins of the 1968 Act, and this explanation given for the Digital Agenda legislation from Attorney-General Daryl Williams:

Some of you might ask 'Why is copyright reform needed?'. The reason why is clear.

Advances in communications technology have exposed *gaps* in copyright protection in the on-line environment. Existing transmission-type rights in the Copyright Act are *technology-specific* and are *limited in scope*. ...

When the Copyright Act was passed in 1968, the Internet and cable TV were in the realm of science fiction and it was thought that a wireless broadcasting right would cover all the possible broadcasting uses of copyright material. Because of the fact that the broadcasting right is technology-specific, the advent of the Internet and cable pay TV has meant that owners of copyright are *not able*

comprehensively to control the use of their work on those systems. Copyright owners, users of copyright material, ISPs and carriers have all become increasingly *frustrated by the uncertainty* surrounding copyright in the digital environment, particularly the Internet.⁶⁹ (emphasis added)

Throughout the late twentieth century, media ownership globalised (so far as media ownership rules support this), portfolios were diversified and media holdings consolidated. Earlier common sense distinctions between the print, radio, music, cinema and television sectors subsequently further blurred. However, for the most part, ‘convergence’ was simply code for repackaging and rebroadcasting ‘old media’ content in a range of formats.

Nonetheless, with ‘convergence’ as the buzzword of the future and the hope for industry expansion⁷⁰, it becomes arguable that there is, or at least will be, just one amorphous ‘entertainment industry’, with fading, historically distinct sectors. Given this development, the old industry-specific copyrights are projected as an ill-fit with the economic landscape.

If it is believed that copyright has always been there to service the ‘needs’ of industry and provide economic ‘incentives’ for cultural production, then it now becomes common sense that the rights need to be further generalised for the digital age—to erase the newly identified ‘gaps’ and ‘limitations’, and deliver ‘comprehensive control’ and ‘certainty’. Copyright owners, whether they be writers, musicians, artists *or* the generic ‘media owner’, now have the same level of entitlement to ‘protect’ their assets from unauthorised access and distribution.

Previously, there was legislative concern for copyright’s internal coherence as jurisprudence—defined with reference to private property principles and social priorities such as providing support for original cultural production. Out of respect for this, distinctions between Part III and Part IV rights were established. In the late twentieth century justifications for law reform have been externalised—the problem is with the new technology. A more personalised engagement with media is not seen as a positive development—by simply having access to a more diverse range of media, to many points of

distribution, to technologies that enhance a new form of durability for works and facilitate a higher degree of portability. These technological ‘advances’ are cast as threats to the ‘established’ industry order.

This means, of course, that the providers and purveyors of these new technologies have not been accorded the same status as the innovators of the early to mid-twentieth century. They are not seen as another new industry that also ‘needs’ new rights from copyright. Digital innovators have been constructed as outsiders, newcomers, freeloaders and rebels that need to learn their place within the domain of copyright. In the digital agenda debates, new technologies are represented as the cause of the problem—platforms for the new forms of deviancy that imperil the progress of entertainment markets. Accordingly, in place of new rights, internet service providers (ISPs) and computer software makers are only given new exceptions to infringement—that apply if they can prove they are compliant.⁷¹

Whereas previously there was a concern for regulatory capture by media owners with ‘access to the corridors of power’, with the digital agenda debates the preoccupation became one of parliament demonstrating legislative capacity to rectify an apparent regulatory ‘failure’. This meant fine-tuning market controls, by limiting the capacity of others to service new and emerging kinds of audiences for works.

The Realities of User Interactivity

In 2006 the *Time Magazine* person of the year was not another great man:

It’s a story about community and collaboration on a scale never seen before. It’s about the cosmic compendium of knowledge Wikipedia and the million-channel people’s network YouTube and the online metropolis MySpace. It’s about the many wresting power from the few and helping one another for nothing and how that will not only change the world, but also change the way the world changes ...

And for seizing the reins of the global media, for founding and framing the new digital democracy, for

working for nothing and beating the pros at their own game, TIME's Person of the Year for 2006 is you.⁷²

As is well discussed in the 'new media' literature, one of the most distinctive aspects of digital media is the change in the quality and nature of interaction with audiences, from that possible with mass media and broadcasting.⁷³ With the internet and narrowcast technologies, the audience is not preassembled or shackled to precise locations, limited modes of viewing and passive forms of interaction. They now become participants in defining their relation with the media 'provider'.

We can choose to learn about what is the latest great thing from a myriad of user-provided information sources—fan sites, blogs, SMS (Short Message Service), emails, friends' lists, playlists and so on. We can tap into MySpace, YouTube, Flickr, Wikipedia and Google to satisfy our transient whims for more. There are ample applications that allow us to download, upload, compile, share and store the data we still anachronistically refer to as photos, music, television programs and films. There is an emerging economics of 'sharing' that is about the economic value of sharing cultural content (and not about free and open source software).⁷⁴ But can copyright law think beyond 'an audience' and allow for an identity other than as passive recipient of a media message?

Superficially, digital copyright law has created the power to tip the balance strongly against 'user's rights', by, for example, supporting strong forms of digital rights management (DRM) and restricting access to circumvention tools⁷⁵, and obliging service providers to promptly remove allegedly infringing material.⁷⁶ However, historically, users have been very sceptical of these legislative initiatives.

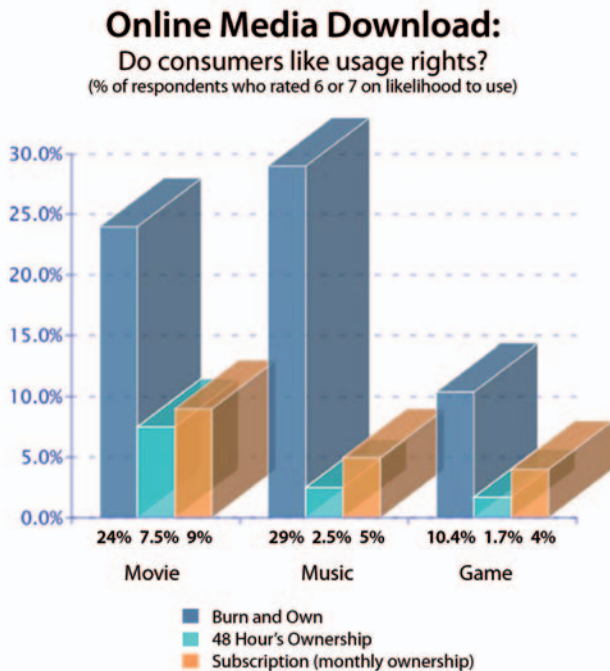
In the 1990s there were a multitude of websites devoted to posting online and mocking the latest 'cease and desist' letters from media owners received by fandom, voicing outrage and pillorying media companies for their contemptible attitude of 'proprietaryship' towards audiences. The bad press led to some softening of attitudes and legal practice towards copyright and trademark infringement by the fan base. These developments supported a body of academic literature.⁷⁷

Exclusive content deals, such as that forged in the mid-1990s between Microsoft Network and Paramount/Viacom that made some

high-demand content only available to Internet Explorer users and not accessible to Apple Mac or Netscape users, were not renewed. ‘Star Trek fans spoke, and we listened’, said David Wertheimer, president of Paramount Digital Entertainment.⁷⁸

Anti-piracy messages have been continually diluted by the profiling of well-regarded artists who distance themselves from the official position of the Recording Industry Association of America, and by the emergence of mainstream ‘social networking’ stars such as Lily Allen and the Arctic Monkeys where liberal online strategies were essential to their achieving phenomenal global success.⁷⁹ With the exception of Apple’s iTunes store, which is estimated to have 70 to 85 per cent of legal digital music in the US, pay-per-download music services have struggled, rife with indecision about business models and consumer demand. This is a market that generated US\$400 million in 2005 and is expected to reach US\$14 billion by 2011.⁸⁰

Figure 6.1



Source: Harry Wang, *Digital Rights: Content Ownership and Distribution*, Parks Associates, 2005.

There is a growing sensitivity to consumer awareness of, and irritation with, the more obviously restrictive forms of DRM, such as code that ties you to a particular player or platform, or times out.⁸¹ Market surveys show that consumers value the least restrictive options (see Figure 6.1).⁸²

But consumers will always respond to good-value content, even if it is delivered in a restricted environment.⁸³

Many consumer organisations are lobbying against DRM⁸⁴, and there is a move to produce handbooks to alert users to problems with it that can only increase its unpopularity.⁸⁵ Furthermore, in France there is continuing pressure to expand the role of competition law, especially in terms of third-party licensing of DRM.⁸⁶ Most recently, Apple Computer's Steve Jobs has sought to defend his corporation's decision to develop FairPlay DRM technology:

Since Apple does not own or control any music itself, it must license the rights to distribute music from others, primarily the 'big four' music companies: Universal, Sony BMG, Warner and EMI. These four companies control the distribution of over 70% of the world's music. When Apple approached these companies to license their music to distribute legally over the Internet, they were extremely cautious and required Apple to protect their music from being illegally copied. The solution was to create a DRM system, which envelopes each song purchased from the iTunes store in special and secret software so that it cannot be played on unauthorized devices.⁸⁷

Coincidentally, the licensing agreement with the Big Four is due for renegotiation. Jobs is carefully trying to position Apple to not take the blame for continuing with its iTunes restrictions. He may also be pushing for FairPlay to become the industry standard for DRM that Apple licences to others.⁸⁸ Audience disinterest and disobedience to the dictates and spirit of copyright and concern over showing any servility to the 'established' culture industry is now starting to be factored into business and marketing strategies.

This is not to suggest that 'interactive audiences' are beyond the

confines of consumerism. Convergence has simply led to different kinds of audience assemblages and marketing practices.

When convergence simply meant repackaging old content for new forms of delivery, corporate advertising strategy sought to maintain a consistent message across all the potential platforms. The strategy was one of blanket marketing drawing upon the psychological profile of the target generations. To maintain consumer interest the one idea was expressed in different ways—the ‘playful’ viral Web campaign, the billboard message, the print media, radio, free-to-air television advertising campaigns and so on: ‘This is believed to be more effective as there are multiple encodings of the same idea, which reinforces the impact on the consumer’.⁸⁹

However, this ‘blanket’ strategy is now giving way to much more sophisticated methods of communicating with audiences, and playing on their individual technological interests and abilities. The new method is transmedia planning.

Time Magazine recognised the foundations for it in December 2006 with the arrival of Web version 2.

The new Web is a very different thing. It’s a tool for bringing together the small contributions of millions of people and making them matter. Silicon Valley consultants call it Web 2.0, as if it were a new version of some old software. But it’s really a revolution.⁹⁰

Acknowledging the ‘revolution’ of interactivity among users involves recognition of the commercial value of the ‘sharing’ input. However, it is a mistake to think of this user interactivity and sharing of contributions in the old 1990s language of proprietary versus free flows of information. Transmedia is a new method of cultural production, where the numerous small accumulations of effort are available and able to be engaged in new media enterprises.

Originally transmedia was a concept used to explain the dynamics of fan-based fiction, where fans engaged in constructing new narratives surrounding characters and events. Some of this was commercially produced; for example, *Dr Who*, *Star Trek* and *Buffy the Vampire Slayer* novellas. These products were both derivative and

highly original, and, in a commercial sense, confused the traditional demarcation and hierarchy of ownership that copyright and trademark impose.

The success of transmedia story-telling was picked up on and reformed as part of new media advertising strategies, especially those targeting younger demographics. 'Transmedia planning' takes for granted the availability of audience access to multiple platforms and the attraction of active engagement with narratives, and directs these resources to serve corporate ends:

In this model, there would be an evolving non-linear brand narrative. Different channels could be used to communicate different, self-contained elements of the brand narrative that build to create a larger brand world. Consumers then pull different parts of the story together themselves. The beauty of this is that it is designed to generate brand communities, in the same way that *The Matrix* generates knowledge communities, as consumers come together to share elements of the narrative. It has a word of mouth driver built in.⁹¹

Transmedia concepts have already affected the delivery of mainstream television. Examples include current high-ranking programs in Australia such as *Lost*, *Desperate Housewives*, *Ugly Betty*—where additional incidental plot detail and 'add-on' content like interviews with stars may be revealed on the franchise web page. This 'interactivity' with the narrative is presumed to support franchise loyalty and longevity, and generate a bigger audience share through playground and water-cooler talk. Film genre examples include *The Matrix* and *Lord of the Rings* franchises, where web pages and computer games were utilised to deliver 'more connections' for audiences to interact with.⁹² In these examples traditional media forms are being pushed out into new terrain, and with that, the old notion of audience transforms.

The level beyond this includes tabloid current affairs television programs, blogs, forums, game shows and Massive Multiplayer Online Role-Playing Games (MMORPGs). Here, interaction with other participants and the outside world forms part of the unfolding

narrative experience, and reaction to those inputs is evident to the audience/players. Where individual contributions to the whole media experience are able to be identified and valued, a dialogue on 'virtual property' and the right to co-own user contributions is starting to emerge.⁹³ Copyright tests of transformative use and parody will also be challenged by these efforts which are separate but deeply collaborative in nature.⁹⁴

Beyond this are the new media vehicles such as Wikipedia, MySpace and YouTube. These form the latest level of 'mass' user collaboration. Compared with the aforementioned examples, with these sites it is quite hard to discern any particular direct control over the productions, or any commercial benefit to be had from encouraging any particular narrative line. Site owners can edit and remove unwelcome contributions and there are efforts to enforce copyright. However, the reality is that the size and scale of the enterprise ensures serious limits on copyright enforcement. For example, popular items can be removed by site managers, but they are most likely to simply be reposted from another address. As with DRM issues, overt 'management' of user/contributor interactions conflicts with the ethos of the medium, and intervention is likely to drive users to move on and contribute to other, more amenable alternatives.

What Copyright Is Missing

We now have many mainstream notions of audience interaction usurping the passive mass media notion, preferred by copyright. However, coming out of the Digital Agenda and the amendments brought about by Chapter 17 of the Australia–United States Free Trade Agreement, there is little appreciation of the significance of that change. We have had minor reforms to accommodate digital realities—a clumsily expressed, limited time and format-shifting exception⁹⁵, a parody exception⁹⁶, and confirmation that region encoding is not (generally) a 'technological protection measure'.⁹⁷ These are laughable. They fail to take into account the complexity of the changes to audiences that are part of the media age we are now in. They do nothing to address the social and economic context of uses of copyright material today, but only sustain the gap between law and social expectation. Further, our newly reformed copyright law is entirely focused on what we *were doing* with media a few years

ago. It suggests no legal capacity to understand and respond creatively to where these technologies and practices might be going.

This reflection on Big Media, broadcasting and copyright began with an exploration of the legislative and jurisprudential development of Part IV rights because it is that history that created the confined space the law is stuck in today. The problem with contemporary Australian copyright is not just that digital copyright laws reflect the sway of old media interests over new media ones. It is not simply that the laws are designed to suppress or outlaw everyday technological practice. The larger problem is the historical one. Copyright did not really know how to accommodate mass media such as broadcasting, and did it so crudely. It created a broad, ill-defined, far-reaching power for media owners to communicate with audiences in Parts III and IV of the Act. It created the right to assemble and market to an ongoing sequence of mass media audiences (with the add-on of broadcasting regulations to adjust that content, in line with general guidelines in the public interest).⁹⁸ Limited exclusive rights were then generalised by the courts, and even further abstracted by the digital agenda and subsequent revisions. While there was no direct right to own audiences created by the *Copyright Act*, that nonetheless is the current effect of the law.

The second part of this chapter explored the implications of this history and how far media practice has moved on from what copyright law has imagined is possible and desirable. For the time being, the retro-flavour of copyright does mean that Big Media can, so far as it chooses to, try and encumber the operation of the new digital devices and stifle development of a greater range of media services. However, this is an unrealistic long-term strategy. There is quite limited market growth in pursuing that option. Securing audience loyalty will be harder than it was in the past. Younger demographics will increasingly require some concessions to their technical appetites and interactive lifestyles. Eventually the laws and practices will have to change.

What is currently missing from Australian copyright law is comprehension of the realities of innovation and audiences today. What copyright needs to do about this is begin to offer something relevant to contemporary audiences to support the future of innovation. The alternative is that copyright remains the master of old media

aspirations, but it ceases to have any relevance to the future of cultural production.

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Notes

- ¹ With thanks to Lloyd Sharp for the good ideas, and Peter Maddigan for research assistance.
- ² Australian Consumers' Association, 'Submission to House of Representatives'; Maiden; Knight.
- ³ Hassall.
- ⁴ Kohler.
- ⁵ Moses.
- ⁶ Lee and Higgins.
- ⁷ Doctorow, 'Europe's Broadcast Flag'.
- ⁸ Lessig.
- ⁹ Murray. There is to date no comprehensive study of the influence of media owners on copyright law reform.
- ¹⁰ Sohn.
- ¹¹ See, for example, 'Who Owns the Media', *Stop Big Media*, <http://www.stopbigmedia.com/chart.php>

- ¹² Blu-Ray, for example, is supported by Sony, Apple, Dell, Hitachi, Hewlett-Packard, Panasonic, Pioneer, Philips, LG, Samsung, Metro-Goldwyn-Mayer, Walt Disney, Twentieth Century Fox, Paramount, Buena Vista, Lionsgate Entertainment, Universal Music, Sony BMG and Electronic Arts.
- ¹³ For a sceptical view of Apple Computers, see Doctorow, 'Opinion'.
- ¹⁴ Vise and Malseed; Jeanneney. See also Googlewatch: <http://www.google-watch.org/>
- ¹⁵ See Bowrey.
- ¹⁶ The *Berne Convention for the Protection of Literary and Artistic Works* was signed at Berne on 9 September 1886, revised at Berlin on 13 November 1908, and further revised by the *Rome Copyright Convention* signed at Rome on 2 June 1928. Article 11 *bis* gave authors of literary and artistic works the exclusive right of authorising the communication of their works to the public by radiocommunication.
- ¹⁷ UK, Board of Trade, Copyright Committee, p. 33, para. [86].
- ¹⁸ *ibid.*, p. 36, para. [99].
- ¹⁹ *ibid.*, p. 41, para. [117].
- ²⁰ It is interesting to note that the Gregory Committee was particularly moved by recent embarrassment caused to the BBC by the unauthorised circulation of 'indifferent' copies of BBC programming.
- ²¹ Copyright Law Review Committee.
- ²² Implemented as the law of Australia in the *Copyright Act 1912* (Cth).
- ²³ Copyright Law Review Committee, para. [24].
- ²⁴ *ibid.*, para. [286].
- ²⁵ *ibid.*, paras [282]–[283].
- ²⁶ *ibid.*, para. [286].
- ²⁷ Commonwealth, p. 1527 (Bowen). The provisions pertaining to sound recordings attracted the most criticism. See also *EMI Music Australia Pty Ltd v. Federation of Australian Commercial Television Stations* (1997) 74 FCR 485, pp. 488–98 (Lockhart J).
- ²⁸ See Brennan.
- ²⁹ Sound recordings, cinematograph films, television broadcasts, sound broadcasts, published editions.
- ³⁰ Commonwealth, p. 1932 (Buchanan).
- ³¹ *ibid.*, p. 1947 (Bryant).
- ³² *ibid.*, p. 1928 (Snedden).
- ³³ Sawyer, p. 12.
- ³⁴ See Drahos.
- ³⁵ Ampex sold the first Video Tape Recorder for US\$50 000 in 1956. The first Video Cassette Recorder was sold by Sony in the USA in 1971.
- ³⁶ In response to local experimentation and in line with developments overseas, the Commonwealth enacted the *Wireless Telegraphy Act 1905* (Cth) which made provision for the development of the wireless radio under strict government control. Likewise later with the emergence of television, the *Television and Broadcasting Act 1942* (Cth) regulated the provision of radio and television broadcasting: Australian Heritage Commission.

- ³⁷ Commonwealth, p. 1938 (Duthrie).
- ³⁸ *ibid.*, p. 1937.
- ³⁹ *ibid.*, p. 1947 (Bryant).
- ⁴⁰ (1998) 195 CLR 158.
- ⁴¹ *ibid.*, p. 163 (Gaudron, Gummow and Hayne JJ).
- ⁴² *TCN Channel Nine v. Network Ten* (2001) 108 FCR 235; *TCN Channel Nine v. Network Ten* [2001] FCA 841; *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417; *Network Ten v. TCN Channel Nine* (2004) 218 CLR 273; *TCN Channel Nine v. Network Ten* (No 2) (2005) 145 FCR 35.
- ⁴³ *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417, p. 420.
- ⁴⁴ *Copyright Act 1968* (Cth) s. 14.
- ⁴⁵ *ibid.*, s. 103A.
- ⁴⁶ *ibid.*, s. 103B.
- ⁴⁷ Including *ibid.*, ss 14, 24, 25, 87, 91, 99.
- ⁴⁸ *TCN Channel Nine v. Network Ten* (2001) 108 FCR 235, p. 272.
- ⁴⁹ *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417, p. 422 (Finkelstein J).
- ⁵⁰ *Network Ten v. TCN Channel Nine* (2004) 218 CLR 273, p. 281 (McHugh ACJ, Gummow and Hayne JJ).
- ⁵¹ Barron, p. 203; Handler.
- ⁵² *Network Ten v. TCN Channel Nine* (2004) 218 CLR 273, pp. 289–90 (McHugh ACJ, Gummow and Hayne JJ).
- ⁵³ *TCN Channel Nine v. Network Ten* (No 2) (2005) 145 FCR 35, p. 54 (Hely J).
- ⁵⁴ *Network Ten v. TCN Channel Nine* (2004) 218 CLR 273.
- ⁵⁵ Schlag.
- ⁵⁶ DiMaggio quoted in Lury, p. 63.
- ⁵⁷ There is a lot of debate concerning the politics of the structural determinism of needs. Communications and cultural studies suggest a much greater richness to popular culture than initially credited to it by Adorno and Horkheimer. See Adorno and Horkheimer; Kellner; Lee; Slater.
- ⁵⁸ Murdoch, cited by Bettig, p. 41.
- ⁵⁹ For an overview of the relevance of these given technological change, see Goldsmith et al.
- ⁶⁰ Lury, p. 59.
- ⁶¹ *ibid.*, pp. 54, 57.
- ⁶² *Telstra Corporation v. Australasian Performing Right Association* (1997) 191 CLR 140.
- ⁶³ *ibid.*, p. 156 (citing Luxmoore and Goddard LJ in *Ernest Turner Electrical Instruments v. Performing Right Society* [1943] Ch 167, pp. 175–6).
- ⁶⁴ *ibid.*
- ⁶⁵ See O'Regan et al.; Katz. The assemblage of audiences for advertisers also gives rise to associated challenges for broadcasting authorities such as 'cash for comment' incidents: see Leiboff.
- ⁶⁶ *Australian Performing Right Association v. Canterbury-Bankstown League Club* (1964) 5 FLR 415; *Rank Film Production v. Colin S Dodds* [1983] 2 NSWLR 553.

- ⁶⁷ Attorney General's Department, p. 2.
- ⁶⁸ See Bowrey.
- ⁶⁹ Williams.
- ⁷⁰ Murray.
- ⁷¹ For example, *Copyright Act 1968* (Cth) s. 112E, Part III, Div. 4A—Acts not constituting infringements of copyright in computer programs.
- ⁷² Grossman.
- ⁷³ Barlow; Flew; Jenkins, *Convergence Culture*.
- ⁷⁴ McGuire and Slater. See also the *Future of Music Coalition*, <http://www.futureofmusic.org>; Fisher.
- ⁷⁵ *Copyright Act 1968* (Cth) Part V, Div. 2A—Actions in relation to technological protection measures and electronic rights management information.
- ⁷⁶ *ibid.*, Part V, Div. 2AA—Limitation on remedies available against carriage service providers.
- ⁷⁷ See, for example, Jenkins, 'Star Trek Rerun'; Tushnet; Coombe.
- ⁷⁸ Peline.
- ⁷⁹ 'Digital Pop Star'.
- ⁸⁰ Holahan.
- ⁸¹ Bohn.
- ⁸² Wang.
- ⁸³ For example, some types of subscription-based gaming such as *World Of Warcraft* are enormously successful despite various levels of user restrictions and protections. Likewise users do still purchase regionally encoded DVDs.
- ⁸⁴ Australian Consumers' Association, *Response to the Attorney General's Department Issues Paper*.
- ⁸⁵ Electronic Frontier Foundation; Indicare.
- ⁸⁶ Gasser and Begue.
- ⁸⁷ Jobs.
- ⁸⁸ Miller.
- ⁸⁹ Jacob, quoted in Jenkins, 'How Transmedia Storytelling Begat Transmedia Planning'.
- ⁹⁰ Grossman.
- ⁹¹ Jacob, quoted in Jenkins, 'How Transmedia Storytelling Begat Transmedia Planning'.
- ⁹² Jenkins, 'Searching for the Origami Unicorn', in Jenkins, *Convergence Culture*, pp. 93–130. See also Nichols et al.
- ⁹³ Balkin and Noveck.
- ⁹⁴ For example, by making 'original' animations utilising MMORPG characters and settings.
- ⁹⁵ *Copyright Act 1968* (Cth) ss 47J, 109A, 110, 110AA, 111, 248D.
- ⁹⁶ *ibid.*, ss 41A, 103AA.
- ⁹⁷ *ibid.*, s. 10(1).
- ⁹⁸ Those content regulations are now falling away: see Given.

CHAPTER 7

Australia's Fair Dealing Exceptions

Do They Facilitate or Inhibit Creativity in the Production of Television Comedy?

Melissa de Zwart

Introduction

Australia has no constitutional guarantee of the protection of freedom of speech. What protection exists depends upon a tenuous connection of rights and defences under laws relating to copyright, defamation, obscenity, vilification and trade practices. How then do producers of light entertainment, comedy and social commentary television programs make decisions regarding the incorporation of pre-existing material, for the purposes of comment, review, criticism, ridicule and entertainment in their programs? Many television formats depend upon showing short clips of material from films, advertisements and other television programs to highlight humorous, absurd or unusual material; however, use of such material may be an infringement of the rights of the copyright owner. Depending upon the context, it is unlikely that the owner of the material would consent to use of the material in a critical or ridiculing context. Others may consent to use subject to payment of a fee, which may be prohibitively expensive or simply too administratively difficult to

obtain within the timeframe of television. Producers of such programs have therefore operated on the assumption that they will be safe from infringement on the basis of industry practice and goodwill, *de minimis* use or use not sufficient to constitute a 'substantial part', the fact that it is too costly or difficult to bring an infringement action, or that such use is permitted under the exceptions to the rights of owners contained in the *Copyright Act 1968* (Cth). The decision in *The Panel* case proved that these assumptions were misplaced.

This chapter will consider the issue of whether, in the context of television broadcasts, the exceptions to copyright encourage the creative re-use of existing works (and other subject matter) or inhibit it. It will focus, in particular, on the new parody and satire fair dealing provision, as this represents a significant enhancement of the current limited range of copyright exceptions.

The Australian Law

In Australia, exceptions are granted to the rights of the copyright owner largely pursuant to the concept of fair dealing. These rights are set out in various sections of the *Copyright Act 1968* (Cth). Australia adopted the concept of fair dealing from English law when it enacted the *Copyright Act 1912*, which was a re-enactment of the *Copyright Act 1911* (UK).¹ Therefore, there has been a close correlation between the development of English and Australian law in this area.² In order to constitute a fair dealing, the use of the work must be for one of the specified purposes; that is, research or study, criticism or review, news reporting, parody or satire, or professional advice provided by a legal practitioner or patent attorney. Unlike the open-ended fair use exception under s. 107 of the *Copyright Act* (US), there is no general right of fair dealing outside the context of these provisions. In addition, the use must satisfy the other criteria set out in the relevant section, such as sufficient acknowledgement of the original work.

For the purposes of considering use of copyright material by a television broadcaster or producer, this chapter will consider only three aspects of fair dealing: criticism or review, and the reporting of news, both dealt with in this section on Australian law; and parody and satire, addressed in the next section of the chapter.

Criticism or Review

Section 103A of the *Copyright Act 1968* (Cth) authorises a fair dealing with an audiovisual item for the purpose of criticism or review:

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of criticism or review, whether of the first-mentioned audio-visual item, another audio-visual item or a work, and a sufficient acknowledgement of the first-mentioned audio-visual item is made.³

In the key Australian case considering the meaning of the corresponding section dealing with copyright works, *De Garis v. Neville Jeffress Pidler*⁴, Beaumont J adopted the *Macquarie Dictionary* definitions of 'criticism'⁵ and 'review'⁶, concluding that 'one is the process and the other is the result of the critical application of mental faculties'.⁷ The case concerned the operation of a press-clipping service by Jeffress, who monitored newspapers for his clients on nominated topics and provided photocopies of relevant articles in return for a fee. In this test case he was found to have copied a number of newspaper articles written by the plaintiffs. Beaumont J concluded that as Jeffress's activities consisted only of scanning for articles on a specified subject matter and did not involve any mental task of analysis or evaluation, they could not therefore be classed as either criticism or review. Therefore, the criticism or review of the subject material must be done by the person seeking to rely on the exception, rather than the customer, or in the case of television, the audience. This may require explicit introduction or analysis by the host of the program or other contextual material to make it clear why the copyright material is being shown. For example, on *Rove Live*, Rove McManus has a 'What The ...?' segment which ridicules items sent in to him by viewers. Setting the criticism apart in this segment highlights the purpose and nature of his use of the material. The use must be more than merely to 'poke fun' at such items. More subtle use of material, aimed at an educated or specialised audience, which leaves it up to the audience to form a critical opinion may not satisfy this requirement.

The most recent Australian decision which considered fair dealing in the context of criticism and review was the Full Court of the Federal Court decision in *TCN Channel Nine v. Network Ten*.⁸ In that case, Channel Nine brought an action against Network Ten alleging that the broadcast of short extracts from twenty Channel Nine programs on the Network Ten program *The Panel* was an infringement of copyright. The action related to a weekly panel-style television program that reviewed highlights from the preceding week in areas of news, sport, current affairs and entertainment. It did this by showing extracts from relevant television programs originally broadcast on Channels Nine and Ten and other local and overseas networks. Such footage included scenes from soap operas, appearances by the Prime Minister on a daytime talk show and at an award ceremony, and various other excerpts demonstrating technical glitches and impromptu broadcasting problems. The excerpts were discussed by a panel of regulars and guests in a lighthearted and frequently humorous manner. Network Ten claimed that the use of the extracts was justified on the basis of fair dealing for the purposes of criticism or review, or additionally or in the alternative, for the purposes of reporting news.⁹

At first instance, Conti J undertook an extensive review of the authorities relating to fair dealing for the purposes of criticism or review and for the purposes of reporting news. On the basis of this review, Conti J concluded that the following principles applied to fair dealing:

- (i) fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;
- (ii) fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing [*sic*] truth of purpose;
- (iii) criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment[,], criticism and review may be strongly expressed;

- (iv) criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
- (v) an oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; 'the path of criticism is a public way';
- (vi) criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;
- (vii) 'news' is not restricted to current events; and
- (viii) 'news' may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.¹⁰

On this basis Conti J would have excused the use of eleven out of the twenty extracts. He concluded that there had not been any use of a substantial part of the relevant broadcasts. Therefore his findings regarding fair dealing are obiter. However, these principles were cited with apparent approval by Hely J who gave the leading judgment in the Full Court.¹¹ Channel Nine had challenged the conclusion by Conti J that the fairness of the dealing should be judged by an objective standard in relation to the relevant purpose (point (ii) above) and argued that Network Ten should be required to provide evidence of the purposes, intentions and motives of the program's producers. Hely J confirmed that the purpose is to be ascertained objectively. Hely J then considered ten segments which were the subject of the appeal by Channel Nine or contention by Network Ten. Hely J agreed with Conti J's conclusions in relation to seven of the ten segments. In relation to the poor disguises used during the brothel interview on *A Current Affair*, Hely J concluded that *The Panel* members were not criticising the producers of the program for failing to protect the anonymity of the people being interviewed, which would have amounted to criticism of the program: 'Rather, "The Panel" were simply poking fun at the disguises which the people had chosen, and using the Panel Segment for the purposes of entertainment'.¹²

Finkelstein J reached a different conclusion in relation to three broadcasts, holding that each was a fair dealing: an extract from *Today* which shows Boris Yeltsin shaking hands with three former Russian prime ministers; an extract showing the Prime Minister singing 'Happy Birthday' to Sir Donald Bradman; and a discussion of *Simply The Best*. Sundberg J agreed with Hely J's conclusions on the availability of fair dealing, except with respect to the extract from *Simply The Best*. Sundberg J stated that on each of his viewings of the broadcast of this extract it was clear to him that the criticism related to the set and 'the fact that it was not possible to determine the basis on which the audience was being asked to vote'.¹³ Therefore he concluded that fair dealing was made out with respect to that extract.

The disagreement between the three Federal Court judges regarding whether the use of a particular excerpt constituted a fair dealing highlights the difficulty of being able to accurately predict whether an intended use will be covered by the law of fair dealing. The court held by majority that there was infringement in relation to the screening of eleven of the extracts, including extracts from the *Midday* show, showing the Prime Minister singing 'Happy Birthday' to Sir Donald Bradman, and an extract from *A Current Affair*, highlighting the disguises used in a story exposing a brothel masquerading as an introduction agency. The fact that while the judges can agree broadly on the principles of fair dealing they can vary widely in their application creates significant uncertainty regarding practical application of the law to fair dealing. This uncertainty demonstrates the complexity and unpredictability of this defence. Disagreement between the judges even over the question of what constitutes criticism or review acts as a significant deterrent to many uses of copyright material.¹⁴

Creators, such as the producers of television programs like *The Panel*, who wish to make use of material already in existence, must bear the risk of whether the use to which they put the work will ultimately be deemed to constitute criticism or review, and further, whether such a use is held to be fair, by the court. In addition, as noted above, the need to justify the use of the material on the basis of criticism or review requires that the material be presented in a certain way. First, it may be necessary to introduce the material in a critical manner or context, in some cases disturbing the flow of

discussion. Second, the requirement of 'sufficient acknowledgement' of the source material must be met.¹⁵ Sufficient acknowledgement is defined in s. 10(1) in relation to a work as: 'an acknowledgement identifying the work by its title or other description and, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgement of his or her name is not to be made, also identifying the author'. As the definition in s. 10(1) is expressed only in relation to a work, what constitutes 'sufficient acknowledgement' in relation to other subject matter, such as a television broadcast, 'must fall to be determined by the circumstances of each "fair dealing ... for the purposes of criticism or review"'.¹⁶ It is a question of fact to be decided in relation to each individual use with respect to television broadcasts. Such identification may consist of the station logo or 'watermark' which are now commonly used by Australian broadcasters.¹⁷

Reporting of News

Section 103B provides for fair dealing with an audiovisual item for the purposes of the reporting of news:

- (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if:
 - (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the first-mentioned audio-visual item is made; or
 - (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.¹⁸

What constitutes 'news' was considered by Mason J in *Commonwealth v. John Fairfax*.¹⁹ This case concerned an application for an injunction to restrain the publication of a book containing previously unpublished government documents relating to various foreign affairs matters and publication of extracts from the book in

newspapers. The Australian Government sought to restrain publication of the book and extracts from it on the basis of ownership of copyright in the documents that made up the majority of the book. Mason J noted that publication of the documents would amount to infringement unless it was justified on the basis of ss 41 or 42 or according to the ‘so-called common law defence of “public interest”’.²⁰ He stated that the concept of ‘news’ is not restricted to current events; however, the fact that the documents were previously unpublished complicated the matter.²¹ Given this fact, Mason J seemed more inclined to prefer the common law defence of public interest, which would make ‘legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm.’²² This would also cover matters such as a threat to national security, breach of the law or danger to the public. However, there was no clear precedent in allowing such a defence to use of material like that under consideration in the case. Given this was an interlocutory proceeding, the question was decided in favour of the plaintiff.

In *De Garis*, Beaumont J again relied upon the *Macquarie Dictionary* in defining the concept of ‘news’.²³ Beaumont J accepted this as accurate for the purposes of s. 42(1) subject to the ‘possible extension mentioned by Mason J in *John Fairfax*’.²⁴ In this way, he appears to subsume the public interest defence referred to by Mason J, within the broader comprehension of the reporting of news defence under s. 42. He concluded that the reproduction of a review of three history books could not be considered to have been done for the requisite purpose of reporting of news.

Despite these decisions, it appears that judges are reluctant to construe the concept of ‘news’ too narrowly. In an interlocutory decision concerning an attempt by Channel Nine to prevent the Australian Broadcasting Corporation’s Channel Two from broadcasting the millennium New Year’s Eve celebrations on Sydney Harbour²⁵, Hill J considered whether Channel Two may have had a defence to possible infringement proceedings on the basis that it was for the purpose of or associated with the reporting of news under s. 42. Channel Nine argued that because the Channel Two broadcast would be hosted by HG Nelson and Roy Slaven, two well-known comedians, the program would be humorous and entertaining rather than newsworthy. Hill J

concluded that the distinction between news and entertainment was difficult to draw and 'the fact that humour is used does not necessarily negate the fact that what is being broadcast may be news'.²⁶ Therefore the broadcast could fall within s. 42.

Returning to the decision in *The Panel* case, Network Ten disagreed with the classification of *The Panel* as a comedy program despite station teasers which highlighted its humorous aspects, maintaining that it was current affairs presented in a lighthearted and entertaining way.²⁷ The court was prepared to concede that the use of humour and satire did not prevent the use from being fair in the context of reporting news: 'The fact that news coverage is interesting or even to some people entertaining, does not negate the fact that it could be news'.²⁸ Further, the use of the extract did not have to be contemporaneous with the event. The use of an extract dealing with drug taking in sport, originally screened ten days before the rebroadcast on *The Panel*, was justified both in the context of the Olympic Games, to be held in Sydney soon thereafter, and the general public debate regarding drug taking in sport.²⁹

In relation to the *Today* show extract, Finkelstein J said that the extract had to be considered in the context of current events:

When the segment was broadcast, the question whether Australia should become a republic was a significant political issue. The referendum for constitutional amendments had been announced, and the segment must be considered in that context. The discussion whether there should be an age limit imposed on a president, while considered in a humorous way because of Yeltsin's known drinking and memory problems, was newsworthy.³⁰

This appears to be a considerably broader test than that applied by the other judges and serves to illustrate the scope for debate about what falls within the concepts of criticism or review and the reporting of news. In relation to the Prime Minister singing 'Happy Birthday', Finkelstein J concluded that fair dealing was made out both on the grounds of criticism or review, as a review of the *Midday* show and its host, and as the reporting of news: 'In a sense, all behaviour of a Prime Minister can be regarded as "political"

because it may affect voters' perceptions and is newsworthy for that reason'.³¹

However, the difficulty of deciding in advance whether something is newsworthy is highlighted by the conclusion of Hely J, who believed that the footage of the Prime Minister being ignored by Glenn McGrath was not newsworthy as the incident had only been shown on *The Panel*: 'The only public embarrassment was created by The Panel's publicising of a background and unnoticed incident'.³² *The Panel* could not in effect use the footage to create the newsworthy event.

Hence the problem with the fair dealing provisions is the subjective nature of their application. Again, lack of ability to predict in advance whether a use of material may be permitted by the defence acts as a disincentive to reliance upon the fair dealing provisions by creators of such material, particularly in the context of live television where decisions are often made shortly before the program is put to air and even altered while on air.

Fairness

Sections 103A and 103B (and corresponding ss 41 and 42) differ significantly from the provisions relating to fair dealing for the purposes of research or study in s. 103C (and s. 40), because they do not provide the same degree of guidance regarding how to determine whether a dealing with a work in particular circumstances is 'fair'.³³ In addressing the question of 'fairness' in the context of criticism or review in *De Garis v. Neville Jeffress Pidler*³⁴, Beaumont J cited Lord Denning in the English decision of *Hubbard v. Vosper*.

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as the basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts

and long comments may be fair. Other considerations come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.³⁵

Applying these principles, Beaumont J concluded that Jeffress had reproduced the subject article in its entirety in the context of a commercial activity, that he did not add any independent work to any article by providing any comment or analysis, and therefore the use of the article could not be 'fair'.

In *Commonwealth v. John Fairfax*³⁶ Mason J held that publication of government documents was not a fair dealing because there was insufficient comment to constitute criticism or review. It was merely a 'vener, setting off what is essentially a publication of the plaintiff's documents'.³⁷ In that case, Mason J raised the issue of whether publication of extracts from previously unpublished documents could be considered fair. He concluded that the fact that the work was circulated without the author's consent was 'at least an important factor' in determining whether there had been a fair dealing with the work.³⁸ Mason J also suggested 'another possible approach' to the issue, stating that 'a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because the dealing promotes public knowledge and public discussion of government action'.³⁹ However, he declined to explore this concept further at the interlocutory stage.

In the interlocutory decision of *Wigginton v. Brisbane TV*, White J considered whether the broadcast of excerpts from videotaped recordings of Wigginton's hypnotic sessions, prepared as part of her defence on a charge of murder of Clyde Edward Baldock, could be justified on the basis of fair dealing for the purpose of reporting news.⁴⁰ Wigginton had been given public defence and the tapes were recordings of hypnotic sessions with her psychiatrist and psychologist on the authorisation of the Public Defender. The tapes had been tendered as evidence in her hearing before the Mental Health Tribunal. Copies of the tapes were leaked to several television stations and Wigginton and the state of Queensland (the owner of

copyright in the tapes) obtained injunctions restraining publication of the tapes in February 1991. In August 1992 Channel Seven sought discharge of those injunctions to enable it to show excerpts from the tapes in the context of an interview with the author of a book on the Baldock murder. It argued that use of up to three minutes of excerpts in the context of a seven-and-a-half-minute story would constitute a fair dealing under ss 103A and 103B.

Adopting Beaumont J's analysis of criticism and review and reporting of news from *De Garis v. Neville Jeffress Pidler*⁴¹, White J was prepared to consider that the use of two to three minutes of the tapes could constitute criticism 'but may fail as to the fairness of the dealing'.⁴² Further, it was open to find that the interview could be characterised as news. White J considered the observations of Mason J in *Commonwealth v. John Fairfax and Sons*⁴³, regarding the publication of 'leaked' documents, and concluded that 'the defendants will have real difficulty in maintaining the defence of fair dealing in the absence of consent by the State of Queensland to their use and the almost certain knowledge that they were "leaked" without the authority of the State'.⁴⁴

Therefore, in making a determination to use existing material on the basis of a fair dealing defence, the user must not only identify the purpose of the use but whether in all of the circumstances that use will be considered to be fair.

Remedying the Shortcomings of Fair Dealing: A Parody and Satire Defence

In May 2005, the Australian Government announced a review of the fair dealing exceptions, with a proposal to enact a US-style fair use defence, which could encompass a broad range of uses. The *Fair Use Issues Paper*⁴⁵ was prompted largely by concerns expressed in the reports prepared by the Joint Standing Committee on Treaties⁴⁶ and the Senate Select Committee on the AUSFTA⁴⁷, that the existing exceptions to copyright were too narrow in the context of the expansion of the copyright term pursuant to the Australia–United States Free Trade Agreement. A major focus of this review was the question of personal use, time-shifting and space-shifting, and many of those involved in the parliamentary reviews were horrified to learn that their nightly taping of television programs and uploading of music to

their iPods was in breach of the copyright laws. However, the question of the narrowness of the fair dealing exceptions with respect to creative re-use of copyright material was also raised, particularly in the context of the recent decision in *The Panel* case.

The concept of enacting a fair use-style defence was abandoned by the government in favour of a combination of specific exceptions, combined with a 'flexible dealing' provision, intended to encompass emerging uses.⁴⁸ A 'parody and satire' defence was originally proposed as part of this flexible dealing provision.⁴⁹ This exception was subject to satisfying the 'three step test' encapsulated in s. 200AB(1). That section provides that copyright in a work or other subject matter is not infringed by a use of the work or other subject matter if the use is covered by one of the purposes identified in the subsections and all of the following conditions exist: the circumstances of the use amount to a special case, the use does not conflict with a normal exploitation of the work or other subject matter, and the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.⁵⁰ This test reflects the test contained in Article 13 of TRIPS (*Agreement on Trade Related Aspects of Intellectual Property Protection*) and other international agreements.

Little insight was provided during the passage of the Copyright Amendment Bill into the reasons behind the enactment of the parody and satire defence. However, the Attorney-General expressed the view that the law would protect the Australian sense of humour:

Australians have always had an irreverent streak. Our cartoonists ensure sacred cows don't stay sacred for very long and comedians are merciless on those in public life. An integral part of their armoury is parody and satire—or, if you prefer, 'taking the micky' out of someone. However, our copyright laws have until now done very little to protect the way people use others' works or images to parody and satirise others in the name of entertainment. I have a Bill currently before the Senate which will ensure Australia's fine tradition of satire is safe. There will be a parody and satire exception for what the law calls 'fair dealing'.⁵¹

Several submissions to the Senate Standing Committee were strongly in favour of a parody and satire exception.⁵² Others, however, pointed out that while the US had a strong tradition of granting an exception for parody, the recognition of a satire defence would go beyond what was protected under US fair use law.⁵³ Some objected to the inclusion of a parody or satire defence at all.⁵⁴

The parody and satire exception was removed from s. 200AB during the revision of the exposure draft legislation and moved to the fair dealing provisions. The *Copyright Amendment Act 2006* (Cth) was passed in December 2006 and came into effect on 1 January 2007. Australia therefore has two new provisions permitting the use of material for the purpose of parody and satire: s. 41A dealing with copyright works⁵⁵ and s. 103AA dealing with audiovisual items.⁵⁶

What is 'Parody' or 'Satire' Under Australian Law?

As noted above, there remains some confusion regarding the definitions of parody and satire for the purposes of the exception. The decision to incorporate a parody or satire defence may initially have been justified on the basis that a parody defence exists under the US fair use law and the reference to satire was included on the basis that it meant essentially the same thing. However, there is a strong presumption under US law that while parody will be an acceptable use, satire will not. There was an explicit recognition during the Senate Committee hearings that the terms were subject to different interpretations and ultimately this matter was left open.⁵⁷ It therefore remains to be seen whether Australian courts will look to the US precedents in interpreting the meaning of parody or whether a truly local meaning will be developed.⁵⁸

The Fact Sheet produced by the Attorney-General's Department states that:

The amendments do not define the terms which are similar and can overlap. Satire often involves attacking an idea or attitude, an institution or a social practice, through irony, derision or wit. Parody often involves the imitation of the characteristic style of an author or a work for comic effect or ridicule.⁵⁹

As noted above, when previously faced with questions regarding the meaning of the terms used in the fair dealing sections, the courts have turned first to standard dictionary definitions. However, in this area, dictionary definitions shed little light on the subject, as they tend to refer to parody, burlesque and satire in a circular manner. For example, the *Macquarie Dictionary* defines parody as: '1. a humorous or satirical imitation of a serious piece of literature or writing ... 3. a burlesque imitation of a musical composition'.⁶⁰

Another influence may be the wealth of literature on the meaning of parody and satire in the context of literary criticism. It is possible that, lacking any legal precedents, courts may be tempted to simply apply understandings derived from other disciplines. The meaning of the terms 'parody' and 'satire' are notoriously unclear. The term 'parody' evolved from the Greek term 'parodia', which meant a song sung alongside the original.⁶¹ However, this meaning has changed over the last 2000 years and has acquired different cultural connotations. It may involve elements of humour, ridicule and serious comment but none of these attributes is fixed or absolute.⁶²

As the Australian law evolves it will be necessary to place literary and artistic interpretations of parody and satire in an appropriately legal context, to reduce lengthy legal debates as to which interpretations should be adopted by the courts.⁶³

The EU Information Society Directive permits member states to enact an exception to the rights of the copyright owner facilitating 'use for the purposes of caricature, parody or pastiche'.⁶⁴ The *Gowers Review of Intellectual Property* recently recommended the adoption of such a defence in UK law on the basis that it would reduce transaction costs across the EU and facilitate the creation of new works that 'create value'.⁶⁵ This means there is as yet little by way of existing UK precedent that will be of assistance to our courts.⁶⁶

Therefore, the temptation will be strong to look to US law in this area.

US Case Law on Parody and Satire

Section 107 of the *Copyright Act* (US) provides that the 'fair use' of copyright material is not an infringement. It provides that in determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The key case on parody under US law is the Supreme Court decision in *Campbell v. Acuff Rose Music*.⁶⁷ This case concerned a rap version by 2 Live Crew of Roy Orbison's 'Oh, Pretty Woman'. According to the defendants, the song was intended to satirise the original song by mocking its romantic tone. At the time when the case came before the court it was doubted whether a parody could qualify as fair use where it was used for profit. The defendants had sought, and been refused, permission to use the original music and lyrics. They continued with the use on the basis that it could be justified as a parody.

Two key issues arose with respect to step one of the test (the purpose and character of the use): how much of the original work could be taken, while still remaining under the fair use defence? Did the commercial nature of the use prevent it from being a fair use?

The court classified a parody as something which was by its very nature a transformative use, reworking aspects of the original work to create a new work that, in part, commented upon the original. A satire, on the other hand, characterised as a comment on something outside of the original work, could not be justified on this basis. Souter J, writing the opinion on behalf of the Supreme Court, expressed the view that:

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work ... If, on the

contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.⁶⁸

This suggests that a parody, being a work which targets the specific work, is protected, whereas a satire, which targets society or issues more broadly, may not be.⁶⁹ In his concurring opinion, Kennedy J went further than this, stating: 'The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)'.⁷⁰ He warns later courts to ensure that they do not accept that any 'commercial takeoff' is a parody.⁷¹ The mere fact that the later work makes humorous use of the earlier work should not be sufficient to grant it protection under the fair use doctrine. The implications of this will be discussed further below.

The suggestion that satire which targets society at large, rather than the subject work, should not be entitled to protection as a fair use had been made a couple of years earlier by Richard Posner in his article 'When Is Parody Fair Use?'.⁷² He argued that fair use should provide a defence to infringement in the case of parody only where the parodied work is the target of criticism, not merely as the vehicle for that criticism; and the parody must not use such a large proportion of the original work that it serves as a substitute for that work. He argued: 'The parodist should be entitled to take from the original no more than is necessary to make the parody effective'.⁷³ However, the fact that the parodist takes only a small amount of the copyrighted features is not determinative of fair use. In drawing the distinction between permissible 'target' parody and impermissible 'weapon' parody, Posner stated that there is no 'compelling reason to subsidize

social criticism by allowing writers to use copyrighted materials without compensating the copyright holder'.⁷⁴ Market failure would operate only where the owner would act out of personal interest in refusing permission to license a work. Although it rejected a market failure approach, the Supreme Court in *Campbell* went to great lengths to ensure that it could establish that the 2 Live Crew's rap song parodied, at least in part, the Roy Orbison song and focused upon the 'naivety' of the original.⁷⁵

However, characterisation of the second work as a parody in *Campbell* was only the beginning of the inquiry. The court must work its way through all of the fair use factors. Applying the second factor, the 'nature of the copyrighted work', the court held that this factor would carry little weight in a parody case, as parodies will almost always be of creative works.⁷⁶ In the case of the third factor, 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole', the court said that it was necessary for the defendants to take the heart of the work in conjuring up enough of the original work to create a parody.⁷⁷ The fourth factor, 'the effect of the use upon the potential market for or value of the copyrighted work', was held to be inconclusive as the court determined that there was not sufficient evidence regarding the harm to a potential rap market by 2 Live Crew's version. The matter was remanded for determination on the facts but was settled before judgment was given.

The majority of recent cases on parody have followed the guidance set down by the Supreme Court in *Campbell v. Acuff Rose Music*.⁷⁸ *Leibovitz v. Paramount Pictures Corporation*⁷⁹, decided shortly after *Campbell*, concerned a poster advertising the Leslie Nielsen film *Naked Gun 33 1/3 The Final Insult*. The poster was modelled upon Annie Leibovitz's photograph of a pregnant Demi Moore, which had appeared on the cover of *Vanity Fair* in August 1991. The poster depicted Nielsen as a naked pregnant woman, posed and shaded in a manner identical to Demi Moore. The court held that the poster qualified as a fair use on the basis of parody, concluding that the poster was a sufficient comment on the original, ridiculing the seriousness and pretentiousness of the Demi Moore photograph. In a footnote the court considered the argument that fair use, in this case on the basis of parody, should only be permitted in the case of market

failure—that is, where the owner would refuse to license such a use—and therefore should only be permitted where the comment upon the original work would be regarded as disparaging. The court rejected this narrowing of the defence and noted that the parodist need not demonstrate refusal to license in order to qualify under the defence.⁸⁰

*Suntrust Bank v. Houghton Mifflin*⁸¹ concerned a book, *The Wind Done Gone* ('TWDG'), which told the parallel story of Margaret Mitchell's *Gone With the Wind* ('GWTW') from the point of view of a black slave. The author, Alice Randall, used a large number of the characters and places, as well as retelling several of the incidents, from the earlier work. Randall claimed that her work 'is a critique of [GWTW's] depiction of slavery and the Civil War era American South'.⁸² The Court of Appeals agreed, concluding that TWDG is 'a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW'.⁸³ The court therefore went on to apply the fair use factors, finding on balance that they favoured Randall. Notably, the court had some difficulty in assessing whether the amount taken from the original was reasonable in the circumstances and noted that 'literary relevance is a highly subjective analysis ill-suited for judicial inquiry'.⁸⁴

In a case which provides an interesting counterpoint to *The Panel* case, *Sandra Kane v. Comedy Partners*⁸⁵, the New York District Court considered the use of a six-second image from a half-hour television show. The image, which showed the plaintiff dancing in a bikini, was taken from her public access television show. The clip was used to introduce a segment on a comedy show called *The Daily Show*, which according to the court 'mimics the format of a news program and analyses current events from a comic and satirical perspective'.⁸⁶ The court concluded that this was not a parody but was a protected use nonetheless, noting that the importance of deeming something a parody is the determination that the later work 'contains elements of commentary and criticism'.⁸⁷ It is interesting that the court relied so heavily on the context of the use of the clip, rather than the actual or direct commentary or criticism applied to the clip. This is a much broader application of the test than was applied in *The Panel* case, in which the Federal Court analysed in detail every single clip used by *The Panel* and its accompanying

commentary. This demonstrates the difficulty of expecting a court to undertake a (con)textual analysis.⁸⁸

A case which departs from the guidelines set down by the Supreme Court concerned a book, written in the style of Dr Seuss, about the OJ Simpson murder trial. In *Dr Seuss Enterprises v. Penguin Books*⁸⁹, the District Court granted a preliminary injunction on the basis that there was a strong likelihood that the defendant's book, *The Cat Not in the Hat! A Parody by Dr Juice*, infringed the plaintiff's copyright in *The Cat in the Hat*, and that the defence of fair use was unlikely to succeed at trial. Considering the question of whether a parody must target the subject work in order to be protected as a fair use, the court noted that while Kennedy J favoured the view that it must make a humorous or ironic commentary on the subject work, the majority judgment did not decide the question either way. Therefore, the court felt that in the absence of clear guidance the former Ninth Circuit rule should apply; that is, 'Only when the satirist wishes to parody the copyrighted work itself does the taking of protected expression from that work become permissible, and even then, only in such amounts as is required to fulfil the parodic purposes'.⁹⁰

In reaching this conclusion the court said that it is necessary to 'balance the interests of the public, the copyright owner and the parodist'.⁹¹ The court appeared keen to read down the extent of the defence for parodies largely on the basis of market failure, noting that owners would be very reluctant to license uses that ridicule their own work. Therefore, only true parodies are protected as they represent the situation where the user 'has no alternative to infringement' and 'it is fair to presume that the author would not profit from the granting of a licence'.⁹²

Thus, although *Campbell* is generally regarded as settling the application of fair use with respect to parody, the California District Courts are still applying a narrower market failure-based test. Even in the US, the dividing line between parody and satire remains an uncertain one, and hence the relevance of these cases to interpreting the new Australian law is limited.

Implications for Australia

Although Australia opted to remove the parody and satire exception from the flexible dealing exception, the exception must still comply

with the three-step test under international law.⁹³ Interestingly, the parody exception under US fair use law was the subject of questions from the EU as part of the Review of Legislation on Copyright and Related Rights in July 1996.⁹⁴ Asked to explain how the parody exception was compliant with the three-step test, the US stated that ‘not all parodies qualify as fair use under US law’.⁹⁵ In order to be protected, the second work must target and comment upon the copyrighted work.⁹⁶

The distinction between parody and satire suggested by Posner⁹⁷ and reflected in some US case law discussed above imposes a highly technical and subjective limitation on the operation of the parody defence, which may be confusing for would-be parodists to interpret and apply, thus operating as a disincentive to rely upon the doctrine to produce a socially useful work. A parody of social norms and practices may have far more public benefit than a parody of a specific work. This appears to have been reflected in the decision to protect both parody and satire in the new Australian amendments.

Given the difference between Australia and US case law in this area, it may be difficult to make an easy transition to the protection of parody and satire, particularly given that satire may not, in fact, be permitted by fair use. The Federal Court in *The Panel* demonstrated a very narrow approach to determining those uses that would be considered ‘fair’, analysing each extract and accompanying commentary. Finkelstein J in *The Panel (No 2)* in particular, made reference to the classic articulation of fair use in *Folsom v. Marsh*⁹⁸ and combined this with an inquiry regarding the nature of substantiality, in this way fusing the consideration of fair use with substantiality. He concludes that the question of substantiality involves answering the question: ‘Does what has been taken amount to “essentially the heart” of the copyrighted work?’⁹⁹ The US parody cases suggest that in order to qualify as a valid parody this is precisely what must be taken.

Therefore, there remains a lingering suggestion, despite *Campbell*, that the exception for parody under fair use exists only where a licence would be refused and where the target of the parody is the work itself. This raises interesting questions regarding how this would be interpreted by an Australian court attempting to apply the principles from *The Panel* case.

Another point of difference for Australia from the US law is the increasing influence of First Amendment jurisprudence on copyright. Freedom of communication is an important guiding principle, increasingly articulated under US law as being a consideration to be factored into the application of copyright. In *Eldred v. Ashcroft*, a case challenging the extension of the copyright term, the majority of the Supreme Court asserted that copyright law contains built-in accommodations of First Amendment principles in the idea/expression dichotomy and the fair use doctrine.¹⁰⁰ The majority concluded that the copyright clause empowers Congress to determine the best scope of copyright and it was not for the court to second-guess the wisdom of Congress in the way it went about exercising that power.¹⁰¹

This decision provides some interesting insights into the contours of US copyright law and may serve as a useful precedent for the consideration of the future shape of Australian copyright law. The US grants explicit recognition to the dual role of copyright law in the copyright clause of the constitution—to promote the public interest in the continued dissemination of works through granting a private reward to individual creators. The majority of the US Supreme Court in *Eldred* explicitly rejected any finding that an extension of the copyright term violated this balance. Rather, they recognised that concepts ‘built in’ to the *Copyright Act* such as the idea/expression dichotomy and fair use explicitly embody that balance. In other words, the US Supreme Court expressly recognised the importance of the fair use doctrine in furthering the specific goals of copyright.¹⁰²

Interestingly, the Second Reading Speech for the *Copyright Amendment Act 2006* stated that the parody and satire exception ‘promotes free speech and Australia’s fine tradition of satire by allowing our comedians and cartoonists to use copyright material for the purposes of parody or satire.’¹⁰³ The relationship between freedom of communication and copyright needs further exploration in the Australian context, but clearly there is scope for further consideration of the role of the parody and satire defence in this context.

Conclusion

Do the fair dealing exceptions facilitate or inhibit creativity in Australian television comedy?

Certainly the previously limited nature of the fair dealing provisions with respect to criticism or review and the reporting of news did little to promote the creative or transformative re-use of existing material. The new parody and satire fair dealing defence provides greater scope for such uses. However, until the meaning of the terms 'parody' and 'satire' acquire greater certainty, it is unlikely that creators of comedy or light entertainment will be seeking to rely heavily on this defence as the cost of 'getting it wrong' may prove too high. Some copyright owners recognise the benefit of allowing the creation of certain derivative works, whereas others may seek total control over the use of their material.

In the meantime, it is likely that the introduction of the specific parody and satire defence will at least allow a certain relaxing of some of the rules that have had to be applied to the creation of material to bring it at least arguably within the parameters of criticism or review or reporting of news, such as introductions and linking material.

In interpreting and applying the new sections, we should avoid making courts the forum for literary or artistic criticism. It is hoped that there may be a recognition of the social value of the medium generally without a review of each individual piece of footage or use of material in order to determine if the parody actually works or not. It is recommended that Australian courts follow the lead of courts in cases such as *Sandra Kane v. Comedy Partners*, where the court was willing to look in general at the nature of the program, rather than run through every individual use of the source material. A number of other issues, such as the relationship with the moral rights provisions, remain unsettled.

The *Copyright Act* recognises that creative works build on those that have gone before. Television programs such as *Supernatural* deliberately draw upon previous creations from their genre, providing viewers with references to old television programs such as *The X Files*, films such as *Dracula*, *The Exorcist* and *The Ring*, and books such as *The Shining*, as well as well-known urban legends, to create a sense of the viewer being part of a series of 'in jokes', or more significantly a cultural dialogue on the meaning of horror, suspense and folklore, and their place in our culture. These references do not take the place of the originals. Rather, it is likely that they will create new

audiences for the older material as younger audiences seek deeper meaning from the cultural references.

It is hoped that producers of Australian television content will feel greater liberation to create transformative materials with Australian cultural references. The introduction of a parody and satire defence is a major bonus for creators of television comedy, but it may take several years before its boundaries are set and its benefits are clearly determined.

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Notes

- ¹ The *Copyright Act 1911* (UK) was the first *Copyright Act* to refer explicitly to ‘fair dealing’.
- ² Australian case law on this subject is limited to a handful of cases, with Lord Denning’s formulation from *Hubbard v. Vosper* [1972] 2 QB 84, p. 94, still recognised as the classic definition of the concept; see discussion below. The Australian cases are: *Commonwealth of Australia v. John Fairfax*

- and Sons* (1980) 147 CLR 39; *Commonwealth of Australia v. Walsh* (1980) 147 CLR 61; *Copyright Agency v. Haines* [1982] 1 NSWLR 182; *De Garis v. Neville Jeffress Pidler* (1990) 37 FCR 99; *Wigginton v. Brisbane TV; Queensland v. TCN Channel Nine* (1992) 25 IPR 58; *Nine Network Australia v. Australian Broadcasting Corporation* (1999) 48 IPR 333; *TCN Channel Nine v. Network Ten* (2001) 108 FCR 235; *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417; *Network Ten v. TCN Channel Nine* (2004) 218 CLR 273; *TCN Channel Nine v. Network Ten (No 2)* (2005) 145 FCR 35.
- ³ See also *Copyright Act 1968* (Cth) s. 41, which provides for fair dealing with a work or adaptation of a work for the purposes of criticism or review of that or another work.
- ⁴ (1990) 37 FCR 99.
- ⁵ *ibid.*, p. 107: '1. the act or art of analysing and judging the quality of a literary or artistic work, etc *literary criticism*. 2. the act of passing judgement as to the merits of something ... 4. a critical comment, article or essay; a critique'. (emphasis in original)
- ⁶ *ibid.*: '1. a critical article or report, as in a periodical, or some literary work, commonly some work of recent appearance; a critique ...'.
- ⁷ *ibid.*
- ⁸ (2002) 118 FCR 417. For an analysis of this decision see de Zwart, 'Seriously Entertaining'. The High Court granted special leave to appeal about the issue of whether the display of each visual image and accompanying sounds constituted a 'television broadcast' in which copyright subsists. The majority (McHugh ACJ, Gummow and Hayne JJ) held that the Full Court had erred with respect to the interpretation of the meaning of a 'television broadcast' under the *Copyright Act*. The issue of fair dealing was not considered in any detail by the High Court: see de Zwart, 'Copyright in Television Broadcasts'. The matter was then remitted to the Full Court of the Federal Court for determination of the remaining issues: *TCN Channel Nine v. Network Ten (No 2)* (2005) 145 FCR 35; see de Zwart, 'TCN Channel Nine v. Network Ten (No 2)'.
- ⁹ As the subject matter of the dealing was a number of television broadcasts, the relevant sections were *Copyright Act 1968* (Cth) ss 103A, 103B.
- ¹⁰ *TCN Channel Nine v. Network Ten* (2001) 108 FCR 235, p. 285.
- ¹¹ *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417, pp. 438–9.
- ¹² *ibid.*, p. 443.
- ¹³ *ibid.*, p. 420.
- ¹⁴ And there was similar disagreement about what fell within the exception relating to reporting of news; see discussion below.
- ¹⁵ *Copyright Act 1968* (Cth) ss 41, 42(1)(a), 103A, 103B.
- ¹⁶ *TCN Channel Nine v. Network Ten* (2001) 108 FCR 235, p. 243.
- ¹⁷ *ibid.*, p. 279, citing *Pro Sieben Media AG v. Carlton UK Television* [1991] 1 WLR 605, p. 618. With respect to the individual extracts from the Channel Nine programs, Conti J held that the use of the onscreen watermark 'Ch 9' constituted sufficient acknowledgement: p. 292. The issue of sufficient acknowledgement was not pursued on appeal.

- ¹⁸ See also *Copyright Act 1968* (Cth) s. 42 which provides for fair dealing with a work or adaptation for the purpose of reporting news.
- ¹⁹ (1980) 147 CLR 39.
- ²⁰ *ibid.*, p. 54.
- ²¹ *ibid.*, p. 56.
- ²² *ibid.*, p. 57.
- ²³ *De Garis v. Neville Jeffress Pidler* (1990) 37 FCR 99, p. 109.
- ²⁴ *Commonwealth of Australia v. John Fairfax and Sons* (1980) 147 CLR 39.
- ²⁵ *Nine Network Australia v. Australian Broadcasting Corporation* (1999) 48 IPR 333.
- ²⁶ *ibid.*, p. 340. The reason the case was based on s. 42 was that Channel Nine claimed ownership of the various elements of the ‘spectacle’, including design drawings for the fireworks display and floating sea creatures, constituting artistic works, various models and constructions being works of artistic craftsmanship, and the script and schedule of events as a dramatic work.
- ²⁷ *TCN Channel Nine v. Network Ten* (2001) 108 FCR 235, pp. 239–40.
- ²⁸ *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417, p. 439 (Hely J) (citations omitted). See also *British Broadcasting Corporation v. British Sky Broadcasting* (1991) 21 IPR 503 where Scott J found that use of footage of the World Cup on a sport news program could constitute fair dealing for the purpose of reporting current events: *Copyright, Designs and Patents Act 1988* (UK) s. 30(2). The court held that the section was not limited to reporting on general news programs; pp. 515–16.
- ²⁹ *TCN Channel Nine v. Network Ten* (2002) 118 FCR 417, p. 444 (Hely J).
- ³⁰ *ibid.*, p. 424.
- ³¹ *ibid.*
- ³² *ibid.*, p. 444.
- ³³ See *Copyright Act 1968* (Cth) s. 40(2).
- ³⁴ (1990) 37 FCR 99, pp. 109–10.
- ³⁵ *Hubbard v. Vosper* [1972] 2 QB 84, p. 94.
- ³⁶ (1980) 147 CLR 39. See also *Commonwealth of Australia v. Walsh* (1980) 147 CLR 61.
- ³⁷ *Commonwealth of Australia v. John Fairfax and Sons* (1980) 147 CLR 39, p. 56. See also *De Garis v. Neville Jeffress Pidler* (1990) 37 FCR 99, p. 106 (citations omitted): ‘a work cannot be published under the pretence of quotation’.
- ³⁸ *Commonwealth of Australia v. John Fairfax and Sons* (1980) 147 CLR 39, p. 55. See *British Oxygen Co v. Liquid Air* [1925] Ch. 383, p. 393; *Hubbard v. Vosper* [1972] 2 QB 84, pp. 94–5; *Beloff v. Pressdram* [1973] 1 All ER 241, p. 264.
- ³⁹ *Commonwealth of Australia v. John Fairfax and Sons* (1980) 147 CLR 39, p. 55.
- ⁴⁰ (1992) 25 IPR 58.
- ⁴¹ (1990) 37 FCR 99, p. 107.
- ⁴² *Wigginton v. Brisbane TV; Queensland v. TCN Channel Nine* (1992) 25 IPR 58, p. 63.

- ⁴³ (1980) 147 CLR 39, p. 55 (citations omitted).
- ⁴⁴ *Wigginton v. Brisbane TV; Queensland v. TCN Channel Nine* (1992) 25 IPR 58, p. 63.
- ⁴⁵ Attorney-General's Department, *Fair Use and Other Copyright Exceptions*.
- ⁴⁶ Joint Standing Committee on Treaties.
- ⁴⁷ Senate Select Committee on the Free Trade Agreement between Australia and the US.
- ⁴⁸ The Copyright Amendment Bill 2006 Explanatory Memorandum, p. 8 observed that 'no significant interest supported fully adopting the US approach'.
- ⁴⁹ *Copyright Act 1968* (Cth) s. 200AB as originally drafted provided exceptions for use of copyright material by or on behalf of a body administering a library or archives for the purpose of maintaining or operating the library or archives; use by or on behalf of a body administering an educational institution for the purposes of giving educational instruction; use by a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject matter in a particular form, or someone else, for the purpose of obtaining a reproduction or copy of the work or other subject matter in another form or with another feature, that reduces the difficulty; and, for the purpose of parody and satire.
- ⁵⁰ See *Copyright Act 1968* (Cth) s. 200AB(7).
- ⁵¹ Ruddock, 'Parody Permit in Spirit of Fair Play'.
- ⁵² See, for example, Power, pp. 4–5; Australian Broadcasting Corporation, p. 4; Australian Subscription Television and Radio Association, p. 3.
- ⁵³ See, for example, Australian Copyright Council, p. 8; Copyright Agency Limited, p. 9.
- ⁵⁴ Australasian Performing Right Association Limited/Australasian Mechanical Copyright Owners' Society Limited, pp. 5–6.
- ⁵⁵ *Copyright Act 1968* (Cth) s. 41A: 'A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire'.
- ⁵⁶ *Copyright Act 1968* (Cth) s. 103AA: 'A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire'.
- ⁵⁷ See Australia, p. L&CA 60:
 Mr Bowman—This is an area where the definitions do overlap generally. For example, if you go to the *Macquarie Dictionary* and look at the first meaning given to 'parody', it is 'a humorous or satirical imitation'. So there is a degree to which the terms overlap.
 Senator LUDWIG—They seem to suggest parody is a mimic and satire is satirical copying or borrowing. I am open, but I thought I would ask your view.
 Mr Bowman—There is one interpretation of the two terms where parody is more a burlesque or humour directed at an original composition whereas satire might be ridicule or humour directed at some broader

social issue, such as a political or social subject matter. We are aware of the view that if you do draw a distinction between parody and satire which is not necessarily clear it should be limited to something that is like a comment or review of the original work but not going further for using the satire for broader social comment. But the government is also aware that there has been some support for transformative uses, where people take a work and use it for some wider social benefit use, and that satire in that broader use of audiovisual material or other copyright works as part of political discourse might be a special area of transformative uses that the community might think is justified.

⁵⁸ The question of how the defence will fit in with the exercise of moral rights also remains to be determined.

⁵⁹ Attorney-General's Department, *Copyright Amendment Act 2006—Fact Sheets*.

⁶⁰ *Macquarie Dictionary*, p. 1241. 'Satire' is defined as: '1. the use of irony, sarcasm, ridicule, etc., in exposing, denouncing, or deriding vice, folly, etc. 2. a literary composition, in verse or prose, in which vices, abuses, follies, etc., are held up to scorn, derision, or ridicule. 3. the species of literature constituted by such composition': p. 1507.

⁶¹ Burr, p. 72. See also Rutz, pp. 286–9.

⁶² Rose, pp. 25–32.

⁶³ See discussion in Fox, p. 620: 'some courts, in reaching their decisions, rely heavily on experts in literary and other art fields. This development is troubling because it can distract courts from the four factors that they must consider in the fair use analysis and take judges on a perilous route through the vagaries of literary and other forms of art criticism.'

⁶⁴ Art. 5(3)(k). Parody defences have been enacted in France, Spain and the Netherlands.

⁶⁵ HM Treasury, paras [4.89]–[4.90].

⁶⁶ See also Rutz.

⁶⁷ 510 US 569 (1994).

⁶⁸ *ibid.*, pp. 580–1.

⁶⁹ See also *Rogers v. Koons* 960 F 2d 301 (2nd Cir., 1992); *Fisher v. Dees* 794 F 2d 432 (9th Cir., 1986).

⁷⁰ *Campbell v. Acuff-Rose Music* 510 US 569, p. 597 (1994).

⁷¹ *ibid.*, p. 600.

⁷² Posner, p. 67.

⁷³ *ibid.*, p. 72. See also Brennan, p. 167.

⁷⁴ Posner, p. 73. For a critique of this approach see Merges, pp. 311–12. See also Light, pp. 625–32.

⁷⁵ *Campbell v. Acuff-Rose Music* 510 US 569, p. 583 (1994) (citations omitted):
While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a

comment on the naïveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

⁷⁶ *ibid.*, p. 586.

⁷⁷ *ibid.*, p. 588.

⁷⁸ See further Green, p. 6, where Green argues that the treatment of parody and satire in the Second Circuit is quite different from that in the Ninth Circuit: 'Second Circuit courts ... have merely ostensibly respected the parody-satire distinction. Second Circuit opinions frequently hold instances of satire to be within the technical definition of parody, thus fair use, based upon a particular element of the satire being targeted at the original'.

⁷⁹ 137 F 3d 109 (2nd Cir., 1998).

⁸⁰ For a contrary decision see *Columbia Pictures Industries v. Miramax* 11 F Supp 2d 1179 (CD CA 1998).

⁸¹ 268 F 3d 1257 (11th Cir., 2001).

⁸² *ibid.*, p. 1259.

⁸³ *ibid.*, p. 1268–9 (citations omitted).

⁸⁴ *ibid.*, p. 1273. For a contrary conclusion on this point, see the concurring judgment of Marcus CJ, pp. 1277–83.

⁸⁵ 2003 WL 22383387 (SDNY) (2003).

⁸⁶ *ibid.*, p. 1.

⁸⁷ *ibid.*, p. 4.

⁸⁸ See also *Mastercard International Incorporated v. Nader 2000 Primary Committee, Inc* 2004 WL 434404 (SDNY, 2004).

⁸⁹ 924 F Supp 1559 (SD CA, 1996).

⁹⁰ *ibid.*, pp. 1567–8 (citations omitted).

⁹¹ *ibid.*, p. 1568.

⁹² *ibid.*, p. 1569. See also *Columbia Pictures Industries v. Miramax Films Corp* 11 F Supp 2d 1179 (CD CA, 1998).

⁹³ Berne Convention, Art. 9(2), TRIPS, Art. 13 and WIPO Copyright Treaty, Art. 10 (Australia acceded to the WCT on 26 April 2007).

⁹⁴ World Trade Organization.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ See discussion above at n. 74.

⁹⁸ Citing 9 Fed Cas 342, p. 348 (1841) at *The Panel (No 2)* [2005] FCAFC 53, para. [14].

⁹⁹ *ibid.*, p. 45.

¹⁰⁰ *ibid.*, p. 219. See also *Re Aimster Copyright Litigation* 334 F 3d 643, p. 656 (1841).

¹⁰¹ *Eldred v. Ashcroft* 537 US 186 (2003), p. 222.

¹⁰² See further, McJohn, p. 95; McGowan, p. 281.

¹⁰³ Ruddock, *Second Reading Speech, Copyright Amendment Act 2006*.

CHAPTER 8

‘So You Want to Tape Off TV?’

Copyright Law, Digital Television and Personal Use

*Robin Wright*¹

Introduction

Leaving the machine set to tape your favourite show on the night you're out is a ubiquitous part of everyday Australian life. Australians have been enthusiastic users of video cassette recorder (VCR) technology since the introduction of domestic models onto the market in the 1970s. In 1984 there was a VCR in about 25 per cent of Australian homes. By 2002 this had risen to 89 per cent², and VCRs were widely used to copy television broadcasts for personal re-use—usually enabling a program to be viewed at a later time. This practice is now transferring to digital media with the adoption of digital recording devices. In 1984 in what became known as the Sony Betamax case³, the US Supreme Court held that time-shifting a television program for private, non-commercial use constituted a ‘fair use’ under US copyright law. This encouraged the mass-marketing of VCR devices in the US and internationally, including in Australia.

However, because Australian copyright law does not contain the ‘fair use’ provisions of US law, until a recent amendment to the *Copyright Act 1968* (Cth), most of the personal copying of television

broadcasts undertaken by Australian users of VCRs was likely to have technically infringed copyright.⁴ The Australian law has now changed, but the private broadcast recording provisions remain narrower, with many common uses of recorded audiovisual material still falling outside what is permitted.⁵ As this chapter outlines, much personal use of digital television content will still not come within any copyright exception, and viewers' ability to make use of statutory exceptions for television content may also be limited in the future by technological controls. Because the *Copyright Act* does not allow for many existing personal uses of digital content, let alone the more transformative uses that are emerging on digital platforms for user-generated content, two alternative developments can be anticipated. One would be the successful development of business models that license at least some viewer re-use of television content—that is, market mechanisms may provide for some of the creative actions of viewers. The other 'development' could be a re-run of the widespread violation of copyright law that has existed since VCRs became commonplace, but occurring on a wider scale and in a more substantial form as users are able to record, duplicate, relocate and re-use digital audiovisual content in new ways. Such increased use by viewers may not be as damaging to content owners as some of them fear—echoing the experience with VCRs—and could see Australian politicians, in many years time, finally catch up with the idea of a digital remix culture and introduce further exceptions into the *Copyright Act* in much the same way as the law has recently been adapted to accommodate the now decades-old VCR recording technology.

Copyright Before the Fair Use Inquiry

Before 11 December 2006, Australian copyright legislation contained a provision which permitted filming or recording broadcasts for private and domestic use, but it was accepted that this only protected the copier from infringing copyright in the broadcast signal itself, not in any underlying copyright material contained within the broadcast.⁶ So copying a feature film or drama series delivered via an Australian television broadcast would have infringed the copyright in the film or series, although not the copyright in the broadcast.

Effectively, VCR technology made most Australians copyright 'pirates', but until the advent of digital television technologies,

nobody paid any attention. The limited private broadcast copying provision in the *Copyright Act*—and its almost universal contravention—remained a long-ignored anomaly in Australian copyright law until it was considered during the inquiry undertaken in 2005 by the Attorney-General's Department into *Fair Use and other Copyright Exceptions* (fair use inquiry).⁷ This inquiry followed a recommendation from a 2004 inquiry by the Joint Standing Committee on Treaties into the implementation of the Australia–United States Free Trade Agreement (AUSFTA).⁸ Chapter 17 of the proposed AUSFTA required a number of changes to Australian copyright law to harmonise with US legislation, and this aroused concern that some of the fair use exceptions available to US citizens, such as the ability to time-shift a television program 'on a device such as a video recorder, or more recently other types of storage mediums'⁹, were not available to Australians. The issues paper released during the fair use inquiry noted:

The government is aware some common personal uses of copyright material infringe copyright. Examples include transferring music from a CD onto an MP3 or iPod player or copying a television broadcast to view later. Those engaged in such uses do not believe they are or should be considered copyright pirates.¹⁰

The fair use inquiry put the issue of personal taping of television content squarely into the wider debate surrounding the use of digital media, copyright and the internet. Digital television had been introduced in Australia in 2001 and the unauthorised uploading of digital television content onto video-sharing sites on the internet, such as YouTube, which began operation in 2005, was beginning to concern copyright owners.¹¹

Responses to the Fair Use Inquiry

The Attorney-General's Department received 162 submissions in response to the fair use inquiry's issues paper, including a number from broadcasting industry organisations such as the Australian Subscription Television and Radio Association (ASTRA), Screen Producers Association of Australia (SPAA), Special Broadcasting

Service (SBS), the copyright collecting society Screenrights, the Nine and Seven Networks, Australian Broadcasting Corporation (ABC) and the Ten Network.¹² Of these organisations, the majority supported an amendment to the *Copyright Act* to allow for some form of personal time-shifting or format-shifting of television content, but there were different opinions about the appropriate extent of any such permission.

Two of the broadcasting organisations who responded to the issues paper submitted that there should not be any change to the existing s. 111 provision. The Nine and Seven Networks submitted that in the digital environment, any right to copy material containing underlying copyright from a broadcast could erode 'the secondary market for retail sales and the commercial value of "repeat" broadcast rights'.¹³ The submission from SPAA similarly reflected their members' concerns that any extension of existing rights had the potential to cut into Australian producers' revenue from DVD and video sales.¹⁴

By contrast, the submission from the ABC supported time-shifting and format-shifting for private and domestic use, stating that these were 'essential and in the interests of its audience'.¹⁵ The other national broadcaster, SBS, was also in favour of exceptions to copyright for private time-shifting and format-shifting, but submitted that time-shifting of a broadcast should be allowed 'solely for the purpose of enabling the broadcast to be viewed or listed to by the person who copies the broadcast at a more convenient time'.¹⁶ And the response from the third commercial broadcaster, the Ten Network, did not oppose the introduction of a time-shifting exception for recording television broadcasts 'for the purpose of private and domestic use of the maker of the copy in order to allow a program to be viewed after the scheduled broadcast time by the person who copied the broadcast'. However, this should be 'strictly limited to the making of a temporary copy, in order to exclude copying for so-called "librarying" purposes' or distribution to friends, making further copies or modifying the original copy.¹⁷

The subscription television organisation ASTRA noted in their submission that their members were already providing customers with a personal digital video recorder service which allowed a subscriber to record programs for later viewing by accessing an electronic

program guide. They therefore supported an amendment to the *Copyright Act* which would allow copyright users to record a television broadcast for 'viewing that program at a later point', but specifically noted that it should 'be subject to the exercise of a broadcaster's right to implement a technological protection measure on their broadcasts'.¹⁸ Network Ten also made this point in their submission, stating that any provisions introduced to allow private copying of television broadcasts should not limit 'contractual restrictions or technological copy protection measures'.¹⁹ The collecting society Screenrights supported the addition of a private copying exception for television broadcasts, but on the basis that it should be remunerated via a 'statutory licence and an associated levy'.²⁰

A number of non-broadcast organisations also provided responses to the fair use inquiry regarding the time-shifting of television broadcasts. The Arts Law Centre of Australia and the Australian Copyright Council supported the private time-shifting of television broadcasts providing copyright owners received appropriate remuneration. They suggested that this could be most efficiently achieved through the introduction of a levy on blank media or recording devices to compensate copyright owners for the unremunerated copying of broadcasts.²¹ The Australian Consumers' Association pointed out that the behaviour and expectations of consumers was out of step with the existing law. It submitted that 'consumers can be educated to a greater respect for copyright material if they are not confronted with the dissonance of unenforceable rights at variance with everyday behaviour'.²²

The government did not release a report on the results of the inquiry but, in May 2006, the Attorney-General issued a media release announcing the introduction of 'significant copyright reforms which make our laws fairer for consumers and tougher on copyright pirates'.²³ The proposed changes would 'for the first time, make it legal for people to tape their favourite TV or radio program and play it at another time'. The announcement stated that the reforms had been guided by a number of principles, including:

- The need for copyright to keep pace with developments in technology and rapidly changing consumer behaviour.

- Recognising reasonable consumer use of technology to enjoy copyright material—Australian consumers should not be in a significantly worse position than consumers in similar countries.
- Reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners.²⁴

Legislative Change Implemented

The Bill to implement these changes was released in October 2006.²⁵ The Explanatory Memorandum noted that:

Video cassette recorders have been used to time-shift analogue television broadcasts in Australian homes since the 1970s. Today a range of new consumer devices (eg DVD recorders, Personal Video Recorders, and digital TV tuner cards for PCs) are being marketed to simplify and encourage the private copying of television broadcasts. Legal action has not been taken by copyright owners in Australia to stop such private copying. Nevertheless, such acts usually infringe copyright. Many ordinary Australians do not believe that ... 'time-shifting' a broadcast for personal use should be legally wrong with a risk of civil legal action, however unlikely. Failure to recognise such common practices diminishes respect for copyright and undermines the credibility of the Act.²⁶

The amended s. 111 included in the Bill was titled 'Recording broadcasts for replaying at more convenient time', rather than the previous title of 'Filming or recording broadcasts for private and domestic use'. Following the Bill's introduction there was a further period of public consultation and amendments made to some of its provisions. In the Bill as first introduced, the new s. 111 required that a recording be made in a 'domestic premises' and 'solely for private or domestic use by watching ... at a more convenient time' in order to be non-infringing. However, later amendments included the introduction of a new definition of 'private and domestic use' into s. 10(1)

of the *Copyright Act* to clarify that the recording could be made or watched ‘on or off domestic premises’. This recognised that: ‘The development of digital technologies is likely to result in increasing use of personal consumer devices and other means which enable individuals to record television and radio broadcasts on or off domestic premises.’²⁷ The Explanatory Memorandum to the Bill also confirmed that: ‘The revised wording of s. 111 enables an individual to record broadcasts, as well as view and listen to the recording, outside their homes as well as inside for private and domestic use.’²⁸

The amended provision therefore remained limited to recording broadcasts for replaying at a more convenient time and did not permit the maker of the recording to keep it indefinitely to be used over and over again. However, it did not include a number of other restrictions which had been mooted early in the process, such as only being allowed to view a copy once²⁹, not being permitted to share it with other household members³⁰, or not being able to record or view it outside the home, such as on portable devices. These changes reflected the government’s desire to ‘allow copyright to be used for socially useful purposes’ by permitting consumers to use the newly available digital technologies without harming the economic interests of copyright owners.³¹ But, of course, the provision does not extend to content obtained via non-broadcast platforms and it leaves to one side the larger issue of contracting out of copyright exceptions³², or the use of technological controls.

These changes to s. 111 occurred as part of a raft of changes to copyright legislation made late in 2006, which included a number aimed at providing users with the ability to engage more with media. One of the most striking of these reforms was the introduction of a new fair dealing exception for parody and satire³³, which addressed concerns about the limitations of Australia’s existing fair dealing exceptions. These limitations had come under scrutiny in *The Panel* case, which dealt with the re-use of television material under the fair dealing provisions for ‘criticism or review’ and ‘reporting news’ (discussed by Melissa de Zwart in this collection; see Chapter 7).³⁴ The introduction of this new parody and satire provision—which may permit a limited transformative use of copyright material—demonstrates a response to specific public policy considerations which have

arisen in the face of contemporary forms of media consumption and re-use.³⁵

Technological Protection Measures and Private Copying

The ease with which users can copy digital material and redistribute it over the internet has caused significant concern to copyright owners. In response to threats posed to existing business models by the unauthorised distribution of material over the internet, copyright owners have investigated technological measures that could be employed to restrict unauthorised copying of various types of media by technical means where legal prohibitions alone are not considered sufficient. In relation to the protection of free-to-air television broadcast content, a number of technologies have been developed for use with the different digital terrestrial transmission standards adopted in different jurisdictions. If such technologies were to be applied to free-to-air broadcasts in Australia, they could potentially allow copyright owners to restrict the copying of television content under s. 111.

At the same time as the changes which included the amendment to s. 111 were made to Australian copyright legislation, further changes were made to the *Copyright Act* to strengthen the prohibition against circumventing technological protection measures (TPMs).³⁶ The changes were required under the AUSFTA to harmonise Australia's legislation with the provisions contained in the US *Digital Millennium Copyright Act*.³⁷ Under these new anti-circumvention provisions, a copyright owner can take an action against anyone who circumvents a TPM which controls access to copyright material, or against anyone who deals in devices designed to circumvent a TPM which either controls access to copyright material or 'prevents, inhibits or restricts the doing of an act comprised in the copyright'.³⁸ It is unclear whether the technological schemes which have been developed to prevent the unauthorised redistribution of television broadcast content would fall within the new definition of a TPM, with David Brennan raising important doubts in his chapter in this collection.³⁹ However, the schemes which have been proposed in the US and Europe do contain components that are capable of using technical mechanisms 'to control the doing of an act comprised in

copyright' such as copying and redistributing. If these components were judged to be a TPM under Australian Law, then the limitations on manufacturing or dealing with devices which allow circumvention of such TPMs are likely to mean that if such a scheme was implemented in Australia, average television users could face a restricted ability to copy as permitted under s. 111.

In 2003 the US regulator, the Federal Communications Commission (FCC), promulgated regulations to implement a scheme to prevent the unauthorised redistribution of digital television broadcast material, called the Broadcast Flag. This scheme was to commence from July 2005.⁴⁰ It involved allowing broadcasters to insert a small digital identifier (the 'flag') into the Advanced Television Systems Committee (ATSC) digital broadcast stream that is used in the US for each program broadcast, which compliant digital reception devices would detect if it was set as 'on'. Once the flag was recognised as being on, the reception device would restrict any further re-use of that content on the basis of technological restrictions operating within the reception device itself. As Brennan notes, in order to be effective the scheme required the national regulation of manufacturers and importers to ensure that all receiving devices marketed in the US were broadcast flag-compliant. As part of the scheme, the FCC approved a number of different copy and redistribution control technologies for inclusion in broadcast flag-compliant reception devices.⁴¹ However, the FCC rules governing the broadcast flag scheme were challenged in the US Court of Appeal by a group of non-profit organisations that included the American Library Association and the Consumer Federation of America.⁴² These groups argued that the FCC had exceeded its statutory powers by attempting to regulate consumer electronic equipment, and the court agreed with their claim. This meant that the broadcast flag scheme did not come into operation in the US as planned. However, copyright owners continue to lobby Congress to provide the FCC with the requisite regulatory powers to implement the scheme.⁴³

A similar technical scheme, called the DVB Content Protection and Copy Management (CPCM) standard, is being developed in Europe by the Digital Video Broadcasting consortium. As Australia has adopted the DVB-T technical standard for the transmission of digital broadcast television, the DVB-CPCM standard, once

completed, could be proposed for implementation by broadcasters and copyright owners in Australia. The technical specifications which have been released so far indicate that the standard would allow for highly granulated usage control instructions to be embedded into a broadcast stream.⁴⁴ These include the ability to allow multiple copies, single copies or no copies to be made; to set a 'signalled time window' during which the content can be accessed; to limit the number of concurrent uses; to establish an authorised domain of devices between which content can be transferred; and to restrict redistribution to a limited geographical area. It also includes the ability to restrict certain types of analogue output and not to apply any controls to specific content.⁴⁵ While usage control restrictions in the broadcast flag scheme are implemented within each receiving device, in CPCM these controls would be specified within the broadcast stream itself.

As with the broadcast flag, in order to function the scheme would require the regulation of reception devices to ensure that they recognise the CPCM content control information embedded in the broadcast signal. There has recently been a change to the *Broadcasting Services Act 1992* (Cth), which provides the Australian Communications and Media Authority (ACMA) with the power to promulgate such regulations.⁴⁶ This would avoid the problem which occurred for the US regulator if such a scheme were proposed for adoption in Australia.

Technologies such as these may provide copyright owners with an additional mechanism to assist in preventing the unauthorised redistribution of material delivered via digital television broadcasts. However, there is concern about how effective they would be—even proponents indicate that they are only likely to create a 'speed bump' to restrict the average user.⁴⁷ There is also concern that once digital material is received by an analogue device, it could be redigitised to remove the flag.⁴⁸ In addition, even if such a scheme was introduced, there would now be a large number of legacy digital receiving devices in the community which were manufactured before the introduction of the scheme. These devices would not recognise the content control information included in the broadcast stream and therefore they would not restrict re-use of the content.⁴⁹ And it is unclear how enthusiastic governments would be about mandating the use of a particular technological device in all reception equipment.⁵⁰ In the

Australian context, there would be a further matter for consideration if such a re-use control scheme were proposed: the potential impact on the effectiveness of s. 111 and the ‘socially useful purposes’ which the government had in mind when crafting the recent amendments.

Private Use and New Business Models

Contemporary television viewers are interested in a closer interaction with the media than was available to previous generations. The ‘range of new devices’ referred to in the Explanatory Memorandum to the legislation amending s. 111 now often incorporate, or allow access to, digital editing and other media-manipulation software which encourage users to cut and paste all forms of media and combine it with their own creative work. As Brian Fitzgerald and Damien O’Brien have noted:

New digital technologies, along with the internet, have opened up enormous potential for what has become known as ‘remix’—cutting, pasting, mashing, sampling and so on. No longer are end users or consumers seen as passive receptors of information, but rather in the process of distributed and peer production, consumers can take on the role of producers.⁵¹

In this environment, new models for television content are being developed. The BBC identified the creative possibilities offered by such technologies for addressing the interest of users to re-use television material and in 2004 launched its Creative Archive project with the aim of allowing ‘people to download clips of BBC factual programmes from bbc.co.uk for non-commercial use, keep them on their PCs, manipulate and share them, so making the BBC’s archives more accessible to licence fee payers.’⁵²

User-generated video content sites such as YouTube have drawn considerable criticism from copyright owners for hosting infringing material copied off television broadcasts.⁵³ However, some copyright owners are also recognising the market potential of users who wish to use these technologies for their own creative output. It has recently been reported that EMI has entered into an agreement with YouTube:

EMI said it will work with YouTube parent company Google to develop business models enabling people to legitimately incorporate videos and performances from EMI artists into their use-generated content on YouTube. The record label said it will rely on YouTube's content management tools to track EMI content and compensate its artists, or in some cases, request the removal of copyrighted work.⁵⁴

Users' interest in interacting with television content offers both threats and opportunities for broadcasters and copyright owners. New business models are emerging which aim to harness the desire of users to make further use of television content without threatening economic returns to copyright owners. Australian subscription broadcasters already offer their customers digital recording devices with an internal hard drive linked to an electronic program guide, to allow copying and retention of television content.⁵⁵ Technologies such as TiVo⁵⁶ and Slingbox⁵⁷, although not yet available in Australia, combine on-demand and downloading content services with free-to-air reception, and allow users to record and redirect content to other devices or locations. These are proving to be attractive to consumers and are creating interesting business models internationally.

Recently in Australia, the Seven Network announced a partnership with a US private-equity firm to provide Australian TiVo services on a subscription basis. Seven is playing up the attraction of interactivity and downloading, and playing down any possible economic damage from allowing users to fast-forward through advertisements, claiming that the new service will provide a 'compelling interactive, free-to-air digital terrestrial TV offering'.⁵⁸ Content delivered via the service will be copy-protected and in order to operate correctly it will require the establishment of a uniform Electronic Program Guide (EPG) providing interactive program information for all free-to-air channels.

However, the issue of EPGs for free-to-air television has been controversial in Australia. In 2006 another Australian commercial broadcaster, the Nine Network, commenced action in the Federal Court against IceTV, a company producing an internet-based EPG.⁵⁹ Nine claims that IceTV has infringed the copyright in Nine's program

schedule by producing the guide. The service offered by IceTV is designed to operate with certain types of commercially available Digital Video Recorders (DVRs). It allows owners of these devices to select programs to record onto their DVR directly from the EPG, rather than having to manually enter advertised program times and risk incomplete or incorrect recordings due to time or program changes. If the court finds that IceTV is in breach of Nine's copyright, this could place restrictions on the development of such services in Australia. Nine may then decide not to license its guide to EPG service providers such as IceTV as such services allow DVR users to fast-forward through advertisements—potentially threatening Nine's revenue—or alternatively Nine may choose to license its guide only to certain service providers or under certain terms. For viewers there are obvious benefits to having access to a comprehensive EPG containing program information from all free-to-air channels (and subscription channels for that matter), and which links directly to any brand of home recording equipment such as a DVR. Following recent changes to the *Broadcasting Services Act 1992*, there is now a provision which allows for the development of industry codes, or for ACMA to develop mandatory industry standards, which deal with 'electronic program guides, including the provision of information for the purposes of compiling such guides'.⁶⁰ There may be an incentive for ACMA to act in this area, as the provision of EPGs in standard form across the industry could encourage the development of more attractive consumer devices and thus, potentially, the wider take-up of digital television

The User, Public Policy and the Television

The availability of digital technologies which enable the manipulation of digital media, whatever its form, is likely to lead to continuing pressure from users for access to television content for more than time-shifting. As Julie Cohen points out, a contemporary user 'engages cultural goods and artefacts found within the context of her culture through a variety of activities ranging from consumption to creative play'.⁶¹ Digital consumer devices encourage this form of interaction⁶², and television—arguably the most influential cultural artefact in countries like Australia—provides some of the most attractive and socially significant content.

The restricted, purpose-based fair dealing provisions in Australian copyright legislation and the lack of any exception allowing for personal transformative use of copyright material—except for the new fair dealing provision for parody and satire—have the potential to restrict the creative activities of Australian citizens if market mechanisms are not developed which enable the re-use of, and interaction with, television material. As outlined above, a range of market mechanisms may emerge, although their prognosis is far from certain. At the same time, the careful crafting of recent changes to s. 111 reflects an attempt by the government to accommodate at least some of the interests of users of copyright audiovisual material alongside the economic interests of copyright owners. But it is unclear if s. 111 will continue to operate effectively in the changing technological environment. Similarly, as argued by Melissa de Zwart in relation to the recently introduced parody and satire exception, there is the potential for the use of s. 111 to be restricted by other mechanisms available to copyright owners as new markets are developed and this has public policy implications:

The introduction of these defences does not address the potential to contract out of the defences or to avoid them by use of a technological protection measure. If such defences have been introduced to protect the public interest in freedom of communication, the ease of transacting in the electronic marketplace does not itself provide any justification for rendering the interest irrelevant.⁶³

How these interests—in communication and re-use and in marketing audiovisual content—are dealt with in the face of proposals for TPMs and contract-based business models for the delivery of interactive television, may prove to be a key practical testing ground for copyright law in light of the continuing rapid development of digital technologies and the market for consumer electronic devices. Two possible scenarios are that the market will develop in ways which provide viewers—or perhaps only consumers who have paid for re-use—with flexible opportunities to interact with audiovisual content in creative ways, or alternatively the ready availability of new digital consumer devices could lead to mass

infringement for personal use, much as occurred with the VCR. In this situation, the government may, some years down the track, again recognise a need for law reform in response to the everyday experience of broadcast media users in the contemporary technological environment.

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Notes

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CHAPTER 9

Flag Waving in the Digital Jungle

*David Brennan*¹

Introduction

This chapter will attempt to describe and explain an emergent feature of digital broadcast standards which in the US is known as the 'broadcast flag' and in Europe as the 'content protection and copy management' (CPCM) system. In this chapter they will each be referred to as flag technologies, for while they differ as to detail, they share the same fundamental nature. While more has been published on the US broadcast flag, the European CPCM flag is more recent and sophisticated, and is being formulated within the same digital broadcasting standard applicable in Australia. The chapter will also contrast the quite unique Japanese solution which encrypts at the source of broadcast.

It is convenient by way of introduction to attempt to more generally situate broadcast flag technologies and regulations. Terrestrial broadcast television is often referred to as free-to-air because it is typically distributed freely without technical restriction or limitation ('in the clear') to all who fall within its geographic footprint. Those within that broadcast footprint can freely receive the signal through generally available reception equipment. This free-to-air quality

generally arises from the public nature of the allocation and licensing of the broadcast spectrum. Public policy has traditionally ensured that the spectrum so allocated will only be used on a free-to-air basis.

Since at least the audio compact disc in the mid-1980s, digital delivery for the supply of mass entertainment has proliferated. From the mid-1990s the internet has emerged as a new means to deliver digital content to a mass market without the need to manufacture individual copies. In an internet-connected world, a single digital copy made available on the internet is subject to uncontrollable copying and further distribution—leaving to one side bandwidth and congestion issues. Members of the internet-connected public have at their disposal the means to access and publish material like never before. Therefore, in reaction to the possibility of unauthorised and uncontrollable internet distribution destroying markets for the sale of such content, copyright owners have, and copyright law has, responded by resort to technological protection. Part of the internet ‘copyright answer’ has been the use of, and the giving of legal protection to, digital rights management (DRM) technologies. Through such measures, business strategies are emerging to convert unauthorised internet distribution into authorised market avenues.

At the same time in developed economies terrestrial broadcasting is in the process of converting to exclusively digital delivery, a process likely to be completed within the next five years. For an audiovisual producer (and copyright owner) that wishes to digitally distribute its titles in an internet-connected world, it is faced with a plurality of choice. This choice has been described by the Motion Picture Association of America (MPAA) in a 2005 paper in these terms:

Digital satellite, digital cable, DRM-delivery to PCs, Telco TV and DVD and D-VHS packaged media all use content encryption and key management to protect content. Additionally, these systems use contractual mechanisms to require protection of content in accordance with compliance and robustness rules, e.g., product behavior and authorized outputs.²

As the MPAA observe: 'This sets Digital Broadcast TV apart from all other forms of digital content distribution as the only professional digital content distribution format that is unprotected'.³ It is 'unprotected' because of the nature of free-to-air broadcasting previously described.

This creates a conundrum for social policy. Copyright owners, faced with the threat of unauthorised and uncontrollable internet distribution of their content, may rationally seek to impose some form of control over whatever delivery means they elect, so as to prevent or inhibit that internet distribution. However, the very nature of free-to-air broadcasting tends to make it problematic to consider how control could be imposed and also preserve its fundamental nature of being 'in the clear'; freely available to be apprehended by all within its footprint. If digital terrestrial broadcasting fails to include technological protection measures, any titles included in the digital broadcast are readily amenable to unauthorised internet distribution. Therefore—at least under a prediction offered by the MPAA—copyright owners may become unwilling to license those titles for free-to-air digital broadcast, preferring instead to limit distribution to one of the avenues offering control. If this were to occur, over time free-to-air broadcast content would diminish, as quality titles migrated to those protected platforms.

This chapter seeks to consider what has been put forward as one solution to this conundrum: broadcast flag technologies and their related regulations. These technologies and regulations seek to preserve the 'in the clear' nature of terrestrial broadcasting, while affording a degree of technical protection which is primarily directed to preventing uncontrollable, unauthorised internet distribution.

Technology in the US, Europe and Japan

A broadcast flag is an electronic notice which is associated with a digital broadcast. The US implementation is its simplest form, comprising merely two bytes of information, which can be set as either 'on' or 'off' in respect of the associated broadcast.⁴ The proposed European CPCM flag is far more elaborate. However, flags are not effective technological protection measures in the sense understood in copyright. As merely a piece of descriptive code embedded within a broadcast, flags do not per se lock, encrypt or scramble

broadcasts prior to reception. Instead, the code is merely a request that hardware receivers limit what can be done with the broadcast after reception.

Regulatory mandate of hardware compliance with a flag request is the consequence of this light-handed nature. This regulation is necessary for three interrelated reasons: (i) a flag does not effect technical exclusion, and therefore not only are legacy digital receivers not affected by it but there is no technical need for future equipment to obey it in order to receive the broadcast; (ii) hardware which ignores the flag has generally greater functionality than hardware which respects the flag; and, (iii) future suppliers of non-compliant equipment would have a competitive advantage over compliant suppliers. Thus, without legal mandate, the whole exercise in applying a flag would be pointless.

The tightness of the relationship between the electronic notice that is the flag, and the regulations that mandate receiver compliance, has created confusing nomenclature. The term 'broadcast flag' has been applied in the US to both the electronic notice and the flag regulations promulgated in 2003 that mandate hardware compliance. The MPAA has explained that the 'broadcast flag' term 'is used both for the rights usage signaling information that is placed in the unencrypted broadcast and for the regulation that gives it meaning'.⁵ In this chapter, such confusing use of terminology will be avoided. The term 'flag' is used to refer only to the electronic notice, whereas the term 'mandate' is used to refer to public laws that require hardware to recognise the presence of a flag request. Taken together, a flag and its mandate is referred to as a 'regime'.

While the US and European broadcast flags share the same fundamental nature, they differ markedly in their modes of implementation. The US flag relies upon public law not only to mandate hardware recognition but also to specify hardware behaviour. A future European CPCM flag will also need to rely upon public law to mandate hardware recognition. However, once recognised, hardware behaviour is specified by the CPCM standard itself. The Japanese solution is of a different nature altogether. It is not a flag-based approach but relies instead upon encryption at the source. It will be considered by way of contrast with the more light-handed flag-based approaches.

US Broadcast Flag

The US flag is able to be included with the broadcast because the US digital television broadcast standard (devised by the Advanced Television Standards Committee) reserved a place—two bytes—in the signal for a ‘redistribution control descriptor’.⁶ This term conveys its primary objective: effecting control on the redistribution of digital broadcast content beyond the domestic environment. ‘Beyond the domestic environment’ includes most obviously ‘the internet’. As explained above, the broadcast flag as a technical component is essentially a simple piece of code which can be set as ‘on’ or ‘off’. Importantly, the flag alone does not effect any technical control. An ‘on’ setting only has effect to the extent that the receiving hardware is programmed or configured to respond. As observed above, it is how public law regulations mandate hardware to respond to the receipt of flagged content that effectively implements the flag’s objective to technically control hardware behaviour. In other words, for the flag as an aspect of the broadcast standard to be effective, it requires hardware obedience which could only be ensured by complementary public law that mandates hardware behaviour once it has received a flagged broadcast. Therefore, the US flag cannot be meaningfully considered without describing this legal mandate which, given the simplicity of the electronic notice, serves as a complementary specification for digital receiving devices.

The joint proponents of the US flag legal mandate, which was promulgated by the Federal Communication Commission (FCC) in 2003, included the MPAA, broadcast networks, certain consumer home electronics companies and certain technology companies.⁷ The form of the hardware mandate can be properly regarded as a consensus position between these groups. The FCC flag mandate required that receiving devices made after 1 July 2005 should permit the electronic outputting of a flagged broadcast in one of six ways, summarised as follows:

- 1 in analog form
- 2 in a form suitable for conventional cable or satellite retransmission provided the flag is retained
- 3 in digital form to an authorised digital output technology
- 4 in encrypted digital form to a product controlled by the receiver

- 5 in encrypted digital form to an integrated recording device
uniquely associated with the receiver
- 6 in a low-definition digital format when the receiver is incorp-
orated in computing equipment.⁸

The objective of the mandate was to give legal consequence to the redistribution control descriptor (the flag) being 'on'. It is the mandate which provides the true source of control in respect of flagged content by regulating equipment suppliers; the flag per se does not effect technical control. To put it another way, control is de jure and not de facto.

Some features of this flag regime should be pointed out. First there is the so-called 'analogue hole'; the US flag regime does not seek to prevent analogue output being converted back into a digital format for internet distribution. Second, the category of output—to 'authorized digital output technology'—involves outputs which themselves require regulatory authorisation. In the only such FCC determination in 2005, several different copying technologies were approved, as were technologies which permitted the secure on-transmission to up to ten devices uniquely associated with the outputting receiver.⁹ The latter defined a type of 'authorised domain' (to use a term deployed in the CPCM system) of permitted digital redistribution. Third, there is nothing in the mandate that requires that equipment receiving flagged broadcasts must limit the number of digital copies that can be made from the broadcast. Fourth, because the flag is merely a request included with an unencrypted broadcast, any appropriate receiver can technically render the flagged broadcast and output the digital feed in any form. This means that the imposition of the flag is entirely consistent with the 'in the clear' nature of free-to-air broadcasting earlier described. Moreover, it also means that the flag is 'backwards compatible'; it has no effect upon the operation of older, legacy digital receivers which are not capable of recognising the flag.¹⁰ The mandate did not require that legacy devices behave in any way on receipt of flagged content.

European CPCM System

A proposed European broadcast flag known as the CPCM system remains in a protracted gestation. Its provenance is with the Digital

Video Broadcasting (DVB) Project, an industry consortium of broadcasters, consumer home electronics manufacturers, technology companies and regulators. It was formed in 1993 after industry failed to accept a European Commission-supported, and EU-mandated, digital satellite broadcasting standard.¹¹ Therefore, the DVB consortium can be seen as having its origins in a rejection of a bureaucratic, top-down imposition of technical standards. The CPCM system is an embryonic technical standard coming out of the consortium which is intended to apply to a plurality of content delivery modes—not only digital broadcasting. However, coming as it does from the DVB consortium, a primary driver appears to be digital broadcasting, and this chapter will primarily focus upon the CPCM system's broadcast applications. A descriptive specification known as the Reference Model was published in 2005, as part of the 'CPCM Bluebook'¹², and is currently in the process of being reduced to a technical specification for submission to the European Telecommunications Standards Institute (ETSI).¹³

The arrival at an industry-based consensus on the CPCM system was not straightforward. Chris Hibbert, Chair of the DVB-Copy Protection Technologies Group which was responsible for the formulation of the CPCM system, has explained that it took three years to merely arrive at the commercial (as opposed to technical) requirements for the CPCM system.¹⁴ The various interests were summarised by Hibbert along the following lines: copyright owners: 'to protect their revenues'; the consumer electronics industry: 'to protect the investment made by their customers in purchasing equipment and possible rejection of products which restrict content usage'; the public service broadcasters: 'concerned that signaling over-restrictive use of their broadcast content would conflict with their public service charters'; and pay TV broadcasters: 'looking for a means to integrate DVB-CPCM with existing conditional access systems to support new commercial offers such as push-VOD to PVR'.¹⁵ The summary gives a taste of the farrago of different positions that needed to be accommodated in the industry process.

Like the US broadcast flag, the CPCM system's predominate characteristic is a concern to confine subsequent communications or transmissions of a received broadcast. This is achieved through

CPCM-compliant devices respecting ‘usage state information’ (USI) coded within the digital medium. A critical aspect of the CPCM system is the flexibility and richness of the USI, which will reflect whatever usage rules have been set by the broadcaster or other relevant rights holder. A preface to the CPCM Bluebook is at pains to point out that:

CPCM is designed to accommodate a variety of business models. The existence of any particular field of USI does not imply that it will be asserted by a particular business, or that it will be allowed to be asserted, or that a particular implementation will require the full functionality described in the Reference Model.¹⁶

The usage rules, being the particular settings that may be elected by the content provider, are categorised into five groupings: (i) copy and movement controls; (ii) consumption control; (iii) propagation control; (iv) output control; and (v) ancillary control. Derived from the CPCM Bluebook, they are summarised below.

(i) Copy and Movement Controls

These controls relate to traditionally the cardinal exercise of rights in copyright—to make a copy. The possible settings that can be applied to content are:

- no restriction on copying (‘copy control not asserted’)
- exactly one copy allowable (‘copy once’) so that once a copy is created, no further copying would be allowed from it (‘copy no more’) except for a temporary buffer as described below for the ‘copy never’ setting
- no copies are allowed to be made (‘copy never’), except for a secure temporary buffer copy solely for the purpose of pausing of playback, or trick-play, where the buffer copy would be neither accessible to the user nor maintained longer than is necessary to provide the pause or trick-play function. (No buffering at all may be elected for content emanating from systems which provide their own pause or trick-play mechanism for the user, such as

DVD, so that any subsequent cascaded pause function within the CPCM system would be unnecessary and might cause confusion for the user ['copy never, zero retention'.])

- a move function which permits content to be transferred to another storage device ('move'), but where such functionality is permitted it must comply with other usage restrictions. (For example, when the content carries a 'copy no more' setting, then if moved to another storage medium the original copy must be no longer accessible.)¹⁷

(ii) Consumption Control

Consumption is a term that is applied in the CPCM Reference Model (and USI) to mean the intelligible rendering of content on devices. These are devices which have received content from a copy of the broadcast. The possible settings that can be applied to content are:

- time-based control, which would bar the consumption (intelligible rendering) or propagation (viewing, copying or movement within or beyond certain defined CPCM realms) of the content after a point in time. (This could be an absolute period [a specified date], or a period-defined initial acquisition or consumption [X days after acquisition or consumption].)
- usage control, which would limit the number of times content can be consumed (intelligibly rendered) or exported (released from the CPCM system).¹⁸

(iii) Propagation Control

'Propagation' under the Reference Model (and USI) relates to the ability to intelligibly render the broadcast content within a defined realm. The CPCM system defines a variety of different realms within which certain propagation is permitted and facilitated. The possible settings that can be applied to content are:

- 'restricted to authorised domain', which will permit outputting the content only to devices belonging to the authorised domain in which that content was first acquired. (The authorised domain comprises CPCM-compliant devices controlled by members of a single household, defined in turn as 'the social unit consisting of all individuals who live together, as occupants of the same domicile'.)

- ‘restricted to local environment’, which will permit outputting to devices in the immediate vicinity, assessed under a proximity test using a network tool used to measure the time it takes for electronic messages to pass between host points
- ‘restricted to localised authorised domain’, which permits outputting only to devices in both the authorised domain and the local environment. (A more specific area restriction is ‘restricted to geographically constrained authorised domain’, limited to devices which have the facility of verifying their geographic location.)
- ‘propagate to untrusted space’ (that is, unrestricted) so as to leave the realm of the CPCM system altogether. (Illustrative uses given for this included creative commons licensed material and promotional clips of commercial content.)¹⁹

(iv) Output Control

‘Output’ refers to the release of content beyond a defined realm.

- For consumption output (that is, in analogue form to devices in order to render the content intelligible to the human eye or ear), the possible settings that can be applied to content permit the:
 - 1 ability to enable and disable the output on analogue outputs for standard definition video
 - 2 ability to enable and disable the output on analogue outputs for high-definition video
 - 3 ability to ensure that, if image constraint is signalled, resolution is constrained within specified parameters prior to high-definition analogue output.
- For exported output (that is, transmission outside the CPCM system), the possible settings that can be applied to content permit:
 - 1 trusted export: a digital output to a trusted content protection system with no explicit control of the output
 - 2 controlled export: a digital output of content mapped to a trusted content protection system under the explicit control of usage rule
 - 3 untrusted export: a digital output or storage format that is neither trusted nor controlled
 - 4 analogue exported content: an unprotected analogue

output. (However, such output may be subject to the copy control usage rules whereby content carrying the copy control states of ‘copy never’ or ‘copy no more’ should not *become* analogue exported content.)²⁰

(v) Ancillary Control

A final setting provides the ability to select ‘do not scramble’ content which is transmitted under other rules within the CPCM system. Such scrambling (encryption) otherwise occurs to make more secure permitted propagation within the CPCM system.²¹ European free-to-air broadcasters (who required this setting in the Reference Model) have indicated that they will define settings under the USI whereby post-reception content scrambling should not be applied. The only restrictions such broadcasters have indicated that they will select are those which inhibit the uncontrolled exporting of content for internet communication—type (iv) above.²²

It is apparent that the CPCM system is more elaborate and quite distinct from the two bytes of data signalling either ‘on’ or ‘off’ that comprise the US broadcast flag. However, notwithstanding its complexity, the CPCM system shares a fundamental characteristic with the US flag. It, like the US flag, does not lock, encrypt or scramble the broadcast prior to a point of reception. The CPCM system is also based on merely a notice—albeit a notice, as shown above, with a far greater range of possible settings than merely ‘on’ or ‘off’. But as merely a notice it does not self-enforce submission to the technology. Consistent with its fundamental flag nature, legacy digital receivers are unaffected by the presence of CPCM encoding.²³ Compelling the obedience of future hardware to the entire CPCM system must come ultimately, like the US broadcast flag, from public law.²⁴

Japanese Source Encryption

An important comparison with these two models is the way in which Japan dealt with the issue in its free-to-air digital terrestrial broadcasting system. Japan uses the Integrated Service Digital Broadcasting (ISDB) standard, which is essentially a common standard across subscription digital satellite (ISDB-S) and free-to-air digital terrestrial (ISDB-T). It is this commonality which is critical in considering

the copyright solution adopted for the latter. In Japan, free-to-air broadcast is encrypted before transmission using the same conditional access system used for digital subscription satellite.²⁵ While access to the digital terrestrial broadcast is without charge (other than the general obligation, applicable for households with analogue or digital reception equipment, to enter into a receiver contract with the national Japanese broadcasting organisation, NHK), digital receivers decrypt the signal using an integrated circuit embedded in a conditional access card (known as the B-CAS).²⁶ In Japan, digital broadcast receivers are supplied with these cards, which must be inserted for the reception equipment to render digital broadcasts intelligibly.²⁷ After decryption, broadcasts of the major free-to-air broadcasters are encoded as 'Copy One Generation' and 'No Redistribution beyond the Home'. The 'Copy One Generation' controls have been explained in consumer information published by the Japanese Government in these terms:

Because with the copying of digital information the sound and picture quality does not deteriorate, a protective measure has been incorporated to protect copyright and prevent illegal copying. This is being only able to make one copy (copy once). Any digital TV recorded under 'copy once' will not be able to be copied by other digital recorders. (Copies can be made with analogue recorders)

However, data can be moved from hard disk to other recording media. If your recorder is equipped with 'move' capability, then recorded programs can be moved to other media. This process deletes the original recording. Example: A program recorded onto a hard disk can be moved to a DVD, but the original recording on the hard disk will be automatically deleted.²⁸

These copy controls have been the subject of controversy, and there has been a suggestion that they may be relaxed.²⁹ Apparently less controversial are the no-redistribution controls which entail the following four proprietary technological protection-system technologies:

- Analog video outputs must have analog Copy Generation Management System (CGMS-A) rights signaling applied;
- Uncompressed digital display outputs are restricted with high-bandwidth digital content protection (HDCP);
- Compressed digital recording outputs are restricted with digital transmission content protection (DTCP); and
- DVD recordings must be protected with content protection for recordable media (CPRM).³⁰

Critically, in Japan there seems to be no specific technological mandate in public law which requires hardware compliance with these restrictions. Rather, the use of encryption-supported conditional access technology controls the platform, and more tightly compels hardware obedience with these copyright-control settings. A distinction can be readily observed. The Japanese model technically protects broadcasts at the source and receivers are therefore technically obliged to obey the encoded conditions. Flag models rely upon obedient hardware to technically protect broadcasts post-reception and rely upon specific legal mandate to ensure that compliance.

Broadcasting Law in the US, Europe and Australia

One consequence of the looseness of the flag-technologies as copyright-control mechanisms is that they have the political appeal of backward compatibility. Legacy devices are unaffected. But another consequence is that their efficacy requires a public law mandate directed at *subsequent* equipment manufacturers.

US Law

As noted above, in 2003 a FCC rule-making represented such a hardware mandate.³¹ It required that from 1 July 2005, all digital broadcast reception equipment sold in the US must obey the six output constraints described above, one of which was defined in a subsequent 2005 determination that permitted limited and secure digital redistribution to a finite number of devices.³² In this way, once flagged broadcasts are transmitted into a future world populated exclusively

with the mandated hardware, there will be no easy way that digital broadcast content per se can be retransmitted or otherwise made available on the internet by the notorious 'guy sitting in his living room in his pajamas'.³³ All his receivers will deny him the ability to output the broadcast in digital high-definition format suitable for peer-to-peer, BitTorrent, YouTube or whatever other indiscriminate redistribution medium he chooses. The best he can do is to avail himself of the analogue hole or use the permitted lower-definition digital output from his computer's digital receiver.

In 2005, shortly before they were to come into effect, the US Court of Appeals for the District of Columbia Circuit struck down the FCC regulations as ultra vires.³⁴ The *Communications Act* provision relied upon by the FCC was construed as a power to regulate devices for the technical process of transmission and reception. The flag regulations were correctly understood by the court to relate to the behaviour of devices after the broadcast had been technically received.³⁵ In response to this decision, the joint proponents of the flag sought legislative reform to confer power upon the FCC to make valid flag regulations. To date, these efforts have been unsuccessful. This has been in part due to complications arising from interests associated with the US sound recording industry to ensure legislative power to promulgate regulations for a future, unspecified audio flag. It seems unlikely that there will be US legislative reform of any sort before the next congressional elections in 2008.

European Law

It is unclear by what means the CPCM system would be mandated in Europe. It is clear from the terms of the 2001 *Information Society Directive* that specific technological mandates were not to be favoured for technological protection measures in copyright law.³⁶ An alternative avenue might have been the revision which is currently underway to the 1989 *Television Without Frontiers Directive*.³⁷ The revised directive, renamed the *Audiovisual Media Services Directive*, proposes largely consumer protection-orientated rules for broadcasters. Although at one point a recital in the most recent draft descends into the realm of copyright (seeking to ensure access to short extracts for reportage), it appears unlikely that this directive would ultimately include any provisions which relate to a CPCM flag

mandate.³⁸ The present literature from the DVB consortium is laconic as to the precise legal means by which the CPCM system would be mandated in Europe.

An interesting point of possible distinction between the US and European flag systems arises from the differing extent of regulatory control between the two. The US flag's meaning in terms of control is defined by public law. The technology simply signals 'on' or 'off'. In Europe this could be somewhat reversed. The proposed European flag's meaning in terms of control is defined by that selectable within the five CPCM control genres; these are technical settings. If European law was to simply require the supply of CPCM-compliant hardware after a certain date, it would be the broadcaster (or rights holder) who would be choosing from the possible settings. This scenario was derided by Cory Doctorow of the Electronic Frontier Foundation (EFF) in a submission to a UK parliamentary committee:

In effect, CPCM and its constituent specifications amount to a complicated, lengthy, and, at present, secret body of private law that describes rules and restrictions potentially applicable to all manufacturers of DTV devices. It is already clear that at least some CPCM coauthors expect—and require—the co-operation of regulators to make this scheme obligatory upon these manufacturers.³⁹

A competing view was that the 'finely granulated control made possible by the CPCM system may provide additional regulatory possibilities for the protection of exceptions to copyright'.⁴⁰ This view imagines that any hardware compliance mandate could be coupled with regulations directed against broadcasters (and presumably other rights holders) that encode content with CPCM restrictions:

It seems that with CPCM, regulators could seek to prevent certain USI from being applied to particular areas of control—such as copy and movement control, consumption control or propagation control—and this could be done in relation to all or certain types of content.⁴¹

A similar type of point was raised before the FCC. Should broadcasters be given complete discretion as to whether they switch the flag on, or should FCC regulations fetter that choice? Public interest groups had submitted that any FCC rule-making should include 'a prohibition on use of the flag for news and public interest programming'.⁴² The FCC disagreed, preferring flag election to be a purely commercial matter for the broadcaster.⁴³ While it remains to be seen what shape (if any) European law takes in this area, it certainly appears that the proponents of the CPCM system are not envisaging regulations which extend beyond a straightforward hardware compliance mandate.

Australian Law

The Australian *Broadcasting Services Act 1992* (BSA) provides as a cardinal, defining obligation that commercial broadcasting services licensed to use the spectrum must provide programs that are 'able to be received on commonly available equipment' and 'made available free to the general public'.⁴⁴

In 2000 digital television broadcasting was regulated in the BSA. From that time, and as a condition of their licences, broadcasters were to comply with any regulation made by the body now known as the Australian Communications and Media Authority (ACMA), which ensured that they entered into no 'agreement, arrangement or understanding' in relation to the provision of domestic digital receivers unless those receivers are 'accessible by' all other broadcasters.⁴⁵ No such regulations have been made, and any such regulations would have been directed not at the suppliers of receiver hardware but rather licensee broadcasters who may have had dealings with those suppliers. As a legislative regime it would have been incapable of mandating hardware compliance with any future Australian broadcast flag.

This has been addressed as part of a swag of broadcasting law reforms that were made in late 2006 and came into force in May 2007.⁴⁶ A new Part 9A of the BSA confers on ACMA the power to make regulations setting the technical standards that relate to digital broadcasts and to the domestic reception equipment that is capable of receiving those digital broadcasts. The Part creates an offence and

a civil penalty for those who supply equipment which is 'capable of receiving' digital broadcasts, but does not comply with any regulated technical standards.⁴⁷ Apart from technical standards, ACMA was given power to determine regulated 'industry standards' under a new BSA Part 9B. That Part gives ACMA the power to determine what 'sections of the industry' are, and to prescribe industry standards which extend to anyone who is a 'participant in a section of the industry'.⁴⁸ Prescribed industry standards are intended to augment or bolster any existing voluntary industry codes, and prescribed industry standards made under Part 9B may not deal with matters of technical standards that are made under Part 9A.⁴⁹ The scope of prescribed industry standards that might be made is illustrated by a list which includes the labelling of domestic reception equipment.⁵⁰ It would therefore seem that hardware receiver suppliers fall within the concept of 'participants in a section of the industry'.

Is ACMA empowered under the reforms to mandate the supply in Australia of only flag-compliant receivers? It seems that if such a power does not exist under the technical standards provisions under Part 9A for reasons similar to those suggested by the DC Circuit Court of Appeals, the power almost certainly would exist under the industry standards provisions of Part 9B.

The WIPO Broadcasters' Treaty

The updating of broadcasting organisation protection has been discussed for some time within the World Intellectual Property Organization (WIPO). Broadcaster protection was omitted from the updating of copyright and the rights of performers and sound recording producers in a pair of 1996 WIPO treaties.⁵¹ Drafts of a new WIPO Treaty on the Protection of Broadcasting Organizations (Broadcasters' Treaty) have been circulating within WIPO since June 2004.⁵² To what extent are flag technologies and mandates being considered within the treaty-making processes? The answer seems to be, not much. There is certainly nothing in the most recent official draft of July 2006 which imposes an obligation of mandating, in national public law, hardware compliance with a broadcast flag.⁵³ It is also clear enough that broadcast flags do not fall within the concept of an 'effective technological protection measure' (ETPM), a concept previously deployed in the 1996 WIPO treaties.⁵⁴ Unlike the Japanese

system, flags provide no 'effective' technological protection in and of themselves. They do not need to be circumvented to access or copy or redistribute the broadcast—unless mere disobedience is considered circumvention, which it manifestly is not. What flags provide is a technical standard for which the law can mandate a degree of equipment compliance. However, the July 2006 draft may address broadcast flag technologies in another way. Flags, or at least certain flags, may instead be regarded as a type of 'electronic rights management information' (ERMI), also protected in the 1996 WIPO treaties and proposed to be similarly protected under the July 2006 Broadcasters' Treaty draft. However, under these provisions ERMI is protected only against removal or alteration⁵⁵; that is, there is no obligation to ensure obedience to ERMI. ERMI is defined in the July 2006 draft as

information which identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with (1) the broadcast or the signal prior to broadcast, (2) the retransmission, (3) transmission following fixation of the broadcast, (4) the making available of a fixed broadcast, or (5) a copy of a fixed broadcast.⁵⁶

Because this definition requires 'information about the terms and conditions of use of the broadcast', it raises the interesting question of whether the 'on' or 'off' two bytes of data which comprise the US broadcast flag could qualify under this definition, or whether such simple binary data would be too insubstantial to qualify. This chapter offers no answer to that question, other than to observe that the source of the terms and conditions resides not so much in the data itself, but in the FCC regulations which give the 'on' designation meaning. In contrast, it may be less ambiguous that the detailed settings of the CPCM system could comprise ERMI information of this sort, providing as it does in code, the substantive terms and conditions of the broadcast's use.

In the first half of 2007 WIPO published a pair of non-papers which proposed further revision to the July 2006 draft treaty. These were prepared in an attempt to reconcile quite divergent national views on the extent to which the Broadcasters' Treaty should reflect public interest concerns as opposed to the private interests of the broadcasting organisations. The papers proposed a scaling back of protection to a so-called 'signal-based' approach.⁵⁷ In these non-papers the ETPM and ERMI protections were made less detailed. The most recent of the two non-papers—dated April 2007—simply suggests the following:

Contracting Parties shall provide adequate and effective legal protection against unauthorized

- (i) decryption of an encrypted broadcast, or circumvention of any technological protection measure having the same effect as encryption;
- (ii) manufacture, importation, sale or any other act that makes available a device or system capable of decrypting an encrypted broadcast; and
- (iii) removal or alteration of any electronic rights management information used for the application of the protection of the broadcasting organizations.⁵⁸

Clearly, flags applied prior to broadcast do not encrypt the broadcast, nor are they measures which have 'the same effect as encryption'.⁵⁹ However, paragraphs (i) and (ii) seem to impose an obligation on a country such as Japan to ensure that its encrypted digital terrestrial broadcasts are protected from circumvention. The non-paper drafts leave ERMI undefined; however, if the definition in the July 2006 draft were to apply, the April non-paper's terms would provide the same sort of flag protection as the July 2006 draft: protection to a flag which qualifies as ERMI against its removal or alteration, but no obligation to ensure obedience.

The trajectory of the treaty-making process is uncertain. A note which prefaces the April 2007 non-paper explains that: 'The task of the preparation of a new non-paper has been complex because the opinions and comments expressed by the delegations diverge greatly, and in many cases point to opposite directions'.⁶⁰ Needless to say,

these are hardly inspiring words to anyone who is enthusiastic about seeing a concluded Broadcasters' Treaty in the near-term.⁶⁹

Conclusions

As foreshadowed in the introduction, the crucial argument made by the content owners (including the MPAA) supporting the flag regime as good broadcast policy, relates to the choice that producers of professional audiovisual content face in the absence of a flag regime. They can release their content in digital format for free-to-air broadcasting, in circumstances in which that content is amenable to uncontrollable and unauthorised internet distribution, or they can refuse to deal with that medium and distribute their content along other technologically protected channels which are buttressed by anti-circumvention copyright laws. Under the second option, free-to-air broadcast viewers would end up with second-rate content. One striking thing about this argument—which was essentially accepted by the FCC—is the assumption about the power of the MPAA and other content owners to deny free-to-air broadcasters content and to distribute that content through other channels. The MPAA can be understood as saying that, over time, 'broadcasters need our content more than the MPAA needs the broadcasters' medium'. The reason this statement seems plausible to policymakers is that broadcasting can be more and more seen to be just one of an increasing number of technological pathways along which a copyright producer could make content available. It is this more than anything else that gave the broadcast flag policy traction in the US.⁶¹ If CPCM proponents succeed in attracting European regulatory mandates, this reasoning will be a central policy justification, although the CPCM system can also be seen to facilitate certain uses within the so-called authorised domain, and permits free-to-air broadcasters to place a bar on post-reception encryption.

Another thing implicit in the central MPAA argument is that no policymaker would so derogate from the copyright owner's exclusive rights as to compel content to be licensed for free-to-air digital broadcasting. This assumption, while probably sound in the US, may not be so sound in other territories. Since 1928 a remunerated exception recognised in international copyright law permits the creation of a copyright exception for broadcasting so long as payment of a fair

royalty to the rights holder is guaranteed.⁶² One thing to perhaps consider is the future utilisation of this flexibility in territories where digital broadcasting occurs and relevant copyright interests have less political power.

In Australia, free-to-air broadcasters have more political power than audiovisual content providers. However, the condition that was a key driver of the flag regime in the US—the power of the MPAA—could be felt through the influence of the MPAA on US trade policy. It is possible to imagine a day when the US Congress finally has put the FCC on a solid legislative footing to promulgate a valid flag mandate. Not long after that day it is also imaginable that the US may attempt to export its broadcast flag regime to Australia through a round of Free Trade Agreement revisions. (From a US trade perspective it does make sense to export; there is no point in having flag mandates in place in the US if the same high-definition broadcast content can be easily made available on the internet by the ‘Aussie sitting in his living room in his pajamas’.) If this was to occur, the obligation would be likely to mirror whatever the US had in place and would perhaps be implemented here (and in other DVB digital broadcasting-standard countries) by mandating hardware obedience with those aspects of the CPCM flag that corresponded with the protected US flag. This might particularly focus upon the fourth type of CPCM setting: output controls. In any event, the Australian legislative framework does now appear to be in place for ACMA to make such regulations under either Part 9A or Part 9B of the *Broadcasting Services Act*.

At the other extreme from this scenario is the position of the EFF, which is a non-government organisation whose slogan dedicates it to ‘defending freedom in the digital world’. The EFF submissions to the FCC against the US flag mandate included: (1) that the flag was such a weak technological measure it was best described as a sieve⁶³, but (2) that it will also damage legitimate, non-infringing activities.⁶⁴ These were mutually exclusive positions argued cumulatively. The EFF position on flag technologies, as it is with any like issue, is that as a matter of public policy copyright should always yield to technology. This is highlighted in the solution proposed by the EFF, which said that if

consumer broadband bandwidth were to increase, content owners could obtain additional protection for theirDTV broadcast content by requiring that broadcasters transmit in higher resolution formats ... If consumer broadband capacities were to increase in the future, [a broadcaster] could begin broadcasting at higher resolutions, making it more difficult to redistribute the full-resolution content via the Internet.⁶⁵

In other words, all that is required is to let broadcasters compete with unauthorised internet distribution in a high-definition arms race; a kind of 'law of the techno-jungle solution'.

Good arguments could be made that flag regimes best belong either within a policy framework for copyright or the rights of broadcasting organisations, or within a broadcasting law policy framework. Flag mandates have the flavour of public law, rather than of private law creating private rights. In this respect they are more akin to traditional broadcasting law rather than the law of copyright or of the rights of broadcasting organisations. But this is not to say that flag mandates are unrelated to copyright. For while flag mandates may be public rather than private law, it is public law which exists in the shadow of the emerging norm of generic protection for technological protection measures in copyright—a point well made by the MPAA.

Whichever way flag mandates are considered, one striking thing about them is what technologically specific law they are.⁶⁶ In this respect, flag mandates have a somewhat similar nature to a little-discussed provision in the 1998 *Digital Millennium Copyright Act* (DMCA). This provision effectively mandated the patented Macrovision copy-protection technologies, requiring that all video cassette recorders sold into the US market eighteen months after the DMCA's enactment had to obey the serial copying Macrovision controls which applied to many analogue prerecorded videocassettes.⁶⁷ The underlying drafting philosophy of this provision—enacting specific technology mandates—was rejected for the 1996 WIPO treaties, which preferred such protection to be couched in technologically neutral terms. This can be seen in the related European and Australian developments since those treaties. Specific technology mandates

have not been enacted; rather, laws have been couched in terms of protection to generic technologies which have copyright-control effects. This has become an article of faith among policymakers, who are keen not to be interfering with market processes by picking certain technologies over others. If flag mandates emerge as a part of public law, they can be seen as belonging to a type of highly specific technology mandate akin to the DMCA's Macrovision laws of 1998. It is a type of law-making which has been largely rejected for the copyright system.

Given that the Japanese digital free-to-air encryption solution appears to be unique to that nation's technological, geographic and cultural circumstances, the question remains elsewhere as to how the law should provide for flag technologies, if at all. Accepting the policy argument for some form of technological protection on digital free-to-air-broadcasting, flag technologies do have appeal as being sufficiently light-handed to be accommodated within the open nature of free-to-air broadcasting. However, technology-specific and industry-specific mandates have an ugly 'command economy' feel. A slightly alternative approach might rely more on copyright and regard some flag-based systems (such as the CPCM) as a 'special type of ERMI' (SERMI). This would only occur once a specialist decision-making body, such as the US Copyright Office, was satisfied after a hearing that: (i) particular ERMI comprises an industry standard and it is reasonable in light of public policy; (ii) if patented technologies are involved, they will be licensed on public, fair and non-discriminatory terms; and (iii) equipment obedience can be specified and implementing that obedience will involve minimal cost and inconvenience to manufacturers.⁶⁸ Once these criteria are satisfied, a rule-making could declare the particular ERMI to be SERMI. This would have the consequence that suppliers of the implicated equipment must ensure that it technically obeys the conditions contained in the SERMI from a particular date. Enabling legislation could require such regulation to be limited for a finite number of years, to ensure that the obligation to obey an ageing SERMI is periodically reassessed. Needless to say, this approach necessarily entails a mandate, for otherwise the whole exercise in applying a flag to digital content would be tokenism. However, it is a more generic approach which arguably permits greater policy nuance, being not based on a

specific industry. The CPCM system, for example, has been created to be applied across a plurality of digital media. A legal approach such as the one suggested will mirror the broad-based nature of such a measure, and is more in keeping with the neutral treatment of such technical measures in copyright law.

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Notes

- ¹ This chapter is based upon a conference presentation entitled 'Waving the Flag in the Digital Jungle' given at the 12th Annual ACIPA Copyright Conference: From The Da Vinci Code to YouTube, Brisbane, 16 February 2007. I would like to thank John Orlando of CBS and Ted Shapiro of the MPAA for sharing their experience with me. Responsibility for the analysis, however, rests entirely with me.
- ² Williams, p. 2.
- ³ *ibid.*
- ⁴ *ibid.*, p. 8.
- ⁵ *ibid.*
- ⁶ *ibid.* For greater detail see *In the Matter of: Digital Broadcast Content Protection*, 18 FCC Rcd, p. 23550, pp. 23556–23560 (2003).
- ⁷ Fletcher, pp. 613, 621–5.
- ⁸ *In the Matter of: Digital Broadcast Content Protection*, 18 FCC Rcd, p. 23550 (2003), Appendix B.
- ⁹ *In the Matter of: Digital Output Protection Technology and Recording Method Certifications*, 19 FCC Rcd, p. 15876 (2004).
- ¹⁰ Fletcher, pp. 617–18.

- 11 Hibbert. See further Council Directive 92/38/EEC of 11 May 1992 on the adoption of standards for satellite broadcasting of television signals, as well as the broader discussion in Shapiro and Varian, pp. 218–23.
- 12 DVB Project. This publication includes within it other documents, including ‘CPCM Reference Model SB1496’ and ‘Usage State Information (USI) SB1497’. These documents are paginated separately and will be referred to in notes below as ‘CPCM Bluebook—Reference Model’ and ‘CPCM Bluebook—USI’.
- 13 Hibbert.
- 14 *ibid.*
- 15 *ibid.*
- 16 CPCM Bluebook, ‘CPCM Compliance’ Preface.
- 17 CPCM Bluebook—Reference Model, pp. 31–2.
- 18 *ibid.*, p. 32.
- 19 *ibid.*, pp. 29–30, 33–6.
- 20 *ibid.*, pp. 36–7; CPCM Bluebook—USI, pp. 19–20.
- 21 CPCM Bluebook—Reference Model, p. 37.
- 22 Hibbert.
- 23 In person at the Melbourne seminar, Chris Hibbert answered ‘absolutely none’ to the author’s question ‘What impact does the CPCM have on legacy digital receivers?’ See also Kenyon and Wright, pp. 338, 354.
- 24 Doctorow. Doctorow observes: ‘CPCM is not free-standing and capable of voluntary adoption by the private sector; it requires the force of law to be effective’.
- 25 Williams, pp. 6–8. For greater detail, see Asami.
- 26 Williams, pp. 6–8.
- 27 Asami, p. 7.
- 28 Ministry of Internal Affairs and Communications, p. 10.
- 29 Tanaka.
- 30 Williams, p. 6.
- 31 *In the Matter of: Digital Broadcast Content Protection*, 18 FCC Rcd, p. 23550 (2003).
- 32 *In the Matter of: Digital Output Protection Technology and Recording Method Certifications*, 19 FCC Rcd, p. 15876 (2004).
- 33 This was a character identified in the blogging context by Jonathan Klein, a former CBS executive: Kurtz.
- 34 *American Library Association v. FCC* 406 F 3d 689 (DC Cir., 2005).
- 35 *ibid.*, pp. 699–700.
- 36 Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, ch. III.
- 37 Council Directive 1989/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.
- 38 European Commission.
- 39 Doctorow (reference omitted).
- 40 Kenyon and Wright, p. 354.

- ⁴¹ *ibid.*, p. 358.
- ⁴² *In the Matter of: Digital Broadcast Content Protection*, 18 FCC Rcd, p. 23550, p. 23568 (2003).
- ⁴³ *ibid.*, pp. 23568–23569.
- ⁴⁴ *Broadcasting Services Act 1992* (Cth), s. 14.
- ⁴⁵ *ibid.*, Schedule 2, Standard Conditions Part 3, clause 7(1)(oa): ‘the licensee will comply with any regulations made for the purposes of clause 36B of Schedule 4’, where clause 36B deals with licensee agreements relating to the accessibility of domestic reception equipment. Clause 7(1)(oa) was reformed upon commencement of new Parts 9A and 9B.
- ⁴⁶ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth), s. 2.
- ⁴⁷ *Broadcasting Services Act 1992* (Cth), s. 130B(2).
- ⁴⁸ *ibid.*, ss 130G, 130H, 130V.
- ⁴⁹ *ibid.*, ss 130L(c), 130R–U.
- ⁵⁰ *ibid.*, s. 130K(3)(a). In the context of the issue of copyright in program guides, another possible area of industry standard-making is ‘the provision of information for the purpose of compiling electronic program guides’: s. 130K(3)(b).
- ⁵¹ WIPO Copyright Treaty, opened for signature 20 December 1996, 36 ILM 65, entered into force 6 March 2002; WIPO Performances and Phonograms Treaty, opened for signature 20 December 1996, 36 ILM 76, entered into force 20 May 2002. On 26 April 2007 (World Intellectual Property Day) the Australian Government deposited its instruments of accession to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, both treaties coming into force in Australia on 26 July 2007. See Ruddock. The binding date for each treaty is three months from the deposit of the instrument of accession: WIPO Copyright Treaty, Art. 21(ii), and WIPO Performances and Phonograms Treaty, Art. 30(ii).
- ⁵² Consolidated Text for a Treaty on the Protection of Broadcasting Organizations, SCCR/11/3, 29 February 2004, http://www.wipo.int/edocs/mdocs/copyright/en/sccr_11/sccr_11_3.pdf
- ⁵³ Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations, SCCR/15/2, 31 July 2006, http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf
- ⁵⁴ *ibid.*, pp. 72–74 (proposals relating to Art. 19).
- ⁵⁵ *ibid.*, p. 77 (proposed Art. 20(1)).
- ⁵⁶ *ibid.* (proposed Art. 20(2)).
- ⁵⁷ Draft Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations, Draft 1.0, 8 March 2007, http://www.wipo.int/edocs/mdocs/sccr/en/sccr_s2/sccr_s2_paper1.pdf and Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations, 20 Apr. 2007, http://www.wipo.int/edocs/mdocs/sccr/en/sccr_s1/sccr_s1_www_75352.doc
- ⁵⁸ Proposed Art. 9 in the non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations, 20 April 2007.

- ⁵⁹ Notably the Australia–United States Free Trade Agreement 18 May 2004 [2004] ATNIA 5, article 17.7 creates an obligation to create liability for the circumvention of encrypted satellite broadcasts. Australia has given effect to this obligation in a technologically neutral way by extending protection from circumvention to all subscription and most encrypted broadcasts: *Copyright Act 1968* (Cth) Part VAA.
- ⁶⁰ Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations, 20 April 2007, p. 3.
- ⁶¹ *In the Matter of: Digital Broadcast Content Protection*, 18 FCC Rcd, p. 23550 (2003) at p. 23555 observes that a flag mandate ‘will ensure the continued availability of high value DTV content to consumers’.
- ⁶² See generally Brennan, ch. 2.
- ⁶³ Electronic Frontier Foundation, Reply Comments, p. 8.
- ⁶⁴ Electronic Frontier Foundation, Comments, p. 13.
- ⁶⁵ Electronic Frontier Foundation, Reply Comments, p. 18.
- ⁶⁶ A point well made previously: Crawford, pp. 599, 651–2.
- ⁶⁷ *Copyright Act 1976* (US) § 1201(k).
- ⁶⁸ Compare the powers that are conferred on the US Copyright Office in promulgating exceptions to access control circumvention liability: *Copyright Act 1976* (US) § 1201(a)(B)–(D).
- ⁶⁹ A subsequent WIPO meeting of the Standing Committee on Copyright and Related Rights in June 2007 failed to achieve agreement on the terms of a proposed Broadcasters’ Treaty for a future diplomatic conference. Consequently, the timetable remains stalled: World Intellectual Property Organization.

CHAPTER 10

The Impact of Copyright Treaties on Broadcast Policy

Kimberlee Weatherall

Introduction

Broadcast copyright. Even the name suggests the tension: between a medium which of its nature is ‘out there’—broadly cast, quite literally—and a set of laws designed to provide creators with exclusive rights and long-lasting control. Nevertheless, television broadcasters claim to ‘own’ their broadcasts; in many countries, including Australia, they do. The World Intellectual Property Organization (WIPO) has been working for the last nine years to draft a WIPO Treaty on the Protection of Broadcasting Organizations (‘WBT’) recognising broadcaster ownership at an international level through expanded copyright rights, which broadcasters argue are necessary to protect their interests and enable them to take action against piracy and unauthorised use of ‘their’ material online. Supporters of expanded rights point to vast sums paid for exclusive rights to show sporting events as evidence of the money at stake.¹ But such efforts may yet fail: there is no consensus on the appropriate scope of broadcasters’ proprietary rights, and it is difficult to construct one at this historical juncture. The market for audiovisual entertainment must

be one of the fastest-moving markets around: everything is changing, from the technical means used to reach viewers, to the companies involved, audience tastes, and even the nature of the content, with the growth in user-generated audiovisual material.

The negotiations on a treaty have therefore been fraught. Some argue that rapid technological change, combined with the special features of broadcast such as its ephemeral nature, militates against any treaty expanding broadcasters' rights. There should be no proprietary rights, according to activist organisations such as the Electronic Frontier Foundation and the Consumer Project on Technology, and no treaty. An expansion of rights, they argue, would increase the difficulty of licensing content for new creators, and hold back the development of interesting new websites and consumer gadgets. Much effort from these NGOs, and others, has been directed at the attempt to limit any treaty to one that merely combats 'signal theft' (whatever that means: debate rages over this too). But such arguments seem largely irrelevant in many countries such as Australia, which observe the Rome Convention² and where broadcasters—significant commercial entities with considerable political power—already have exclusive rights.³ Whatever its theoretical merits—and these are heavily contested—the case against broadcaster protection was lost for all practical purposes in Australia and elsewhere fifty years ago. Even those countries, like the US, which do not recognise a broadcast copyright per se provide various protections against unauthorised re-use.⁴ And finally, Australia in 2004 signed up to a Free Trade Agreement with the US ('AUSFTA'), which also strengthened broadcasters' proprietary and other rights.

What does all this mean for broadcast policy? This chapter reviews the impact of recent and proposed copyright treaties on government policies in the area of broadcast and digital television. As I will show, the real issue facing Australian policymakers is that the growing number of copyright treaties will limit their freedom to enact public policy. More specifically, the treaties will force a change in broadcast policymaking practice as compared to the past. Historically, broadcast regulators have been able to tailor broadcasters' rights according to the demands of broadcast policy. As this chapter shows, it will be much more difficult to adopt this course in the future. From now on, they are going to have to pay attention to copyright. It is

going to be copyright first, broadcast policy later, and this could have some rather interesting effects in forthcoming debates over technology. First, however, we need to understand how broadcast and copyright fit together.

Broadcast and Copyright

Broadcast

Once upon a time, ‘watching television’ was where you sat down in front of the family television, at a time predetermined by the broadcaster, to watch a show along with the rest of the viewing public. Now, the audiovisual material formally known as television can be delivered through an increasing variety of technical means (cable, analogue broadcast, digital broadcast, the internet, other networks) to appliances from televisions to portable devices like mobile phones and iPods. Consider the number of ways in which a consumer can receive audiovisual entertainment: on their television (free-to-air or subscription); on a laptop or PC streamed from an online website or from a downloaded copy; on their mobile phone; or from a purchased DVD.

Broadcasters may still be ‘broadly casting’ their wares, but the technological trend is somewhat against this approach. With the important exception of ‘event television’ which needs to be experienced live—such as major sporting events or news, or maybe reality television—programs are abstracted from predetermined schedules and enjoyed when the viewer chooses.⁵ More importantly, reaching a mass audience no longer requires the involvement of a broadcaster. From a viewer’s perspective, the identity of the source is relatively unimportant: ‘television’ can, or will, be mobile, disaggregated and personalised. From a broadcaster’s perspective, however, which of these methods they are involved in, and when they get a share in the profits or veto rights, are pressing questions because they impact on the underlying economic model that supports their business. It is not surprising that the claim for ownership is being asserted more forcefully.

Copyright

Nor is it surprising that copyright is the vehicle of choice for the broadcasters’ claim to ownership. It is partly about path dependency:

broadcasting organisations are currently protected under the 1961 Rome Convention, which offers relatively limited rights reflecting the nascent state of broadcasting at the time.⁶ The eighty six members of the Convention must grant broadcasters the right to authorise or prohibit:

- 1 the simultaneous (wireless) rebroadcasting of their broadcasts
- 2 the fixation (recording) of their broadcasts
- 3 the reproduction of fixations made without consent
- 4 the communication to the public of television broadcasts in places accessible by entrance fee.

As compared to the rights of copyright owners, there are obvious gaps: the right to control the making and distribution of recordings is limited, and there is no general right to prevent public 'performances' and communications. Thus in a country with the bare minimum Rome Convention rights, having a television on in the restaurant is not something broadcasters can protest; nor the simultaneous or deferred retransmission of broadcasts via cable or the internet. In all these cases, only the consent of owners of underlying content is required. Finally, there is no international legal protection for technical measures—encryption, for example—which broadcasters use to limit access to their broadcast; countries are not required to prevent the decryption of subscription television without paying, or the sale of unauthorised decoders.⁷ It is no surprise, then, that after the 1996 WIPO Internet Treaties extended copyright in a digital context for most copyright owners, delegates in WIPO argued that it was 'logical' or 'necessary as a matter of basic equity' to update the rights of broadcasting organisations.⁸ Negotiations, which commenced in 1998, have been far from easy. Quite an effective campaign against the treaty has been run by organisations such as the Electronic Frontier Foundation and the Center for Democracy and Technology, and there are strong differences between countries' approaches. As this chapter is written, it is quite possible that the treaty will fail.

The reasons why the WBT is proving difficult to negotiate are partly political. Attempts to expand copyright (or any intellectual property rights) have in recent years become more politically controversial.⁹ Any treaty which would expand intellectual property is

automatically opposed by the 'access to knowledge' movement, which seeks to promote wider dispersal of knowledge and culture. Further complications arise from current attempts by some countries to insert 'development goals' into all intellectual property (IP) treaties. The rights of broadcasters may not obviously raise development issues, but the proposed WBT happens to be the first substantive IP treaty to be put to WIPO in this environment.¹⁰ Thus some countries and organisations are arguing there should be preamble statements and provisions promoting development and access to knowledge. These are opposed by IP owner representatives, partly out of a desire to avoid setting precedents.

Apart from these political issues, however, opponents give a series of reasons 'in principle' why broadcasters should not get additional copyright rights. One common objection to giving broadcasters copyright is that it will encroach on or override the rights of other copyright owners.¹¹ This issue is less important than many make out. In general there is no hierarchy of copyright rights: the consent of each party with rights is required before any act can be undertaken.¹² A broadcaster with the exclusive right, for example, to distribute copies of its broadcasts could not do so over the objection of the owner of copyright in the content. There are *some* ways that broadcasters' rights might cause awkwardness; for example, by competing for a share of remuneration from blanket licensing for activities like retransmission¹³, or taking away the exclusive right of content copyright owners to decide whether to demand the taking down of material hosted on websites. But resolving these kinds of turf disputes is nothing new in copyright.

Opponents have also argued that broadcast is different from other kinds of things which copyright protects, making copyright law a poor conceptual fit. Usually, copyright arises when a human author creates an intellectual work embodied in a physical form. But 'television as we know it is ... authorless'.¹⁴ Broadcasters qua broadcasters are corporate selectors, collators and distributors of copyright-protected material via ephemeral means. Broadcast itself is more like a service than a thing.¹⁵ This leads to a number of difficulties.

One problem is that in the absence of a human author, who should receive rights? The Rome Convention grants rights to 'broadcasting organisations'—but leaves this term undefined.¹⁶ Defining the concept is easier said than done, because 'broadcasting' has

many participants and many steps. Consider what is necessary for a 'broadcast'. There is the infrastructure—the network—used to deliver the broadcast, whether that network happens to be physical (such as a cable) or more ethereal (such as a mobile telephony network or WiFi). Over this infrastructure travels the signal—the electronically generated carrier capable of transmitting programs.¹⁷ This signal carries the content, or 'stuff we see'—the news shows, live sports broadcasts, Hollywood movies, and advertisements—much of it produced by someone other than the broadcaster, and put together by—someone. That 'someone' may be a 'channel provider', such as one of the US networks; it might be a network affiliate; it might not be the same entity which actually does the transmission. Which of these multiple companies and contributors should get rights? The current draft WBT defines 'broadcaster' as 'the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images and sounds or of the representations thereof, *and* the assembly and scheduling of the content of the transmission'—suggesting only those who do both get protection.¹⁸ The US and the EU are at odds, with the EU preferring to grant rights only to 'broadcasting organisations' as traditionally conceived—meaning owners of infrastructure who actually emit signals. The US has proposed broadening the net to grant rights to 'channel providers', arguing that this reflects the way the industry actually works, with specialist channel providers who do not own infrastructure but who do put together content.¹⁹ This issue, however, is not insurmountable it could be left to national law.²⁰

A further issue—and perhaps the most difficult—is what exactly is to be protected by a proprietary right?²¹ The signal or 'content-carrying signal'? If so, where does it begin and end (and how much can you copy before you infringe)?²² Or is it the content: for example, individual programs?²³ The 'broadcast day' as a compilation?²⁴ Different countries have adopted widely varying approaches. This is undoubtedly a difficult conceptual issue—again, however, it is not insurmountable and is not unique to broadcast.²⁵

Broadcast Policy and Copyright

All the reasons against the WBT given above raise the question of whether broadcast should be protected by copyright at all. The

international anti-WBT movement seems to be dominated by a US-centric view that: (a) broadcasters do not have property rights, and (b) they do not need them now. In Australia, where broadcasters have long had copyright without the sky falling down, these arguments are unconvincing unless one accepts the blanket statement that ‘no new intellectual property rights should be created, ever’. Using copyright to protect broadcasters may be conceptually unsatisfying, but none of the issues most often cited by opponents seem reason to deny protection. And, of course, the debate about whether there should be rights is irrelevant given the international framework.

In my view, such claims miss the point. The key issue that policymakers should be aware of arising from new copyright treaties—both the prospective WBT, and, for Australia, the already-here AUSFTA—is the effect they will have on the broadcast policymaking/law-making dynamic. With each new copyright treaty, *broadcast and communications* policymaking becomes more difficult.

For as long as broadcast and broadcasters have been around, governments—both parliament and executive agencies—have stepped in and imposed extensive regulations reflecting certain public policy goals:²⁶

- universal public access to broadcast and communications, pursued via policies which favour free-to-air broadcasters and promote access in regional areas²⁷
- content standards: in terms of ensuring quality, relevance for different audiences (such as children) and the suppression of obscenity and excessive violence
- ensuring a certain amount of local and Australian content
- ensuring a diversity of voices, for example through cross-media ownership laws²⁸
- competition and technological innovation (although this last is very inconsistently pursued).²⁹

Such issues are considered elsewhere in this book. Not all of these objectives conflict or even interact with copyright policies. But to the extent that they are concerned with promoting alternative networks and broad access, they have strong potential to do so. Historically, the tension has been resolved by governments taking a

miserly approach to copyright, in order to promote broadcast policy goals. They have been able to do so in part because of the limited scope of their international obligations in relation to protecting broadcasters.³⁰

Retransmission: A History of the Pre-eminence of Broadcast Policy over Broadcaster Rights

This dynamic—broadcast policy first, copyright second (if at all)—has been recognised by various commentators on copyright in this space. Thus Wu has talked about ‘copyright’s communication policy’³¹; Streeter has commented that, day to day in the television industry, ‘the concepts of ownership, property and copyright have become increasingly residual categories, supplanted by considerations of efficiency, fairness, and the overall functionality of the system.’³² One illustration of the dynamic can be found in the history of cable retransmission of free-to-air broadcast television. Retransmission is what happens when a pay television (pay TV) company such as Australia’s Foxtel provides to its subscribers, via the same cable, free-to-air (FTA) channels at the same time as the original broadcast, and without altering any of the content. When retransmission started to happen all over the world, a number of public policies arose that highlighted potential conflicts between copyright and broadcast policy.

The stakes can be illustrated by imagining the industry dynamic at an abstract level. Consider the position of a lawmaker approached by a prospective cable company in a time before cable, when broadcast is all done over the air. Such a company has a new technology for capturing the broadcast signal and transmitting it further by wire without diminished quality, deployment of which will increase the size of the public who can watch the broadcast. This is, of course, a good thing in broadcast policy terms, because it increases access to broadcast, particularly in remote areas. It may, however, face opposition from two sets of claimants. First, there are the owners of copyright in the underlying content. In their case, international law provided from very early on that new acts of communication fall within the copyright owner’s rights.³³ However, given the reality that a requirement for licences would lead to enormous transaction costs, and a history of statutory or compulsory licensing for broadcast³⁴, it

was not too much of a stretch to allow the application of statutory licences here. Our hypothetical lawmaker here has a ready-made answer.

More relevant for the purposes of this chapter, however, is the second set of claimants: broadcasters. Here, international law provided—and still provides—no clear answer. Bear in mind that broadcasters, far more than underlying content owners, have strong incentives to refuse permission to prevent a potential competitor from gaining a foothold, particularly at the early stage when the new technology is first introduced. Denied content, or faced with punitive or uneconomic conditions, the second network may never get off the ground.³⁵ The upside is that the broadcaster's investment is protected, but at a cost—newer, better technology is not introduced³⁶; consumers do not get the benefit of the better quality signal; some in remote or poor reception areas may miss out entirely—and competition is reduced. The broadcast policies are not served.

Now assume for a moment that the second network is allowed to retransmit, and does get off the ground. Over time, its need to retransmit broadcasts may change. Other, more lucrative content may become available. With the introduction of digital television and the multiplication of channels, retransmission may over time become a burden to the second network. The more dominant the second network becomes, the more likely this is.³⁷ At this time the second network might prefer to cut off retransmission: disrupting broadcasters' businesses, reducing the local audiences, and thus potentially reducing advertising revenues and threatening their viability. In short, the policy dynamic is not straightforward, and may change over time. Our hypothetical lawmaker may want to change policy over time too. But if broadcasters have full copyright rights, lawmakers' flexibility may be limited.

Turning back to the real world, how did these conflicts play out? In the US these battles came early.³⁸ The first cable systems for television were introduced in the late 1940s, via what is known as Community Antenna Television (CATV)—powerful antennae were installed at high points near towns, with cable used to deliver signals to individual houses with otherwise poor reception or none at all.³⁹ By the 1960s, such systems were found throughout the US, and some cable companies had begun to 'import' distant broadcasts using

more powerful microwave methods.⁴⁰ This brought broadcasters and cable companies into conflict. The battle between the incumbent broadcast industry, copyright owners and these new distributors was joined in the courts and via the broadcast regulator, the Federal Communications Commission (FCC), as the 'broadcast industry and its affiliates mounted a large, successful effort to contain the growth of cable using every regulatory and political device at their disposal'.⁴¹ This was hardly surprising given companies' 'natural desire to thwart competition and recreate monopoly'.⁴² In terms of copyright, the US, which was not then (and is still not) a signatory to the Rome Convention, did not recognise rights in the broadcast signal.⁴³ This meant that the regulator, the FCC, had a fairly free hand in deciding what rights broadcasters should have, if any. The broadcast industry was successful in 1966. The FCC created 'must carry' rules requiring cable companies to retransmit signals of local broadcasters who requested it⁴⁴, and rules limiting retransmission whereby cable systems in the top 100 markets could retransmit 'distant' signals only with the consent of the FCC, and only where they could show it would not injure local broadcasters.⁴⁵ These interventions were designed to foster the broadcast policy in favour of diversity and localism (the idea that there should exist local broadcasters and not just large, national channel providers), and access—protecting the viability of advertising-supported television by preventing 'audience fragmentation' between local and distant signals which might cause advertisers to pay less.⁴⁶ Thus the FCC did not create full proprietary rights for broadcasters, but did construct a kind of qualified exclusivity that served broadcast policy goals.

The US broadcasting regulations and related copyright rules changed frequently as cable television regulation went through periods of regulation, deregulation and reregulation⁴⁷, and the relative power of the network players changed.⁴⁸ In 1971, a compromise known as the '1971 Consensus Agreement' replaced the 1966 rules with a new set, which limited the number of distant signals that could be carried and prohibited retransmission of programs in a distant signal where a local broadcaster had exclusive rights in relation to that program.⁴⁹ This was of course another regulation-based exclusivity for local broadcasters. In 1979, the FCC recommended abolition of these rules⁵⁰, heralding a period of explosive growth for cable.⁵¹

Much later, in 1992, the rules changed again.⁵² Now, broadcasters may elect between a must-carry obligation (without payment), and retransmission consent rules (where payment can be negotiated).⁵³

This brief description merely scratches the surface of a long and involved history of jockeying between US broadcast and cable industries.⁵⁴ For present purposes it is sufficient to note four points. First, the battles in the US over retransmission were fought out with the extensive involvement of the broadcast regulator, the FCC. Second, the copyright-based claim to control (albeit in relation to the underlying content) was initially used by the broadcast industry as a tool to limit or control the entry of a competitor. Third, while underlying copyright owners eventually succeeded in obtaining remuneration via a statutory licence (thus not a full proprietary right), the rights granted to *broadcasters* were built on a much more reduced model, designed to accommodate broadcast policies such as localism and access. Fourth, the pattern of rights shifted over time: sometimes broadcasters had limited proprietary-style rights; at other times, they had no proprietary rights as such.⁵⁵ From a copyright perspective, Wu has argued that this history demonstrates copyright's underlying 'communications policy'—one of allowing entry into communications markets and not allowing the proprietary claims of incumbents to prevent new technology taking hold.⁵⁶ From the perspective of broadcast policy, the lesson is that the absence of copyright allowed the regulator to tailor broadcaster rights according to prevailing broadcast policy.

Given that Australia has long had broadcast copyright, you would expect that the outcomes would have been quite different: that broadcasters would have prevailed more readily in gaining recognition of their right to control. Not at all.

Cable television (aka subscription television, or pay TV) came late to the scene, due entirely to broadcast policy in Australia favouring the incumbent FTA industry.⁵⁷ When pay TV entered the market in 1995, it took advantage of an existing provision in the *Broadcasting Services Act 1992*—s. 212—originally inserted to allow 'self help' operators taking steps to improve reception in remote distances—much like the original CATV systems in the US.⁵⁸ Section 212 allowed retransmission of broadcasts without infringement of any copyright—whether in the broadcast signal or the underlying

content.⁵⁹ Just prior to the launch of subscription television, the Federal Court of Australia rejected broadcasters' claims that retransmission would infringe copyright, relying on this provision and s. 199(4) of the *Copyright Act 1968*.⁶⁰

In the following period, from late 1995–2000, the debate over copyright and retransmission continued in earnest. Copyright cognoscenti recognise that this same period was also the time when the introduction of a broad right of 'communication to the public' was being debated⁶¹, the World Wide Web was young, and convergence was the catchword du jour: in short, everything was up for grabs. In 1998, a two-part proposal was put forward to amend copyright and broadcasting regulation. At that stage, it was proposed, by amendment of the *Broadcasting Services Act*, that subscription television retransmitters would be required to seek consent from broadcasters to retransmit broadcasts. At the same time, a statutory licence would be introduced into the *Copyright Act*, providing that retransmitters would not infringe copyright in the content provided they paid remuneration under a statutory licence to underlying copyright owners.⁶² Not surprisingly, the proposal was favoured by the FTA broadcasters, who argued that their property rights should be respected, and opposed by the subscription broadcasters, who echoed arguments heard in the US many years before: that retransmission increases coverage and thus benefits FTA broadcasters and their advertisers, and ensures a better service for consumers.⁶³ Subscription broadcasters also pointed out the relatively weak bargaining position of subscription television: as an industry, and a late market entrant, it has over time struggled for viability.⁶⁴

One interesting feature of this debate was the extent to which the claim to ownership of the signal was used in an attempt to achieve what a purist might consider 'non-copyright ends'. Copyright was the legal claim being made, but a key stated goal was for FTA broadcasters to have a say in the technology to be used and the signal quality. Around the same time, parliament passed legislation instructing the then regulator, the Australian Broadcasting Authority, to formulate digital conversion schemes for commercial and national broadcasters.⁶⁵ Broadcasters were asking whether in the conversion from analogue to digital television, pay TV should be required to retransmit the full digital signal (requiring conversion of their

equipment before or at the same time)—or whether, if a consent regime was introduced, FTA broadcasters could insist on this as a condition. Thus the Federation of Commercial Television Stations argued before a Senate Committee that retransmission

should not be something that is totally outside our control and involve a signal which is other than the signal which we generate, whether it is because the quality is not maintained in some way or because it is not the complete signal. We simply want a modicum of control over the way in which our signal is retransmitted, more than a modicum, we think we should have absolute control.⁶⁶

Just as in the US, the proprietary rights of broadcasters get mixed up with broadcast and technology policy.

The amendments to the *Copyright Act* were passed in 2000, introducing the statutory licence found now in Part VC of the Act.⁶⁷ For content copyright owners remuneration was secured.⁶⁸ However, the provisions which would have established the consent regime were withdrawn by the government, to permit further industry consultations. Broadcasters' interests were thus subjected to further discussions relating to broadcast policies such as signal quality, the transition to digital television, high-definition television and more. At the time of writing, it is still the case that there is no right to remuneration for broadcasters under the *Copyright Act* for retransmission of the signal, and broadcasting law still provides that owners of broadcast copyright are unable to bring an action for infringement against retransmitting cable television companies.⁶⁹

Again, the full details of the fight over retransmission in Australia are not important. The bigger picture, however, echoes some of the lessons from the US, despite the fact that the broadcasters here started from a stronger legal position. The scope of broadcasters' copyright has been tied up with debates regarding broadcast policy, including the facilitation of the subscription television industry, ensuring access to broadcast in remote areas, and the introduction of digital and high-definition technologies. The desire to promote these goals of broadcast policy has led to broadcasters being denied certain rights they might, as copyright owners, expect to have.

Importantly, this has been possible because no provision in international law—Berne, TRIPS, Rome or any other convention—has required countries to grant broadcasters exclusive rights in relation to cable retransmission. Thus Australian lawmakers could limit the scope of broadcasters' rights by reference to broadcast policy without breaching international copyright law.

New Treaties, New Technology, but No Room for Broadcast Policy?

This situation of relative freedom in broadcast policy is changing, as pressure for a more extensive copyright treaty framework covering broadcasters grows. This is true both at a multilateral and bilateral level. At a multilateral level, members of WIPO are attempting to negotiate a WBT. As noted above, at the time this chapter was being written, there was considerable doubt over the proposal. At a session at the Annual Fordham IP Conference in April 2007, representatives from WIPO, the European Commission and the International Intellectual Property Alliance all expressed some scepticism about whether any treaty would be concluded. While a Diplomatic Conference is proposed for late 2007, the practice of WIPO is to adopt treaties by consensus. If just one country decides to oppose the treaty, it will fail. Even if no WBT is concluded, Australia's freedom to determine broadcast and copyright policy is constrained by the provisions of the very large copyright chapter in AUSFTA.

The growing number and strength of copyright treaties will not affect past broadcast policy decisions. Countries have been careful, both in the proposed WBT and in AUSFTA, to preserve their current systems. So, for example, the April 2007 'Non-Paper' would allow contracting parties to 'provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organisations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights'.⁷⁰ This is important because the Berne Convention specifically allowed members to impose a statutory licence to allow rebroadcast and retransmission of copyright works:⁷¹ in practice, some of these statutory licences involve practically zero payment for retransmission within the broadcast area.⁷² When the WIPO Copyright Treaty was negotiated, it specifically preserved this

provision.⁷³ This approach makes sense in context. It seems unlikely that broadcasters would get stronger rights than other copyright owners, and means that countries do not have to change entrenched broadcast rules.⁷⁴ AUSFTA also allows Australia to continue to deny broadcasters any right to prevent, or receive remuneration for, cable retransmission of broadcasts.

In the case of new technologies, however, there is nothing to preserve: no existing exceptions or limitations. Thus new treaties have much greater potential to affect newer technologies and networks. We can take two upcoming areas in which this is an issue: retransmission by means other than traditional cable (that is, internet or internet protocol retransmission of television), and in relation to the use of technologies such as encryption to limit copying and use of broadcasts. In these areas, more and stronger copyright treaties may see governments setting the initial copyright policy protecting broadcasters—and having to adjust broadcast (or more accurately, perhaps, in light of the move from broadcast, ‘communications’) policy around those pre-existing rights. This could be very different from the way the debate over cable retransmission has happened, and much more restrictive in terms of achieving broadcast policy goals.

Internet Retransmission

Consider first the retransmission of broadcast signals via the internet. The possibility that a company might want to adopt some new, IP protocol-based network for television is far from fanciful.⁷⁵ Could Australia, party to the AUSFTA and perhaps to some future WBT, decide that it wanted to allow, either freely (with an exception) or without permission but with payment (via a statutory licence), retransmission of television signals via the internet—or using internet technologies such as via IP TV⁷⁶, either generally, or through particular providers, or to a limited network (for example, an educational network), or via non-interactive internet signals?

No. If a WBT was concluded based on the current drafts, such acts would fall squarely within the broadcaster’s exclusive right to control simultaneous or deferred retransmission⁷⁷, and provisions that allow preservation of existing exceptions, or extension of the same exceptions as apply to other copyright owners, would not assist. Most countries, including Australia, do not allow retransmission of

works via the internet without permission of the copyright owner, although Europe, Australia and Canada have all considered it.⁷⁸ Thus under a future WBT, Australia could only apply an exception or statutory licence if it could be reconciled with the standard set by the Berne Convention's three-step test⁷⁹: a highly doubtful proposition. Under the Berne three-step test, a country may only have in its legislation an exception to copyright owners' rights if: (1) it is confined to certain special cases; (2) it does not conflict with a normal exploitation of the work; and (3) it does not unreasonably prejudice the legitimate interests of the owner. The first criterion is interpreted as requiring that the exception be 'narrow in both scope and impact'.⁸⁰ An exception or statutory licence covering exactly the same ground that the exclusive right covers would be too broad to pass this test.

Whichever way you look at it, the constraints on government broadcast and communications strategy have shifted drastically. Without a treaty, countries could determine the scope of broadcasters' rights in relation to new networks by reference to broadcast (or communications) policies. This freedom was used by governments to promote principles of access and competition in the provision of broadcast services; for example, by encouraging the development of cable. With a treaty, copyright must be considered, and any exception must be limited and requires a clear rationale.

The position is even clearer and more restrictive for Australia under the AUSFTA. Article 17.4.10(b) of that agreement specifically provides that *notwithstanding* the three-step test, 'neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content and of the signal'. Under this provision, even exceptions which comply with the three-step test appear to be excluded.⁸¹ The flexibility to apply broadcast or communications policies in this context is thus pre-emptively cut off, although a side-letter allows the parties to renegotiate, if there is a 'significant change in the reliability, robustness, implementability and practical availability' of 'geolocation' technologies that can be used to limit by geographic area who can receive material online.

So with both possible multilateral and existing bilateral copyright treaties, it would seem that, unlike with terrestrial broadcasting, Australian regulators (and any other regulator in a country that signs

a WBT) are not going to be free to shape broadcaster rights on internet technology to fit their preferred broadcast policy: whatever they do will have to be done, at the very least, with an eye to copy-right and the three-step test.

Does this matter? Some would no doubt argue that we should trust the market. There are two problems with that argument. First, there is the fact that in relation to radio, the US itself established a statutory licence for webcasting.⁸² Are we so sure television is and will always be different? Second, and more importantly, how can we be so sure, ahead of time, and without knowledge of future technological developments, that broadcast policy will never need to step in? Surely, cutting off the possibility of having any exceptions at all—even those that comply with the three-step test—for internet retransmissions, as AUSFTA does, and thus removing *any* role for national communications policy, is needlessly restrictive and short-sighted.

An alternative response is that for countries other than Australia, the three-step test is either effectively no limit at all, or at the very least sufficiently flexible that it can accommodate the different history of broadcast, and perhaps be more generous in allowing countries to take account of broadcast policy in overriding, or limiting, the rights of broadcast organisations. It seems doubtful, however, that the test will be interpreted for broadcast content significantly differently than for other kinds of copyright-protected material. And in any event, it is still the case that, if a WBT is concluded, broadcast and copyright policy are no longer determined simultaneously: copyright precedes, and to some extent pre-empts, broadcast and communications policy. This is a dramatic shift from the past.

A third response is that once we are talking about the new communications technologies, such as the internet, we are no longer talking about broadcast but communication which is frequently interactive and/or on-demand, and often based on some kind of restricted access. Just as governments have not sought to extend broadcast policy to the internet (or, where they have, for example via content restrictions, have been criticised⁸³ or slapped down for it⁸⁴), so too, in copyright terms, we are in a different paradigm, with different rules and different policy needs. To some extent, obviously, this is true. The need to promote basic policies such as access and

competition in communications providers which informed the history of cable retransmission, is much less compelling in the context of the internet, which has facilitated the multiplication of content and communications sources. But the argument here is not that the *same* policies which influenced the history of cable retransmission apply to the internet: rather, it is that *some kind* of communications and competition policy remains important. The point is that the dynamic, with copyright treaties, is very different; where before broadcast policy and copyright grew together, now, particularly in the case of Australia, copyright may prevent experimentation with certain communications policy approaches. It is also arguable that a benefit we lose by the inflexible approach is experimentation with different legal models for handling these issues. Finally, of course, while we are familiar with the internet, it would be foolish to assume we know what all communications technologies for the next fifty years are going to look like, or what policies will be appropriate for them. It is trite, but true, that we simply do not know what the future will bring.

The Legal Treatment of Access and Copy Controls

Another new technology issue where multilateral and bilateral treaties may complicate or constrain government policymaking is in relation to what copyright lawyers call ‘technological protection measures’ (TPMs).⁸⁵ In lay terms, this is DRM, or Digital Rights Management: technologies such as encryption and authorised reader software, which are used to control (and usually limit) the use that can be made of content. Well-known examples include the Content Scrambling System (CSS) used to prevent people from copying and redistributing movies bought on DVD, and FairPlay, the software used by Apple to limit use of most music purchased from its iTunes store. Since 1996, and the WIPO Internet Treaties, many countries have introduced what are known as ‘anti-circumvention laws’—laws which give the force of law to TPMs by making it illegal to ‘hack’ (circumvent) them, and/or to sell devices, programs, or services to circumvent those measures. Copyright industry representatives have sought anti-circumvention laws because the simple fact is that most TPMs that are distributed to the mass market can be hacked or avoided given sufficient time and effort.⁸⁶ Once protection is removed, unlimited

digital copies of consistent quality can be made and distributed widely, interfering in the market of the copyright owner. Knowing this, it is argued (although not accepted by everyone), that unless given legal support, copyright owners may engage in several undesirable responses: they may refuse to distribute material in digital form; they may engage in an ‘arms race’, employing more and more elaborate systems as each successive one is breached; or they may reduce their investment in creating new content, leading to a decline in copyright material generally or, more likely, in ‘quality’ material which requires a significant investment to create.

Producers of television content are particularly concerned by the threat of digital redistribution. Movies and high-quality television are expensive to produce, and these industries are highly dependent, under current models, on exploitation of multiple revenue streams with staggered timing (‘windows’)—consider the way that a movie has been first shown in cinemas, then sold on DVD and made available for rental, subscription television and finally FTA television, with different timing in different markets. The threat of digital redistribution has the potential to interfere with this model. Thus, it is argued, owners of high-quality content will be reluctant to allow digital broadcast of their content unless it can be protected.⁸⁷ Not only that, but should they refuse, this will have far-reaching implications for the shift to digital television. Digital television needs content; it also needs, arguably, High Definition (HD) content—as a new feature that helps consumers justify making the move. Policymakers around the world want the population to move to digital television, partly because it is ‘better’ technology, and partly because the move frees up spectrum for other uses.⁸⁸ It is argued that content owners will be even *more* reluctant to let HD versions of their content on unprotected broadcast signals. Thus, to encourage the move to digital and HD content, technical protections which limit re-use (for example, recording and redistributing online) and their legal enforcement are both needed. While high-quality content is presently making its way onto television signals without waiting for effective technical protections (much content only retains its value for a limited period, after all—producers cannot just wait until the technology is there), right now there are concerted moves by these industries to push for technical protection in standards bodies, and if such protection is agreed,

it seems likely that producers will demand its use: apparently in Australia, content protections have already been demanded.⁸⁹

How protection can be done varies, depending on whether you are talking about FTA or subscription television. For subscription television, preventing people from gaining unauthorised access or selling unauthorised decoding devices is a fundamental, well-developed part of the business model. The signal is encrypted and only authorised decoders may read and render it.⁹⁰ In this context, re-use rules are relatively simple to apply—at least in theory. All content owners have to do is give the ‘key’ to descramble the signal only to those producers of televisions, recorders or other reception devices who agree to make devices that will obey the rules.⁹¹ For FTA television, which is broadcast to the general public unencrypted⁹², the picture is more complicated. Technical standards are being developed for embedding re-use rules into the television signals: the Broadcast Flag in the US⁹³; the Digital Video Broadcast Consortium CPCM standard in Europe.⁹⁴ However, there is no reason why consumer electronics companies should build devices to obey such rules. In contrast with subscription television, there is nothing device manufacturers need to obtain from content owners in order to make their products ‘work’ (no ‘key’ is needed). The only way to make the receiving devices observe re-use rules would be via government regulation of reception equipment.⁹⁵ The details of these technologies are explored in this collection by David Brennan in Chapter 9.

In this chapter, it has been argued that governments have historically been able to accommodate the tension between broadcast (communications) policy and copyright policy mostly by limiting copyright rights by reference to broadcast policy concerns. What if governments wish to limit the legal protection they give to technical use controls, by reference to broadcast or communications policy? Can they do so—and would a WBT make any difference? There are a number of reasons why governments might take an active interest in technologies designed to limit re-use of television content:

- Governments have a long history of regulating the conditions of public broadcast, and in particular, have a history of requiring certain broadcasts to be unencrypted and available to all members of the public.⁹⁶

- Issues of freedom of speech and freedom of political communication may arise. Governments may not wish to enforce technical measures used to limit dissemination of and commentary on important news or political content.
- Governments may wish to ensure that members of the public continue to have their accustomed ability to make personal use of material; for example, by ‘time-shifting’ (taping it to watch at a more convenient time).⁹⁷ The ability to do so may not be a mere matter of convenience that should be paid for—consider shift-workers and their equal access to television content.
- Governments may be concerned to ensure that technical standards do not constrain innovation and competition in consumer electronics and computing equipment. To the extent that standards purport to limit what features can be offered to consumers, innovation and competition are limited, and interesting and innovative new ways of enjoying content may be stymied.⁹⁸
- The market may or may not work to protect consumer interests, particularly in small markets like Australia. Broadcasters must purchase content from producers and have strong incentives to respond to their demands for content protection.⁹⁹ Unless there *are* limiting rules on the technical limitations which may be imposed, it may be difficult for our broadcasters to resist claims by overseas content owners, in particular for application of maximum content protection.¹⁰⁰

Kenyon and Wright in a recent piece have argued for a positive role for government in regulating technical measures. For example, they argue, regulators could decide that private time-shifting must be allowed; that device-shifting within a user’s personal domain be allowed; or that news content be able to be redistributed.¹⁰¹ Whether this is a good idea depends on many issues: involving regulators in creating technology-specific rules is always controversial. Leaving that to one side, however, for their argument to hold, it would have to be the case that copyright treaties do not limit the application of broadcast policy to control copyright owners’ use of technical measures. To what extent might governments be constrained? Do we here, as with internet retransmission, have a situation where

broadcast and communications policies must come second to copyright rules?

As Brennan has analysed elsewhere in this collection, regulation of the broadcast flag-type technologies—that is, the technical measures used for FTA broadcasting—will be unconstrained by any WBT. Flag-type technologies are not ‘effective technological measures’ used to protect copyright by controlling access or copying, and there is no proposal to include provisions that require compliance with flag-type technologies. It would seem, therefore, that if, say, flag-type technology inserting instructions to control re-use of FTA broadcasts *were* introduced into Australia, international copyright law would not constrain the government in making broadcast policy-oriented decisions to mandate use of such technologies—or to make a mandate subject to ‘public policy-oriented’ limitations.

On the other hand, when it comes to broadcasts that are encrypted—that is, pay TV—the situation may be different. All of the current proposals for a WBT would both require legal protection for encryption—either by requiring parties to prevent ‘the circumvention of effective technological measures that are used by broadcasting organisations in connection with the exercise of their rights’¹⁰², or by preventing unauthorised decryption and the sale of unauthorised decryption devices.¹⁰³ Similarly, AUSFTA requires Australia and the US to prevent the manufacture, sale or use of devices designed to decode encrypted satellite signals without the authorisation of the distributor.¹⁰⁴ This might seem to leave a loophole for cable-delivered encrypted television. However, not only did Australia implement these provisions, applying them to *all* encrypted television¹⁰⁵, in addition, it is at least arguable that protection for the encryption systems of cable-delivered pay TV is required by the general anti-circumvention provisions in AUSFTA, which require parties to protect ‘any technology ... that in the normal course of its operation, controls access to a protected work’.¹⁰⁶ Encryption of cable-delivered pay TV controls access to the underlying copyright-protected works.¹⁰⁷

Thus our copyright treaties require legal protection for the encryption systems used by pay TV. The next question is whether those same treaties would prevent the government from seeking to control how pay TV stations *use* such systems. Say, for example, the government were to decide it wanted to *require* subscription

television providers to allow private time-shifting for all subscription television content. Since AUSFTA and the draft WBT only require that the law protect encryption from *unauthorised* decoding, it would seem perfectly permissible for government to impose, through its broadcast policies and broadcast regulator, conditions for authorised decoders.

However, that might not be the end of the story. Under AUSFTA, government actions which breach the spirit, but not the text, of the agreement can still give rise to a claim: the IP Chapter in AUSFTA is subject to a non-violation clause.¹⁰⁸ Non-violation or nullification claims arise where a country applies a measure which nullifies or impairs ‘a benefit the [other treaty] Party could reasonably have expected to accrue to it’ under the agreement. It might be argued that if the government steps in and seeks to limit how broadcasters use technology to protect copyright, or what controls can be imposed, that denies copyright owners the full benefit of the legal protection they expected under AUSFTA. The more control the government tries to impose, the more likely it is to ‘nullify’ the benefits of legal protection. At present, this can only be speculation, because it is not really known what a successful nullification claim in relation to IP law would look like.¹⁰⁹ It is also worth considering that FTA and subscription television, to some extent, compete for the same content. Assuming that content providers want technical protection, it is an open question how unprotected FTA television can remain without seeing a migration of content. This could lead to pressure for equal protection and equal treatment on both broadcast systems. The government’s freedom to regulate technological controls and copy protection could be attacked from the flank. But all this is speculative.

In summary, particularly as compared to the issue of internet retransmission, the future role for broadcast policy in relation to technical measures looks, for the moment, safer, with or without a WBT—albeit with a small, subscription-television-nullification-claim-shaped cloud on the distant horizon.

Some Final Comments

So much of the discussion of the growth of the copyright treaties is of the ‘more rights bad’ ilk. Thus, with the proposed WBT, we have

seen repeated claims that the creation of rights will stand in the way of creativity and the user-generated content revolution. I have argued, however, that this largely misses the point, particularly in Australia.

The actual effect of the growth and strength of copyright treaties, particularly in Australia, with AUSFTA, is to restrict government policymaking freedom. This has long been recognised in copyright, where the restrictions are blindingly obvious. What might be less obvious to the casual observer, however, is that it also has the potential significantly to complicate the making of *communications* policy—by putting copyright owners' rights front and centre in future debates over the technologies of broadcast and reception, at least in those countries which sign up to multilateral and bilateral copyright treaties, and which take their obligations under those treaties seriously; which, by the way, Australia does. This is not to say that copyright will always prevail over communications policies. But it can no longer be ignored or sidelined. With copyright more important in the policy mix, it is by no means guaranteed that communications policies such as those promoting access and the introduction of new technologies will prevail.

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Notes

- ¹ In 2000, the price of the television rights for the English Premier League for three seasons was euro 2.6 billion: Geradin, p. 69.
- ² The *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* of 1961 ('Rome Convention').
- ³ *Copyright Act 1968* (Cth) ss 87, 91. In 2003 the Australian (free-to-air and subscription) broadcast industry employed over 9000 people and earned pre-tax profits of \$207 million: Australian Bureau of Statistics.
- ⁴ Balganesch.
- ⁵ But see Given, pp. 206–10 (proportion of asynchronous viewing should not be overestimated).
- ⁶ Rome Convention, Art. 13. Art. 14.3 of the *Agreement on Trade Related Aspects of Intellectual Property Protection* ('TRIPS') is in similar terms, but allows members *not* to grant rights, provided that owners of copyright in underlying content have rights. There is a limited right against interception of satellite signals in the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, Brussels, 21 May 1974.
- ⁷ Cf WIPO Copyright Treaty of 1996 ('WCT'), Art. 11, and WIPO Performances and Phonograms Treaty of 1996 ('WPPT'), Art. 18 (together, the 'Internet Treaties'). Many individual countries do ban these acts: see *Copyright Act 1968* (Cth) Part VAA (Australia), or 47 U.S.C. §553; 47 U.S.C. §605(e)(4); 18 U.S.C. §2511(1)(a) (US).

- ⁸ WIPO, p. 29.
- ⁹ Ficsor.
- ¹⁰ The Singapore Trademark Law Treaty (2006) was concerned with procedural matters.
- ¹¹ Balganesch.
- ¹² Berne Convention on the Protection of Literary and Artistic Works 1886, Art. 14*bis*(1) ('without prejudice to...'); Rome Convention, Art. 1; Australia–United States Free Trade Agreement [2005] ATS 1 ('AUSFTA'), Art. 17.4.3. Current drafts of the WBT specifically articulate this principle: *Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, SCCR/15/2, 31 July 2006 ('Revised Draft Basic Proposal'), Art. 1(2); *Chair's Non-Paper on the WIPO Treaty on the Protection of Broadcasting Organizations, Draft 1.0 (April, 2007)* ('Chair's Non-Paper'), Art. 4(1).
- ¹³ Assuming you accept the 'cake' theory of remuneration: that more claimants means smaller slices of cake, rather than a larger cake: Stewart, pp. 192, 226; see also Ricketson and Ginsburg, vol. 2, para. [19.19].
- ¹⁴ Streeter.
- ¹⁵ Thus we have the *Broadcasting Services Act 1992* (Cth). Bently and Sherman, pp. 82–3; Handler, 'The Panel Case and Television Broadcast Copyright'.
- ¹⁶ Ricketson and Ginsburg, vol. 2, para. [19.10].
- ¹⁷ The definition is drawn from the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, Brussels, 21 May 1974, Art. 1.
- ¹⁸ Revised Draft Basic Proposal, Art. 5(c) (emphasis added).
- ¹⁹ See United States.
- ²⁰ Ricketson and Ginsburg, vol. 1, para. [7.01].
- ²¹ Handler, 'Television Broadcast Copyright'; Brennan, 'Australian Television Broadcasts as Copyright Property'.
- ²² *Network Ten Pty Ltd v. TCN Channel Nine Pty Ltd* (2004) 218 CLR 273.
- ²³ *ibid.*
- ²⁴ Canadian law recognises the broadcast day as a compilation of dramatic works: Copyright Board of Canada. See also in the US *National Association of Broadcasters v. Copyright Royalty Tribunal* 675 F 2d 367, 377–79 (DC Cir., 1982); *Cable News Network, Inc v. Video Monitoring Services of America* 940 F 2d 1471 (11th Cir., 1991) (recognising a weak compilation right).
- ²⁵ Handler. Similar issues arise in relation to computer programs.
- ²⁶ Given, p. 58.
- ²⁷ Kenyon and Wright; Hitchens, pp. 46–7; Given, pp. 256–60.
- ²⁸ Given, *Turning off the Television*, pp. 251–6.
- ²⁹ *ibid.*; Hitchens, p. 26.
- ³⁰ The Rome Convention only grants rights to control rebroadcast by wireless means.
- ³¹ Wu.
- ³² Streeter.
- ³³ Berne Convention, Art. 11*bis*; TRIPS, Art. 9; although a number of commentators, most notably David Brennan, have noted how the rights of

- copyright owners have nevertheless been subjugated to broadcast policy: Brennan, *Retransmission and US Compliance with TRIPS*; see also Wu, pp. 317–23.
- ³⁴ Ricketson and Ginsburg, vol. 2, paras [13.67]–[13.71].
- ³⁵ How much retransmission benefits broadcasters is contested: *Audio-Visual Copyright Society Ltd v. Foxtel Management Pty Ltd (No 4)* [2006] ACopyT 2; Streeter, p. 586.
- ³⁶ The incumbent could purchase and implement the new technology itself; in theory it should do so if the benefits of the increased audience outweigh the costs. Of course, it is precisely in remote areas where the benefit is likely to be smallest.
- ³⁷ Hitchens, pp. 235–9. Thus the situation may be very different in the US (with 80 per cent penetration) and Australia (with 25 per cent). Another factor is access to attractive content: anti-siphoning laws are important: *ibid.* In the period where no ‘must carry’ obligations were in force requiring retransmission by US cable companies, they continued to retransmit 90 per cent of free-to-air signals: Brennan, *Retransmission and US Compliance with TRIPS*, p. 324.
- ³⁸ Wu, pp. 317–23.
- ³⁹ Hitchens, p. 20.
- ⁴⁰ *Teleprompter Corp v. CBS* 415 US 394 (1974).
- ⁴¹ Wu, p. 311.
- ⁴² Given, p. 251, quoting James Fallows.
- ⁴³ Compare above note 21.
- ⁴⁴ ‘Must carry’ rules guarantee access to signal for cable retransmitters, but simultaneously prevent them from ‘switching off’ the FTA operators’ signals if and when they are ‘no longer required to attract market share’: see Hitchens, pp. 235–9.
- ⁴⁵ Brennan, *Retransmission and US Compliance with TRIPS*, p. 226.
- ⁴⁶ *ibid.*, pp. 248–50.
- ⁴⁷ Hitchens, pp. 20–1.
- ⁴⁸ See Brennan, *Retransmission and US Compliance with TRIPS*, pp. 226–9, 234, 248–55; Wu, p. 314.
- ⁴⁹ Brennan, *Retransmission and US Compliance with TRIPS*, pp. 227–8.
- ⁵⁰ A statutory licence was enacted in 1976 to remunerate owners of copyright in the underlying content: 17 U.S.C. §111. As to the rights of US broadcasters to remuneration as content owners, see *National Association of Broadcasters v. Copyright Royalty Tribunal* 675 F 2d 367, 377–9 (DC Cir., 1982); *Cable News Network, Inc v. Video Monitoring Services of America* 940 F 2d 1471 (11th Cir., 1991).
- ⁵¹ During this period there were constitutional fights over the FCC’s attempts to redraft ‘must carry’ rules: Brennan, *Retransmission and US Compliance with TRIPS*, pp. 249–50.
- ⁵² *Cable Television Consumer Protection and Competition Act* 1992 §4; upheld in *Turner Broadcasting System v. FCC* 520 US 180 (1997).
- ⁵³ 47 C.F.R. §76.56; Hitchens, p. 237.
- ⁵⁴ See Wu; Brennan, *Retransmission and US Compliance with TRIPS*. Canada

has a system largely modelled on the US system: Canadian Heritage; Canada–US Free Trade Agreement, 2 January 1988, Art. 2006.

⁵⁵ Balganesh.

⁵⁶ Wu.

⁵⁷ Hitchens, p. 26.

⁵⁸ Senate Environment, Communications, Information Technology and the Arts Committee, para. [4.8].

⁵⁹ *Broadcasting Services Act 1992* (Cth) s. 212. Also relevant were the provisions of the *Copyright Act*. At that time, owners of broadcast copyright had no general right of communication, and no cable diffusion right (see below note 61). Other copyright owners' rights were governed by s. 199(4) (since repealed), which provided that a person who retransmitted an authorised broadcast to cable subscribers was deemed to have the licence of the owners of copyright in underlying content.

⁶⁰ *Amalgamated Television Services v. Foxtel Digital Cable Television* (1995) 60 FCR 483, appeal dismissed *Amalgamated Television Services v. Foxtel Digital Cable Television* (1996) 66 FCR 75. Australia has never had 'must carry' rules, although the public broadcasters have argued for them: Hitchens, pp. 235–6.

⁶¹ Prior to 2000, copyright owners in Australia had two communication rights: the broadcast right and the diffusion (cable) right. The introduction of a technology-neutral right of communication to the public had been proposed from 1994 in the *Highways to Change* report of the Copyright Convergence Committee. In late 1996, a technology-neutral right was included in the WIPO Internet Treaties. Between then and 2000, debate continued over the appropriate form for new digital copyright laws.

⁶² Broadcasting Services Amendment Bill 1998 (Cth) (a second, 'copyright' part to the proposal was not released at the time of the initial debate). There would have been exceptions to the consent requirement for self-help operators and in remote areas. It is worth noting that this is in fact the system which pertains in Europe under the 1993 Directive.

⁶³ A Senate Committee also received submissions from consumers who complained that they might lose access to FTA service via cable, resulting in a deterioration of signal quality: above note 58. See also *Audio-Visual Copyright Society Ltd v. Foxtel Management (No 4)* [2006] ACOPYT 2 (on the importance to some consumers in poor-reception areas of cable retransmission).

⁶⁴ Hitchens, p. 26.

⁶⁵ *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth).

⁶⁶ Tony Branigan, General Manager, Federation of Commercial Television Stations, quoted in Senate Environment, Communications, Information Technology and the Arts Committee, para. [4.22]. (FACTS has become the body Free TV Australia.)

⁶⁷ There are conditions to the statutory licence: in particular, the content must be unaltered (s. 10 definition of retransmission), and retransmission must be simultaneous, or delayed only to take account of time differences: s. 135ZZI.

- ⁶⁸ Although more recently there has been a significant dispute over what should be paid: *Audio-Visual Copyright Society v. Foxtel Management (No 4)* [2006] ACopyT 2.
- ⁶⁹ *Broadcasting Services Act* 1992 (Cth) s. 212(2) and (2A); see Ricketson and Creswell, para. [9.530]. Ricketson and Creswell note that this is 'a regrettable, but fortunately isolated, example of the need to look beyond the Copyright Act to other legislation to determine the full extent of the rights for which the Act provides'. It should be noted that there are some limits to retransmission: Australian broadcast law does limit retransmission within broadcast license areas; subscription retransmitters must carry regional affiliate material. If subscription television providers wish to retransmit material from outside licence areas, they may seek permission from ACMA. However, no such permission has, at the time of writing, ever been sought.
- ⁷⁰ Chair's Non-Paper, Art. 10. Alternative XX of Art. 17 of the official draft—the Revised Draft Basic Proposal—is in similar terms.
- ⁷¹ Berne Convention, Art. 11 *bis*(2), inserted in the 1948 Revision of Berne: see Ricketson and Ginsburg, vol. 1, para. [12.27].
- ⁷² Cf Brennan, *Retransmission and US Compliance with TRIPS* (arguing such an approach does not comply with TRIPS). It is more questionable whether any of the existing drafts would allow an approach which effectively 'extinguishes' the broadcaster's rights as they apply to cable retransmission, as Australia currently does.
- ⁷³ WIPO Copyright Treaty, Art. 8 and the Agreed Statement concerning Art. 8: Ricketson and Ginsburg, vol. 1, para. [12.48].
- ⁷⁴ For example, many countries retain 'must carry' rules. See above note 53 and accompanying text (US); Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, Art. 31; European Commission Working Document.
- ⁷⁵ The Australian Communications and Media Authority's *Communications Report 2005–2006* talks about 'public interest considerations such as ... encouraging development of innovative content services, such as IP TV and video-streaming over the internet' (albeit while being 'respectful of community standards'): p. 228.
- ⁷⁶ 'IP TV' is television which is delivered, not using the usual broadcast spectrum, but via broadband, using the Internet Protocol.
- ⁷⁷ Chair's Non-Paper, Art. 7; Revised Draft Basic Proposal, Art. 9 (simultaneous retransmission) and Art. 14 (transmission following fixation; that is, deferred retransmission).
- ⁷⁸ The original draft of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) would have included internet retransmissions in the Part VC retransmission licence; they were specifically excluded in the final version: see *Copyright Act 1968* (Cth) s. 135ZZJA. On Canada, see Canadian Heritage, Copyright Policy Branch. In relation to Europe, see European Commission.
- ⁷⁹ WBT drafts include this test for the permissibility of exceptions to exclusive rights: Chair's Non-Paper, Art. 10; Revised Draft Basic Proposal, Art. 17.

This argument assumes—since any other result would likely lead to a veto from developed countries—that any access to knowledge provisions have only limited impact.

- ⁸⁰ World Trade Organization, United States—Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160/R, 15 June 2000, paras [6.109], [6.118]–[6.148]. An exception for limited networks—for example, intranets in educational institutions—might be assessed differently. But that would not be an exception serving *broadcast and mass communications* policies.
- ⁸¹ It is not clear whether the provision relates only to *simultaneous* retransmission. The international approach is to treat ‘retransmission’ as referring only to simultaneous, unaltered communication of the signal: see, for example, Revised Draft Basic Proposal, Art. 5(d); Chair’s Non-Paper, Art. 7; *Copyright Act 1968* (Cth) s. 10 (definition of retransmission). Undefined, however, the term is certainly broad enough to cover the communication of the content from a fixation (recording) of the original signal; see also Chair’s Non-Paper, Art. 7 (referring to ‘deferred retransmission’). The narrower interpretation is preferable, since the alternative would exclude any use of recorded material for purposes such as, for example, fair dealing (Australia) or fair use (USA).
- ⁸² 17 U.S.C. §§112, 114. The ability to do so is preserved in AUSFTA, Art. 17.6.3(c).
- ⁸³ For criticism of Australian attempts to impose content restrictions and censorship online, see Hitchens. Consider also the debate about internet content in the context of revisions of European directives in the area of television: *ibid*.
- ⁸⁴ Consider the line of cases holding online censorship unconstitutional in the US: *Reno v. ACLU* 521 US 844 (1997); *Ashcroft v. ACLU* 535 US 234 (2002); *Ashcroft v. ACLU* 542 US 656 (2004).
- ⁸⁵ See *Copyright Act 1968* (Cth) s. 10 (definition of ‘technological protection measure’).
- ⁸⁶ Biddle et al.
- ⁸⁷ These general concerns motivated FCC involvement in mandating broadcast flag technology: *Digital Broadcast Content Protection: Report and Order and Further Notice of Proposed Rulemaking* 18 FCC Rcd 23,550, p. 23,552 (2003).
- ⁸⁸ See Crawford, ‘The Biology of the Broadcast Flag’; Kenyon and Wright.
- ⁸⁹ Wright, Kenyon and Bosland, p. 4 (quoting one industry representative noting that American content contracts ‘now include three pages of clauses on copy protection and the technologies that they want’).
- ⁹⁰ In Australia set-top boxes are supplied by the subscription broadcaster. In the US, the FCC *CableCard* decision requires decoders that can be inserted into any consumer electronics devices.
- ⁹¹ In reality it can be difficult to enforce the requirement to implement re-use rules, particularly against producers of consumer electronics who are based in other countries. This system also ceases to work once the decryption key is leaked. Further, more often than not, more than one

device will be involved; for example, information must be decrypted by one component and then delivered to a screen. Thus almost inevitably, there is a 'gap' between these: the 'analogue hole'. See further Brennan in this volume, ch. 9.

- ⁹² This is required by law: *Broadcasting Services Act 1992* (Cth) s. 14.
- ⁹³ The broadcast flag is a series of 'bits' embedded in an Advanced Television Systems Committee (ATSC) digital broadcast signal. ATSC is an international committee which sets voluntary technical standards for television. Its standards are used in the US: see Kenyon and Wright, p. 344.
- ⁹⁴ Content Protection and Copy Management. The CPCM system being developed forms part of the Digital Video Broadcast (DVB) standards, developed in Europe and adopted in Asia and Australia: *ibid.*, pp. 351–4; Brennan in this volume, ch. 9.
- ⁹⁵ See also Van Houweling, pp. 118–20.
- ⁹⁶ See above note 92.
- ⁹⁷ Kenyon and Wright, p. 358. In the US, both US law (17 U.S.C. §1201(k)) and the FCC in its *Plug and Play* ruling have sought to protect this ability. On the implications of a shift from 'free for use' to 'pay for use' in television, see Given.
- ⁹⁸ Kaplan, pp. 335–6; Crawford, 'Shortness of Vision', pp. 710–12.
- ⁹⁹ On the dynamic where content protection is designed and implemented by parties other than the content producer, see also Halderman and Felten.
- ¹⁰⁰ Van Houweling notes that US cable companies *requested* that the FCC impose rules limiting encoding of broadcasts, because 'only if all [the cable and satellite companies]'s hands were tied by the FCC could they safely resist the content industry's demands that their programs be wrapped with restrictive TPMs': p. 112. A similar dynamic has been claimed to have occurred in music: Jobs. It would appear this would also apply in Australia to broadcast: see Wright, Kenyon and Bosland.
- ¹⁰¹ Kenyon and Wright, pp. 354, 358–9. For similar arguments, see Van Houweling, p. 107.
- ¹⁰² Revised Draft Basic Proposal, Art. 19.
- ¹⁰³ Chair's Non-Paper, Art. 9.
- ¹⁰⁴ AUSFTA, Art. 17.7.
- ¹⁰⁵ *Copyright Act 1968* (Cth) Part VAA.
- ¹⁰⁶ AUSFTA, Art. 17.4.7.
- ¹⁰⁷ In the US, general anti-circumvention law has been enforced against unauthorised cable television decoder suppliers: *DirecTV, Inc. v. Ferguson* 328 F Supp 2d 904 (ND Indiana, 2004); *Comcast of Illinois X, LLC v. Hightech Electronics*, 2004 WL 1718522 (ND Ill., 28 July 2004).
- ¹⁰⁸ AUSFTA, Art. 21.2(c).
- ¹⁰⁹ While the WTO agreements provide for such claims in IP, no non-nullification claim could be brought during TRIPS' first five years of application: TRIPS, Art. 64(2). The moratorium was extended during the Doha Round of WTO negotiations.

Part III
Media and Communications
Regulation

CHAPTER 11

Switching Off Analogue TV

Jock Given

Introduction

Digital television and analogue television can co-exist, like AM and FM radio, or 45 and 33 1/3 rpm disc records. The particular technologies, spectrum bands and policy models employed to deliver digital TV over the air, however, conceived it as a replacement for analogue, not a supplement. Any co-existence would be temporary. Because digital technology was already so widespread and the features it offered seemed so attractive, many assumed over-the-air television's transition to digital was inevitable and would occur smoothly. That it has not says much about the nature of television, the benefits and costs of digital transmission, and the power of the industrial interests that demanded and resisted the conversion. This article examines the original plans for digital television in Australia, New Zealand, the United Kingdom and the United States; the experience to date, especially the factors responsible for delaying the timetables for analogue shutdown in these countries; and the likely future. The four countries provide examples of early, middling and late adoption of the technology in markets with very different levels of multi-channel television and state participation in television broadcasting. Despite

the global consistency of the rhetoric and some of the policies surrounding DTTV, 'digital terrestrial television' is producing different results in different places. The reallocation of spectrum it enables seems certain to do the same.

The Plans

Governments around the world accepted the immense costs and risks of overhauling their terrestrial television systems because of the direct advantages digital transmission offered for television and the indirect benefits promised by freeing spectrum for other uses. DTTV would provide sharper pictures and sound, more channels, more robust mobile reception, and the ability to store, manipulate and distribute content more easily. Widely described as the most important development in television since the medium was launched, digital broadcasting would provide many people with 'their first experience of the full potential of the information superhighways', according to the UK's 1995 policy paper.¹ Australia's then Minister for Communications, the Information Economy and the Arts promised this 'quantum leap in television technology' would provide the capacity 'for the humble television set to become a central information point in every home'.² Each jurisdiction endorsed policies that made existing free-to-air broadcasters central to the transition, although they emphasised different features. Australia concentrated on the improved quality of high-definition television (HDTV), treating digital primarily as a quality upgrade to the existing free-to-air system. This feature also dominated early policy discussion in the United States, although the final policy did not compel broadcasters to offer it.³ The UK stressed the competitive potential of multi-channel services delivered over digital terrestrial as a rival to the increasingly dominant satellite subscription broadcaster BSkyB.⁴ Making decisions much later, and taking note of the overseas experiences, New Zealand's broadcasting minister said the move to digital television was 'essential to securing the future viability of free-to-air broadcasting in New Zealand', and the continuing strength of public broadcasting's place in it.⁵

The mechanisms and timing for realising the indirect benefits of DTTV varied in the four countries. In the United States, the pressure for reallocation of vacated spectrum to other uses was strong.

The whole process of inventing an American system of digital television was stimulated by free-to-air broadcasters' determination to resist the Federal Communications Commission's (FCC) plan to reallocate some television frequencies to land mobile uses.⁶ The revenue that would be raised from selling the vacated analogue spectrum helped to convince Congress to support the scheme at a time when spectrum auctions had just been introduced and their revenue potential was being noticed. A date for shutting down analogue transmissions was set, and later revised, in budget rather than communications legislation.⁷ In the UK, the initial policy paper contemplated eventual shutdown but no date was proposed until a year after services commenced. The range 2006–10 was then suggested, though it was subsequently delayed by two years. More explicit assessment of the 'digital dividend' that would flow from analogue shutdown followed. Australia initially proposed a simulcast period of eight years, but required a review midway through that period. Only when legislation was amended in late 2006 to try to speed digital take-up were plans put in place that seriously contemplated the eventual shutdown of analogue transmissions.⁸ Relying on a cost benefit study completed in 2006 and discussed further below⁹, the New Zealand Government agreed to launch digital on the basis of an eventual shutdown of analogue, although there was further work to do on the process and criteria for the transition.¹⁰

The cost and complexity of the transition to wholly digital transmission were widely acknowledged, although, as explored further below, they were also underestimated. Consumers would have to buy new receivers or set-top converters and get used to the culture of constant upgrades and problems of compatibility between new and old equipment that were familiar in personal computers but new to television receivers. Broadcasters would have to install new transmission equipment, pay the costs of simulcasting in analogue and digital for years, and confront the possibility of fundamental changes in the nature of their business. They would also have to convince viewers of the need for new receivers while lacking a contractual relationship with them, unlike subscription broadcasters. Consumers and broadcasters would both confront the consequences of different and perhaps reduced signal coverage. Program suppliers would face increased risks of piracy because of the quality and ease with which

digital formats could be reproduced and redistributed.¹¹ The experience of shutting down other transmission technologies showed it could be done but not without strong political will, patience and subsidies. In the UK, the 405-line black-and-white television system adopted in 1936 using VHF frequencies was not closed down until 1985, twenty-one years after 625-line UHF services were introduced.¹² In Australia, the government made its first decisions about digital TV in 1998 while experiencing political heartache over the phased shut-down of the analogue mobile telephone network, eventually completed in 2000, and the redundancy of TV decoders used to receive free-to-air satellite broadcasts in remote areas, caused when the Digital Video Broadcasting-Satellite (DVB-S) transmission system was introduced.¹³

Weighing the direct and indirect benefits against the costs was a difficult exercise, undertaken with different levels of analytical sophistication in each country. It required policy analysts to dig below the conceptual neatness of digital conversion to test the intuitive conclusion that net benefits would result from transmitting existing services in better quality using less spectrum, and making new services available on the vacated frequencies. If this analysis proved DTTV was worth doing, there were further questions about the optimal timing and who should bear the cost. Of the four countries, only New Zealand set out to assess the net benefits of the transition to digital terrestrial TV by comparing it with what might have occurred anyway. The conclusion from this comparison was equivocal. Using its baseline assumptions for take-up of digital free-to-air and pay TV, the study found that introducing digital transmission without a commitment to shutting down analogue would generate a net *cost* to the nation. Net benefits could be confidently expected to accrue only if all viewers were forced to migrate.¹⁴ This was a significant conclusion. Left to make their own choices, consumers would not choose DTTV in sufficient numbers to deliver net benefits. Since an important part of the rationale for digital was to offer new media choices, the fact that net benefits would only accrue if viewers were forced to relinquish analogue reception undermines the intuitive conclusion that introducing DTTV necessarily generates net benefits. The UK published a study in February 2005 that concluded 'switching off, rather than maintaining dual transmission systems, is in the

economic interest of the UK'. Unlike New Zealand, however, digital transmission was already well underway, so there was no examination of the threshold question of whether introducing DTTV itself would deliver net benefits.¹⁵

The second question addressed by cost benefit analyses, relevant whether or not digital transmissions had started, was the optimal timing of switchover. The New Zealand and UK studies both found it should occur as soon as possible. More extreme versions of this conclusion were presented in the United States and Australia. Intel sponsored a study that found huge net social benefits would result if digital switchover was brought forward in the United States, rather than waiting until the legislative benchmark of 85 per cent DTV take-up was reached in each market. The proposal would cost US\$1 billion to subsidise digital set-top receivers, but create social benefits valued at \$US233–473 billion.¹⁶ Australian newspaper publisher Fairfax presented a study by consultants A.T. Kearney showing similar results to the Productivity Commission's 1999/2000 inquiry into broadcasting regulation¹⁷, and electronics retailer Alex Encel presented the same argument to a parliamentary committee reporting in early 2006. He argued that, for a projected cost of \$150 million, the government could bulk-buy a set-top box for every household, bring forward digital switchover by three years, and pay for it with off-setting savings of \$50 million annually by eliminating analogue transmission costs for the ABC and SBS.¹⁸ This assumes set-top boxes could be bought for around \$43, around half the price of the cheapest model currently available, and 15 per cent of the top-priced model.¹⁹

Crucial to most of these evaluations is the methodology for valuing the benefits of new media services. The UK study identified several kinds of benefits: additional services offered over existing television spectrum; 'extended coverage' benefits that can only accrue to viewers unable to receive digital transmissions once analogue transmissions cease and the full power of the digital transmitters can be utilised; and new services offered over vacated spectrum. In addition, substantial 'imputed consumer benefits of compulsory migration' were claimed.²⁰ Together, these highly uncertain benefits made up 81 per cent of the total estimated benefits. Decreasing the estimates for them by a third would turn the net benefit from switchover into a net cost, whenever it occurred. The rest of the benefits in

this model came from the cost savings that would result from ceasing analogue transmission, a much more quantifiable item. The costs of the transition, also much more quantifiable, comprised non-voluntary purchases of digital receiving equipment by consumers; additional consumer energy costs; broadcaster infrastructure; and marketing and 'practical support' costs, excluding the cost of any targeted government assistance. The House of Commons Culture Media and Sport Committee criticised the government's cost benefit analysis, although it recognised it had been used to inform rather than guide the decision to proceed. It thought the benefit side 'very subjective', the assumptions underlying the estimates insufficiently explained, and the narrow economic case for switchover 'inconclusive'.²¹ Several distinctive features of the UK environment are also important to keep in mind when considering the international relevance of its cost benefit assessment. Spectrum for DTTV was allocated free of charge for two twelve-year licence terms to encourage investment in the new medium, unlike the spectrum used for analogue TV (a hidden subsidy); the BBC's capacity to force the pace of DTTV was supported by an above-inflation increase in the licence fee, paid by all television viewers (a hidden cost)²²; and analogue shutdown will allow digital transmissions for the fifth free-to-air network, Five, to expand beyond the 78 per cent of the population reached by its analogue signals, to the same near-universal coverage as the other terrestrial networks (a UK-specific benefit).²³

In New Zealand, the cost benefit study valued consumer benefits by estimating the willingness to pay for extra television services based on an existing study, and comparing it to similar overseas estimates and the prices paid by Sky customers for multi-channel pay TV packages. As in the UK, the aggregate of these benefits and the value of vacated spectrum provided over 80 per cent of the total estimated benefits in the base scenario. Most of the rest came from savings on analogue transmission. Unlike the UK study, large figures were included for the cost of the additional programming required to generate the consumer benefits 40 per cent of the total costs in the base scenario. In Australia, A.T. Kearney included benefits from 'incremental advertising revenue, and incremental subscription/value added services and transactional revenue', which it found to be about 16 per cent higher than the costs of donating set-top boxes to all

Australian homes with TVs. This figure might have been even higher if it had included the additional savings from the much reduced simulcast period, although the study overall could have been refined in many areas. Unlike Britain, where digital switchover will allow Five to reach beyond its analogue coverage areas, the take-up of digital in Australia causes viewers to *lose* access to the analogue-only community channels currently transmitting in four of the five cities. These channels still have no clear technical and financial migration path to digital transmission. In the United States, no formal cost benefit study was attempted by government, but it would have confronted the additional complications that a large part of the freed spectrum is being allocated for public safety uses, whose valuation is even more difficult than commercial services. There is also considerable pressure for spectrum to be allocated free for commons-based wireless applications and devices, rather than allocated by auction to commercial spectrum managers and service providers.

What cost benefit analysis has been undertaken in the four countries, therefore, has concluded that the benefits of digital switchover will be greater the quicker it happens. But the valuation of benefits is highly speculative, and the overall conclusion is unsurprising, given the assumptions that underpin the whole transition. A simulcast model means transmission costs increase greatly as soon as the simulcast begins. The sooner it ends, the sooner transmission costs are reduced. These are easy to quantify and highly visible, particularly where a big share of them is incurred by government-funded public service broadcasters. On the benefits side, by assuming consumers will value new services offered using existing and vacated spectrum more highly than existing services, greater benefits are guaranteed to flow if they are brought forward. This conclusion remains more intuitive than tested. The cost benefit studies do not prove that societies necessarily benefit from a rapid transition to digital. They merely remind us that once a country commits to digital terrestrial transmission, there are real costs in delaying full switchover, and benefits, whose scale is difficult to assess, which remain unrealised.

A third issue, highlighted in the New Zealand study but relevant in all countries, is the optimal mix of digital platforms to be deployed in introducing digital television. The different responses to this issue expose the real goals for the transition and the circumstances in

which governments are prepared to wear any opprobrium from viewers affected by analogue shutdown. These, in turn, have reflected the state of multi-channel television at the time DTTV is launched. In Australia and the UK, where 20 and 26 per cent of households respectively had access to multi-channel TV when DTTV was launched (see Table 11.2 below), the goal has been primarily to replicate analogue terrestrial television coverage with digital. Governments could not rely on existing multi-channel platforms to convert much of the population to digital reception. In the United States, where more than three-quarters of households received multi-channel television already and priorities for the use of vacated frequencies were soon clear (public safety for some, deficit-reducing spectrum auctions for the rest), the goal has been to find a politically acceptable formula for targeted assistance that would allow analogue shutdown to occur as soon as possible across the whole country. More of the work of converting the population to digital TV has fallen to the commercial multi-channel cable and satellite providers already supplying television to the overwhelming majority of viewers' main sets. The introduction of DTTV has been a big issue only for the minority of households who watch terrestrial TV on their main sets, and, in other households, for second, third and other sets and VCRs.

New Zealand, where multi-channel TV take-up lies between these two extremes at 42.8 per cent of households (mainly digital satellite), has interpreted the goal as how best to ensure free-to-air, digital TV services are universally available. That might involve some viewers who currently receive terrestrial analogue services getting digital services by satellite, the option that has proved so popular already as a way of getting access to extra (pay) TV channels. The cost benefit analysis examined both an all-terrestrial and an all-satellite digital TV transmission system with analogue shutdown, finding that neither could be preferred over the other on purely financial grounds. It did, however, find that a hybrid terrestrial/satellite system would hasten the take-up of digital TV and its accompanying benefits and so enable switchover to be brought forward, reducing the period of simulcast. On this basis, the New Zealand Government expressly endorsed a hybrid terrestrial/satellite digital TV strategy, incorporating an initial rollout of DTTV reaching 75 per cent of the population, and the satellite platform to serve the rest.²⁴

Table 1.1.1: Who Pays?

Country	Transmission infrastructure and ongoing simulcast	Consumer receivers: targeted assistance for non-adopters before switchover	Coordination and public marketing	Programming
UK	Above-inflation increase in the licence fee paid to the BBC justified in part by the extra capital costs of digital	BBC meets cost from the licence fee	Industry meets cost—Digital UK, independent, non-profit body set up at request of government, owned by public service broadcasters (BBC, ITV, C4, Five, S4C and Teletext), and multiplex operators	Above-inflation increase in the licence fee paid to the BBC justified in part by the extra programming costs of digital
United States	No subsidies to broadcasters or transmission providers	Government meets cost from proceeds of vacated analogue spectrum auctions	Industry meets cost—DTV Transition Coalition set up to ensure no consumer left without broadcast TV due to lack of information about transition	No subsidies
Australia	Government meeting cost of national broadcaster conversion (ABC A\$600m, SBS A\$400m 'over the decade') and subsidising regional commercial broadcasters with licence fee rebates of up to A\$250m	Not yet determined. Minister anticipates 'some disadvantaged Australians, either by factor of age, location or means, may need some extra assistance'	Digital Australia: organisation within government department, funded by government (A\$22m over four years), assisted by Industry Advisory Group	No specific subsidies, but ongoing funding of national broadcasters ABC and SBS
New Zealand	Government providing NZ\$25 million for the Freeview consortium 'to support the free-to-air transmission platform in its first five years'	Not yet determined	See 'Transmission infrastructure'	Government providing NZ\$79 million over six years to TVNZ to support two new advertising-free digital services

Sources: House of Commons Culture Media and Sport Committee, *Analogue Switch-off: A Signal Change in Television*, HC 650-1, Stationery Office, London, March 2006; *United States Deficit Reduction Act of 2005* ss. 3002-3005 and http://www.ntia.doc.gov/ntiahome/frnotices/2006/couponprogram_nprm_07202006.htm; Senator Helen Coonan (Minister for Communications, Information Technology and the Arts), 'ABC Funding Increases' and 'SBS Corporation Funding', Media Release 036/06 and 037/06, 9 May 2006 and Address to ABN AMRO Communications Conference 2007, Sydney, 17 April 2007; NZ Government, 'Digital Television Strategy', December 2006, <http://www.mch.govt.nz/publications/digital-tv/DTV-strategy.pdf>

A fourth question that cost benefit analysis might help to answer is who does or should pay the costs of introducing DTTV. Table 11.1 above shows where subsidies are being provided by governments to cover or assist in meeting the main costs—transmission infrastructure, domestic receivers, the coordination and public marketing of the transition, and extra or more expensive (HDTV) programming. The New Zealand cost benefit study includes estimates of the impact of the transition to digital TV on different stakeholders. It found the big losers from the introduction of DTTV would be pay TV operators, whose revenues from subscription and advertising would be much lower. Free-to-air broadcasters would initially face higher costs but eventually higher revenues. Government, electronics retailers and the production industry would earn higher revenues from more efficient spectrum utilisation, consumer equipment sales and program commissions respectively. For transmission companies, DTTV would be ‘neutral to positive in revenue terms’. Consumers, however, would be worse off financially because of the need to buy new equipment. The study argued these purchases would be voluntary, motivated by non-financial benefits—a claim that overlooks the atmosphere of compulsion with which governments and others have surrounded the whole DTTV transition.²⁵

The Experience

Table 11.2 below shows the widely different status of the DTTV transition in the four countries. It has not yet started in New Zealand but is less than two years from completion in the United States. It is now the most popular multi-channel TV platform in the UK, ahead even of the satellite service that pioneered both analogue multi-channel and digital TV, and a timetable for the phased shutdown of analogue across the regions has been agreed. At the time of writing (early June 2007), the Australian Government had committed itself to a revised switchover timetable and was busy recruiting staff for Digital Australia to coordinate the process.

Britain’s experience, although widely interpreted as the most successful national deployment of DTTV in a market without substantial cable penetration, was far from smooth. One of the pioneer providers, ITV Digital (initially called OnDigital), went bankrupt and its licence was reallocated to a loose affiliation of the BBC, BSkyB and

Table 11.2: Digital Terrestrial TV: Plans, Experience, Future

Country	Policy settled	Services commence	Initial switchover deadline	Current switchover deadline	Current digital terrestrial TV take-up (%)	Other multi-channel TV take-up (%)	Multi-channel TV take-up at DTTV launch (%)
UK	1996	November 1998	2006–10	2007–12	33.0 (Q1 2007)	48 (Q4 2006)	26.4 (1998)
United States	1996	1998	31 December 2006	17 February 2009	3.3 (December 2004) ^a	86 (June 2005)	78.2 (June 1998)
Australia	1998	1 January 2001	2008–11	2010–12	29.6 (October 2006)	26.1 (Q2 2007)	20
New Zealand	2006	May 2007 (satellite); 2008 (terrestrial)	na	6–10 years after launch	na	42.8 (December 2006)	na

^aThe National Association of Broadcasters more recently estimated that just 1.3 million of the 19.6 million households that relied exclusively on over-the-air television signals households had over-the-air digital TV sets (6.7%): FCC, *Notice of Proposed Rulemaking in the Matter of Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, 25 April 2007, para 12. This represents just 1.2% of total TV households in 2005/06: 'Nielsen Media Research Reports Universe Estimates for the 2005/06 Television Season', 24 September 2005.

Sources: Ofcom, *The Communications Market: Digital Progress Report*, Digital TV, Q1 2007, 20 June 2007; FCC, *12th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, released 3 March 2006; FCC, 'Commission Adopts Fifth Annual Report on Competition in Video Markets' (CS Docket No. 98-102), News Release, 17 December 1998; Digital Broadcasting Australia, *Information Bulletin, March–April 2007*, <http://www.dba.org.au/newsletter/IB-MarApr07-full.asp#PRODUCT1>; Eureka Strategic Research and ACMA, *Digital Media in Australian Homes 2006*; ACA, *Telecommunications Performance Report, 2000/01*; Jock Given, *Turning off the Television: Broadcasting's Uncertain Future*, UNSW Press, Sydney, 2003, Ch. 7; OzTAM, *OzTAM Universe Estimates: Q2 2007 (April)*, http://www.oztam.com.au/pdf/tv_ratings/subscriptionTV_UE20070422.pdf; Spectrum Strategy Consultants, *Final Report—Executive Summary, Cost-Benefit Analysis of the Launch of Digital Free-to-Air Television in New Zealand*, 15 June 2006, http://www.mch.govt.nz/publications/digital-tv/Final_Report_Exec_Summary_June06.pdf; Sky Network Television Limited, *Interim Report December 2006* (multi-channel TV take-up figure is for Sky retail and wholesale customers).

a transmission provider (now the Macquarie-controlled Arqiva). It became known as Freeview, a brand name that came to encompass the whole concept of DTTV in Britain.²⁶ New Zealand imported the name, the primacy of free-to-air in the DTTV mission and the concept of a single, collaborative entity to deliver it. Australia stuck with

the US model of individual digital multiplexes allocated to each incumbent commercial and national free-to-air analogue broadcaster, and did not proceed with the allocation of extra frequencies for non-broadcast 'datacasting' services. Take-up of DTTV in the United States has been extremely slow, reflecting the small proportion of main sets that rely on terrestrial transmission. Take-up in Australia was slow initially, but has quickened along with sales of larger plasma and LCD TV sets, which make the most of the improvements in picture and sound quality available even from standard-definition digital reception. Anecdotal evidence suggests take-up has been much faster in Tasmania and Mildura/Sunraysia, where a digital-only channel brought access to the third commercial channel available in the biggest cities since the 1960s, and with it some hit programs like *Big Brother* and *Australian Idol* that had not been seen in those markets.²⁷

In the markets where DTTV is underway, switchover has been delayed by about two years and governments have accepted, or seem likely to accept, lower levels of voluntary take-up before it occurs. Policy momentum has shifted from the benefits of digital take-up to the costs of deferring analogue shutdown. The wholesale transition to digital has proved neither smooth nor inevitable, because of the nature of television and the development of other media, the benefits and costs of digital transmission, the power of the industrial interests that demanded and resisted the conversion, and their relationship to politics. It has also been influenced by factors that either did not exist at the time the initial policy was formed, or whose importance has grown—what might be called 'X-factors'.

TV and Other Media Developments

Governments around the world chose to do different things with the flexible capacity offered by digital transmission, and the media environment has changed in ways that have both encouraged and thwarted the take-up of these different kinds of DTTV services. Internet use has grown strongly, as was widely anticipated in the mid to late 1990s when DTTV was being debated and introduced. DTTV, however, has not become a mechanism for universal access to the internet, as some imagined. So far, DTTV has mainly delivered more TV, better quality images and sounds, and limited interactivity, rather

than a fundamental transformation in the nature of TV or the experience of viewing it. In the United States, the broadcasters who boasted that they already offered a universally accessible 'National Information Infrastructure' when arguing for spectrum for digital transmission²⁸ did little to pursue this vision once the spectrum was allocated. But the internet has affected DTTV in at least two ways.

First, it has taken some of the time viewers might have spent watching TV, especially in the evening prime time that generates most TV advertising revenue. Roy Morgan data shows the number of Australians accessing the internet at home between 5 p.m. and 10 p.m. doubled between 2000 and 2005, and the number of New Zealanders doing likewise increased 40 per cent between 2002 and 2006. While more than half the respondents in the New Zealand study reported little change in their use of 'old media' (TV, radio, magazines, making telephone calls), significant minorities said they were spending less time watching television (18 per cent) and making international (18 per cent) and domestic long-distance (18 per cent) telephone calls. In Australia, the numbers of 'heavy users' of commercial television and radio, newspapers and cinema have all declined since 1998, but the number of 'heavy internet users' has risen steeply. (Morgan sets a much higher threshold for heavy TV use than for heavy internet use.)²⁹ These usage patterns are reflected in advertising revenue. In 2006, 8.4 per cent of advertising expenditure in all media in Australia was spent online, a bigger share than radio (7.8 per cent) and magazines (6.3 per cent). Free-to-air TV's share was declining, but at 27 per cent of all advertising spending, it was still much larger than the fast-growing pay TV sector (1.8 per cent).³⁰

Second, broadband internet connections have steadily raised the standard of interactive screen-based experiences, making DTTV's interactivity a pale imitation of something already available elsewhere. Less than 1 per cent of Australian households had a broadband connection in 2001 when DTTV started. By December 2006, nearly one in five had broadband.³¹ The response times, search capacities, ability to conduct transactions and other features of broadband internet access have steadily raised the standard of the 'internet-like' experience that DTTV was supposed to offer.

Entirely absent from the policy debates about DTTV in the mid-1990s was a household digital video device that has proved far more

attractive to consumers—the digital video/versatile disc (DVD) player. More than two million were sold in Australia each year from 2003 to 2006, a total unit sales figure considerably higher than the country's 7.38 million TV households.³² Wholesale revenue from sales and rental of video formats trebled between 1999 and 2004, having fallen in each of the three previous years. The rental market that dominated the VHS era has been more than replaced by DVD 'sell-through' (purchases).³³ In New Zealand in 2001, DVD players and digital TV (satellite pay TV) were each in about 10 per cent of New Zealand homes. Five years later, 30 per cent had digital TV but more than 70 per cent had DVD players.³⁴ This 'DVD Revolution'³⁵ has transformed the television landscape around the world at precisely the time DTTV was supposed to be doing it, with complicated implications for both. Better quality, cheaper audiovisual recordings have encouraged audiences to schedule their own viewing. Extra features and directors' voiceovers have inspired people to make more use of affordable digital cameras to make content themselves. But the renewed emphasis on picture and sound quality has stimulated sales of larger screen receivers and home theatre equipment, which is tailor-made for digital distribution, especially at HDTV standard. Many of the most popular DVD titles are boxed sets of television programs³⁶, whose repeated consumption boosts interest in the live broadcast of the next series. Rather than being swept away by the introduction of multi-channel pay TV in Australia in 1995 as many expected, the reinvigorated audiovisual software market has been a major cause of its relatively slow take-up in Australia. That has kept free-to-air TV in the centre of the country's transition to digital TV reception. At the same time, the 'Napsterisation' of the music industry has made the film and television industry around the world reluctant to take full advantage of the quality improvements possible from digital transmission, even though this was the central promise of DTTV in the United States and Australia.

Free-to-air TV programming might not have been fundamentally transformed by digital transmission alone, but there have been big changes in the nature and scheduling of programs and advertisements over the ten to fifteen years that DTTV has been discussed and deployed. Between 1999/2000 and 2004/05, spending by Australian commercial TV stations on variety and other light entertainment,

including most reality TV formats, grew much faster than overall program spending. Expenditure on programming staples, however, like drama, news and current affairs, grew more slowly than overall program spending, and expenditure on sport grew at about the same rate.³⁷ Some of the most enthusiastic consumers of new kinds of TV programs were also big users of the internet and mobile phones.³⁸ Many programs introduced new forms of interactivity, but they used premium-rate voice calls and SMS rather than TV remote controls. Television integrated the programs it distributes in real time with online content and direct sales of physical media. Advertisers stressed the need for multi-platform marketing campaigns, though not for the first time. Audiences fragmented across the plethora of possibilities, although big events continued to draw audiences that were as massive as ever, boosted in part by the scale of out-of-home viewing.³⁹

Benefits and Costs of Digital Transmission

The cost benefit analyses discussed above demonstrate that most of the costs of digital transmission are easier to value than its benefits. Many of these costs, however, were underestimated or given insufficient attention when policy models were debated and agreed, particularly the cost of domestic receivers and aerials, new content and simulcasting.

The cost for consumers to buy new receivers was always going to be much larger than the cost for broadcasters to install new transmission equipment. This consumer cost was often treated as if it was not a real cost at all. Purchases would be voluntary, easily motivated by the benefits and tumbling prices, perhaps undertaken as part of the natural TV set replacement cycle. But this underestimated the *total* cost of household conversion and continuing differences in the cost of digital reception equipment with different capabilities. Headline announcements about £30–50 or \$100 set-top boxes are unreliable guides to the full cost of converting all equipment in a household, which might include installing new aerials and wiring, consuming extra electricity through equipment left on standby and re-recording video libraries.⁴⁰ The price of basic set-top boxes has fallen as expected—standard definition models ranged from \$90–299 in Australia in early May 2007, well down since 2002 when the cheapest model cost \$499.⁴¹ Those that provide access to the

high-definition signals that were one of the main reasons for upgrading, however, still cost at least twice as much: \$199–899. More than a third of Australian households with digital receivers have opted for high definition.⁴² Add the capacity for personal digital video recording and the prices increase to \$250–899 for standard definition or \$799–1399 for high definition.⁴³ Within this range, another element that adds to the price is the twin tuners needed if different channels are to be watched and recorded at the same time—a basic expectation carried over from analogue VCRs. These are not trivial sums, and still virtually none of the receivers currently available includes an Application Programming Interface (API) like the Multimedia Home Platform that would enable the more sophisticated kinds of interactive content that were another of DTTV's selling propositions.

A cheap receiver, much advocated by the supporters of early switchover, means less features, less benefits from DTTV and less reason to buy at all. Where there has been a clear value proposition, like the third commercial TV channels in Tasmania and Mildura/Sunraysia, anecdotal evidence suggests cheap set-top boxes have dominated sales of digital receivers. Generally, however, DTTV is being smuggled into Australian homes inside or alongside other devices—integrated digital TV sets (53 per cent of all digital receiver sales in the December 2006 quarter)⁴⁴, other widescreen and high-definition sets, or set-top box/personal video recorder (PVR) combinations—in the same way the UHF reception capacity needed to watch the SBS in the 1980s initially found its way into many Australian homes inside VCRs. This might not be so powerful an inducement to convert second and third sets in households as it has been for main sets. It also locks consumers into a larger upfront cost for a multi-function device, which might discourage upgrading as digital reception technology improves, thus compromising the long-term potential of the DTV transition. Cheap set-top boxes and integrated products reduce or render invisible the costs of digital conversion for today's consumers, but only at the risk of also reducing the long-term benefits of the whole analogue–digital transition.

Governments in the UK and New Zealand acknowledged the cost of new content by general or targeted increases in funding for public service broadcasters. Australia required minimum levels of high-definition programming to be funded by the broadcasters.⁴⁵

From early 2004, east coast regional commercial TV operators were required to broadcast minimum numbers of local news and weather bulletins, local community service announcements and, if requested by emergency service agencies, emergency warnings. This requirement was given legislative force as part of the liberalisation of media ownership restrictions in 2006.⁴⁶ It was, however, only indirectly related to the digital conversion process. Initially imposed in response to public concern over the closure of TV news bureaux in several large regional centres, it was an effort to prevent a *reduction* in programming already available in analogue, rather than a requirement for an *improvement* in programming to be made available in digital. Interactive content in Australia is receiving some small government funding support through the Australian Film Commission, though this is not specifically tied to DTTV.⁴⁷ Without targeted funds or regulatory requirements, terrestrial broadcasters have shown limited interest in expensive interactive applications. Innovation in this area has come primarily from subscription broadcasters, whose control of their customers' set-top receivers greatly simplifies the writing of new applications.⁴⁸

Industry Attitudes

Incumbent broadcasters' attitudes to DTTV have had a marked impact on policy debates and progress towards switchover. These have been strikingly different in the two markets where free-to-air television is dominated by public service broadcasters (the UK and New Zealand) and those where it is dominated by commercial broadcasters (the United States and Australia). The BBC has led DTTV in the UK, and TVNZ is positioned to do the same in New Zealand. In the United States and Australia, DTTV is not being led at all. The fragmented and competitive free-to-air industries in these countries worked together well enough to make the political case for beginning DTTV, but they have been unconvinced of the business case for aggressively developing and marketing it, and unwilling or unable to cooperate sufficiently to launch a compelling product for consumers. This is not just because of the relative power of the public service broadcasters. It also reflects the particular capabilities of digital transmission. The ability to provide more content streams, in different formats, at a range of different production values, in order to

make archives accessible online and reduce viewers' dependence on broadcast schedules is a boon to broadcasters with public service missions. But it is a mixed blessing for commercial operators trying to reach the biggest possible audiences at every moment of the day.⁴⁹ DTTV has made powerful public service broadcasters stronger, but weak ones have struggled to take advantage of it. The leading role being played by the BBC and the role planned for TVNZ are also a product of political timing cycles. Post-Thatcher administrations in Britain helped re-energise public service broadcasting for the digital age, and the post-Lange/Douglas Labour Party in New Zealand was itching for a chance to reinsert the public into its publicly owned TV service. In Australia, by contrast, the Liberal/National Coalition's 10 per cent cut in the ABC's annual budget soon after winning office in 1996 showed it was unlikely to give public broadcasters a leading role in any new media developments, though a different government might not have behaved any differently. As in the United States, the close relationship between local commercial television stations and local politicians, and between national politicians and national network operators, has ensured that the industry's slow progress with digital has been matched by the government's.

On the other hand, changes in the communications market have launched new players into policy debates with different perspectives from those of incumbent broadcasters. The flexible capacity offered by digital transmission turned broadcast spectrum into a resource that could be put to many other uses, attracting the interest of telecommunications companies, especially mobile operators, and the IT and internet industries. In the United States, these new interests organised themselves into a 'High Tech DTV Coalition' that strongly supported full switchover.⁵⁰ The privatisation of transmission providers in Australia and the UK created new entities with a big stake in DTTV policy. That development has been made even more significant by the acquisition of the biggest broadcast transmission providers in Australia (Broadcast Australia) and the UK (Arqiva, whose parent company acquired its main transmission rival National Grid Wireless in April 2007) by Macquarie Communications Infrastructure Group.⁵¹ In New Zealand, continuing state ownership of the broadcast transmission provider Kordia, as well as TVNZ, means the maker of policy about DTTV still has a direct financial interest in the outcome.

X-Factors

Political support for the whole politically risky transition to digital TV in the United States was underwritten by the revenue anticipated from auctioning vacated spectrum, but congressional resolve was cemented by two events occurring after the initial policy was set. Deficiencies in the communications systems used by public safety agencies like firefighter, police and ambulance services, especially the interoperability of wireless networks, were exposed by the September 2001 terrorist attacks on the World Trade Centre⁵², and again by the emergency response to Hurricane Katrina in August–September 2005. More than a fifth of the 108MHz (UHF channels 52–69) being cleared has now been allocated for public safety to help remedy these problems. In addition, up to US\$1 billion from the auction proceeds is being used for a program of grants administered by the Department of Homeland Security to assist public safety agencies to acquire, deploy and train for interoperable communications systems using the vacated spectrum. This can be interpreted as a long-delayed victory for companies like Motorola that argued in the 1980s for some television spectrum to be reallocated to alternate uses.

The money will be channelled through a Digital Television Transition and Public Safety Fund, established under the same legislation approved in early February 2006 that reset the date for digital switchover. This fund will also be used to pay for the DTTV coupon converter program discussed below; to fund temporary transmission facilities to deliver DTTV to the New York City area, following the destruction of the equipment previously housed on the World Trade Centre and pending permanent facilities on the ‘Freedom Tower’ (up to US\$30 million); and to help eligible low-power TV stations to acquire digital transmission equipment (up to US\$65 million) and low-power analogue TV broadcasters who retransmit broadcast signals to purchase digital–analogue conversion equipment so that they can still operate once the incoming signals are all digital (up to US\$10 million).⁵³ Congress’s confirmation of a single ‘hard’ date for ending analogue transmission by high-power stations across the whole country, which simplifies the reallocation and speeds up the delivery of new services, and the fixing of an early date by which the auction proceeds must be deposited into the fund (30 June 2008), can also be

seen partly as a response to the urgent need for new public safety systems generated by 9/11 and Katrina.

The single national date for shutting down analogue in early 2009 will, if met, transform the United States from laggard to leader in the DTTV transition. 'X-factors' have clearly played a major role, powerful enough to overcome the structural bias 'in favour of the status quo and against large scale reforms' that Galperin notes as a feature of the organisation of the state in the USA, and which he contrasts with the remarkable capacity for radical reform demonstrated under Britain's 'quintessential party government model'.⁵⁴

The Future

The widely varying status of the DTTV transition in the four countries means big differences in their immediate policy and industrial challenges. Likely developments can be assessed across the same four areas as the experience to date: the nature of television and the development of other media; the benefits and costs of digital transmission; industry attitudes; and X-factors. This final section concentrates on the future in the two least-developed digital TV markets, Australia and New Zealand.

TV and Other Media Developments

As switchover occurs in some places around the world, governments and parts of industry are increasingly anxious not to be left behind. But they do not want to be left behind in other areas of communications either. Although they want to encourage take-up of digital TV to ensure ongoing access to television, they are already interested in new kinds of communications services that might use DTTV capacity, vacated analogue spectrum, or different infrastructure like fixed broadband and satellite. This is telecommunications as well as broadcasting. The main players and the industrial and policy history are different, but the politics is just as intense. DTTV is a concrete test of convergence between these sectors, both as a business opportunity and a policy challenge. The policy priorities across all areas of communications are also likely to be fluid. Galperin argues that digital TV policy in Britain and the United States was shaped by different imperatives at different times. In the 1980s, the international competitiveness of consumer electronics manufacturers dominated, and

in the early 1990s, it was the successful participation in the information society. Later in the decade, spectrum recovery and fiscal stability became the issues.⁵⁵ To these, Starks adds maintaining a place for terrestrial transmission and reception in a world of expanding satellite, cable and broadband telecommunications, to preserve the local cultural, linguistic and war-time communications capabilities of public service broadcasters.⁵⁶ The rationale for switching off analogue TV may continue to shift before this long and large project is complete.

Efforts to increase digital take-up will include the carrot of expanding services and the stick of technical requirements for receivers. The New Zealand Government announced the extra TVNZ channels at the outset, and the late 2006 policy changes in high-definition-centric Australia included allowing incumbent broadcasters to progressively introduce multi-channels. From early 2007, commercial broadcasters were able to transmit separate programs on their standard-definition and high-definition digital streams. This effectively meant a second channel for each of the commercial broadcasters in most areas, although not much has been done with the capacity yet. A third will be allowed in 2009. Restrictions on the ABC and SBS, who were already able to offer limited multi-channel services, were lifted altogether. The two sets of frequencies that were offered for the uncertain purpose of 'datacasting' in the biggest markets several years ago, but which were then withdrawn after limited industry interest, will be re-tendered. One will be available for services awkwardly crafted to deliver something between datacasting and television to fixed receivers in homes. The other will be used to transmit television services to mobile receivers using the Digital Video Broadcasting-Handheld (DVB-H) standard. The latter may encourage the take-up of 'digital TV', but not the in-home receivers necessary to hasten switchover.⁵⁷ In the UK, the number of channels available from Freeview has expanded and subscription services have been offered over the DTTV platform for several years, though not as part of Freeview itself.⁵⁸ BSkyB is discussing plans to launch a pay-per-view service over the DTTV platform with Ofcom⁵⁹, and the BBC and free-to-air broadcasters want most of the vacated analogue spectrum to be allocated for high-definition DTTV services.⁶⁰ DTTV will continue to be a combat zone occupied by the rival forces of

preservation, adaptation and obliteration, preaching different visions of what television is, what it is becoming and what it, and the spectrum used to deliver it, could be.

These same forces will also be fighting about broadband, a battle with unpredictable consequences for DTTV. In Australia, this fight intensified early in 2007 when the Labor opposition announced it would establish a public-private partnership to build a Fibre-to-the-Node (FTTN) network reaching 98 per cent of all Australians. Telstra had been arguing with the competition regulator for some time about the terms of access to any such network, and a separate proposal was developed by a group of its competitors.⁶¹ Labor's announcement and Telstra's focus on the FTTN network in its extraordinary public campaign against the telecommunications-specific competition laws in the *Trade Practices Act 1974*⁶², turned an arcane regulatory dispute into a major public issue. The government's concern about the electoral appeal of Labor's sketchy plan was shown by a stream of media releases that attacked it and everything else the Opposition said or didn't say about digital communications. It also demanded improved methodologies for assembling the Organisation for Economic Co-Operation and Development (OECD) data that Labor (and Telstra!) argues shows Australia to be a broadband backwater.⁶³ Clearly, this positive plan for better broadband was thought to have made a deeper impression on voters than Labor's announcement, as part of a package of proposed budget cuts, that it would withdraw public funding for the body set up to oversee the switch-over to digital TV.⁶⁴

This stoush over broadband shows that Australian politicians think communications policy still matters to voters, even without Telstra privatisation left as an issue dividing the major parties, as at recent elections. It might also suggest that, although the digital future matters to voters, the free-to-air television industry's late 1990s version of it might not be wholly indispensable to all politicians. The era of bipartisan support for the main elements of digital TV policy might not last forever. While no-one should underestimate the scale or intensity of the potential fall-out from blunders over analogue switch-off, getting broadband and its successors right in the twenty-first century—the communications policy question now perceived as The Future, and which is The Present for an increasing number of

businesses and households—may be as important as not getting digital TV wrong was in the late 1990s. Broadband might also mark a shift in the relative power of different communications companies. Government ownership of most telcos in the past has constrained and disguised the scale of their political influence, beside the more obvious and newsworthy activities of private media moguls. But privatisation has freed them, liberalisation has galvanised them and, on the evidence of Telstra's nowwearetalking.com.au, the internet has empowered them to wade into politics as deeply as any newspaper or TV mogul. If they are prepared to withhold investment in critical infrastructure in ways that lead to governments being pilloried, they will be every bit as powerful as the television networks whose nightly news bulletins have made and broken political perceptions for decades. Finally, as a rival carrier for some of the sorts of services digital TV promised, an FTTN network should be an important factor in decisions about how much analogue TV transmission infrastructure to replicate in the few areas where digital facilities are not already operating, what to do with the vacated spectrum, and perhaps how much of the DTTV infrastructure to upgrade when the time for that arrives.

Benefits and Costs of Digital Transmission

The shift in emphasis already apparent in the United States and the UK, from the benefits of digital to the costs of retaining analogue, is likely to occur in Australia and eventually in New Zealand once terrestrial digital services commence. Fearful of a consumer backlash, the rationale for full switchover will acquire new rhetoric. Just as 'analogue shutdown' became 'digital switchover', Digital UK now says the whole process not only makes TV transmission more technically efficient and ensures the UK 'continues as a world leader in broadcasting', but, by allowing more people to receive DTTV, 'makes TV fairer'. The US Department of Commerce's (NTIA) consumer brochure explaining the digital TV transition highlights the allocation of some vacated spectrum to firefighters and police.⁶⁵ In Australia and New Zealand, timetables will be determined and announced to get manufacturers, retailers, broadcasters and consumers thinking about 'how' rather than 'when' or 'why'.

Governments will recalibrate the benchmarks they insist are met before analogue transmission can be switched off. The United

States and the UK show how this is likely to be done. Both abandoned the idea of minimum levels of digital take-up (85 and 95 per cent respectively), and are instead implementing programs that make subsidies available to certain classes of people or households to enable them to receive digital services. These governments are placing their faith in promotional campaigns to ensure consumers are aware of switchover, and of the availability of cheap receivers for all and subsidies for at least some consumers, to minimise the number who notice the shutdown of analogue transmission. The crucial issues for the design of subsidy programs are about who can get support, how much and what can they do with it. The United States is making support available to every household but only for very limited purposes and for a short time. A maximum of two US\$40 coupons will be available to every household to enable them to buy up to two digital set-top converters. Applications have to be made between 1 January 2008 and 31 March 2009. Coupons will be valid for only three months and cannot be renewed, traded or combined. The assistance will cost at least US\$990 million, and up to US\$1.5 billion.⁶⁶ In the UK, a wider range of assistance is being offered to a limited group. Most people aged seventy-five or over, or with significant disabilities or registered as blind or partially sighted, are eligible. Assistance will be available to provide and install equipment to convert one TV set, plus some follow-up support. The administrator of the scheme is required to determine the most cost-effective form of assistance in each case. This could be a Freeview or other set-top converter, an internal or external aerial (which might be a satellite dish), a subscription to a pay TV service or something else. Assistance will be free to the poorest households. Other eligible households will have to pay 'a one-off modest fee'. Over the six years from 2007/08 to 2012/13, £603 million has been allocated to the scheme.⁶⁷

Australia and New Zealand will both face difficult decisions about how to make free-to-air digital TV available to households beyond the reach of the currently planned DTTV services. For New Zealand, the choice will be whether or not to extend the DTTV rollout to reach any of the 25 per cent of the population who will only be able to receive free-to-air DTV in the initial (and perhaps only) phase by satellite. For Australia, the choice will be whether or not to shrink the geographic reach of analogue free-to-air terrestrial television,

which has been expensively expanded in recent years under a government 'black spots' program. The UK provides an important precedent for this choice. There, introducing digital transmission from just 7 per cent of transmitter sites (80 out of 1154) enabled 73 per cent of the population to receive DTTV. The remaining 93 per cent of sites are needed to get DTTV to the additional 25.5 per cent of households that will ensure digital coverage approximates analogue's coverage of 98.5 per cent of the population (it will not be exactly the same 1.5 per cent of households missing out on terrestrial coverage). The decision was taken to proceed with the introduction of digital transmission from all sites, 'partly because it provides wider choice and simplifies the message of communicating switchover to the public'. Satellite pay TV provider BSkyB argued it was more economical to convert only 200 to 500 of them and get viewers who would have been served by the others to switch to digital satellite. BSkyB argued that subsidies paid to individual consumers to ensure no-one is left without access to digital terrestrial TV are actually interventions in the wider market for all forms of digital TV that encourage take-up of an inferior form of it. The Commons Committee thought that, in the absence of more detailed published analysis, the case for converting all transmission sites to digital remained 'open to dispute', and recommended the government provide more information on the cost of conversion as a function of population covered.⁶⁸

In Australia, satellite already has a small but clear place in the structure of free-to-air television transmission, but large amounts of government money have recently been spent expanding *analogue* terrestrial coverage. This is in addition to the amounts spent directly on national broadcaster digital infrastructure, and subsidising commercial broadcaster digital infrastructure through licence fee rebates (see Table 11.3). When a domestic satellite system was launched in the 1980s, a new form of Remote Commercial Television Licence was created that authorised commercial television services to be delivered to remote audiences, often for the first time. Some households receive services direct from the new satellite and others from terrestrial retransmission facilities supplied by the licensee or local 'self-help' organisations. The 'black spots' program that ran until 2005, under which the federal government financed new or replacement analogue transmitters, and a continuing program to expand

Table 11.3: Geography and Technology of Australian Free-to-Air TV

Location	Free-to-air TV services	Form of transmission	Start of DTTV	Commercial TV licence fee rebates (\$m)
Mainland capital cities: Brisbane, Sydney, Melbourne, Adelaide, Perth	3 commercial, 2 national and 1 community in all except Adelaide	Analogue and digital terrestrial commercial; analogue community	1 January 2001	
Major regional markets: Queensland, NSW, Victoria	3 commercial, 2 national	Analogue and digital terrestrial	From 2003	163.2
Tasmania and Mildura/Sunraysia	3 commercial (one a joint venture of the other two), 2 national	Analogue and digital terrestrial – third commercial station digital only	From 2003 for all except Mildura/Sunraysia digital-only channel (2006)	14.9
Two operator, non-remote: Darwin	2 commercial, 2 national	Analogue and digital terrestrial	From 2003	6.6
Solus operator: Griffith, Broken Hill, Mt Gambier, Riverland, Spencer Gulf	2 commercial provided by one operator, 2 national	Analogue and digital terrestrial	From 2003	7.5
Remote	2 commercial, 2 national, 1 community in 80 Indigenous communities	Analogue and very limited digital terrestrial transmission in Mt Isa, Geraldton, Kalgoorlie, Sth West, Great Sth WA and remote Indigenous communities; other markets served by digital direct-to-home satellite with analogue terrestrial retransmission in some communities	Progressive roll-outs from 2007	'Almost \$20 million' for regional and remote WA; 0.6 advance funding for Central and Eastern TV2; funds not yet allocated for other remote licensees
Total				Approx. 213 allocated; leaving up to 37 of 250 to be allocated

Sources: ACMA, 'Commercial TV Broadcasting Licences', 21 August 2006; 'Community TV Broadcasting Licences', 7 July 2006; 'Determined Simulcast and Application Dates for Commercial Broadcasters in Regional Licence Areas', 24 November 2003; Television Licence Fees Regulations 1990 – Schedules 1 and 2.

SBS coverage, reduced the number of viewers relying on direct-to-home satellite transmission.⁶⁹ But these programs delivered analogue, not digital TV, unlike the direct-to-home satellite transmissions, which have long been digital.

Having solved yesterday's problem in many of the smallest markets—good quality, cheap analogue TV reception—it is unclear whether terrestrial transmission is now the right technology to deliver the next generation of TV to them. Even with licence fee rebates, it has proved impractical to offer to these markets the full range of DTTV services available in large markets, including HDTV, and the value of vacated spectrum is minimal, given its less dense use in these areas. Satellite may be a more economic way of delivering a high-capacity digital video service to many viewers than is acknowledged by the current policy model, which is driven by the political imperative of replicating terrestrial analogue coverage throughout the country.⁷⁰ This debate may also be affected by the reach of any FTTN or wireless broadband networks.

Industry Attitudes

An important influence on industry attitudes to the digital transition might be changes in the ownership of big media companies. In Australia, that might especially include those enabled by recent changes to laws. New television owners may adopt different strategies, either because they see the future differently or because they control different portfolios of assets, and governments may be less sensitive to their views, especially if television audiences decline. Almost as soon as the new laws were passed, Australia's two top-rating television networks, Seven and Nine, were sold into 50/50 joint ventures between their previous owners and overseas private-equity firms. Nine's parent later sold a further 25 per cent.⁷¹ The largest investor in the third network, CanWest Global Communications, searched unsuccessfully for a buyer for its stake⁷², although it found one, the Australian private-equity firm Ironbridge Capital, for its New Zealand commercial TV and radio operation CanWest MediaWorks.⁷³ Online newsletter *crikey.com.au* suggested that three of Australia's biggest media moguls were being 'replaced largely by cost-cutting private-equity owners whose interest in the Australian fourth estate is based entirely on their ability to flip their new properties at even

higher prices'.⁷⁴ Heavy investment in technical and programming innovation to capitalise on the potential of digital transmission may not be a priority.

Different kinds of owners, however, have different interests in DTTV. The platform has always mattered more to the Seven Network, shut out of Foxtel, than it has to the PBL-controlled Nine. Indeed, one could suggest that the lucklustre deployment of DTTV in Australia has already owed much to the era of PBL's common ownership of Nine and 25 per cent share in Foxtel. But with Nine now controlled by a private-equity firm and no longer the dominant local TV network, Seven's attitude to DTTV may influence the whole platform in Australia much more powerfully, particularly its new partnership with TiVo.⁷⁵ News Corporation's attitude and decisions are likely to be especially important in New Zealand, where it acquired the Prime Network in early 2006 to showcase the programs and channels available on its Sky pay service, and to offer delayed free-to-air coverage of major sports in primetime.⁷⁶ It already controlled a lot of UHF spectrum, which it still uses to deliver a limited-channel pay TV service to the declining number of customers who have not switched to satellite. This gives News a direct stake in the shutdown of analogue TV. Sky's acquisition of Prime positions free-to-air TV as a promotional vehicle for pay TV, in the same way Sky has used its news and sports news channels on Freeview in Britain. That strategy might motivate further acquisitions in Britain, where there is speculation Murdoch will do a deal with RTL to swap his large but not controlling stake in ITV for control of Five.⁷⁷ It might also be relevant in Australia, where he holds 25 per cent of the dominant pay TV operator Foxtel and 50 per cent of its main supplier of premium sports, and is no longer prevented from owning TV stations as well as newspapers in the same market. A subscription operator acquiring a free-to-air network primarily to promote the pay service might make very different decisions about developing the DTTV platform from one focused solely on DTTV. Interactive applications and PVR capability might be developed largely as teasers for the premium-quality services and functionality available through pay TV. If Murdoch's activities in the United States are a guide—the acquisition of MySpace and the sale of the satellite pay TV operator DirecTV, while retaining the Fox free-to-air TV network—yet another approach to the relationship between

different forms of digital media might be underway, along with new means for communications companies to press themselves into the service of politicians.⁷⁸

X-Factors

More dramatically, influential existing media owners like Murdoch might expire at the controls. The death of Kerry Packer was always likely to have a profound impact on the future of the medium in Australia.⁷⁹ The media ownership and digital TV legislation passed less than a year after it happened in December 2005 was still very favourable to the interests he bequeathed, but James Packer has now virtually removed the family from the free-to-air medium his grandfather and father dominated for half a century and the political influence of other media seems likely to grow. It may be harder for tomorrow's television proprietors to co-opt parliamentarians to help craft the media future into the shapes they most desire. A change of government in Australia at the federal election due in late 2007 would also establish new relationships between media proprietors and ministers. Fresh perspectives on the roles of what are often caricatured as old and new media might be brought by a different generation of leaders. More distant, less predictable things might also have an impact on the future of DTTV, as 9/11 and Hurricane Katrina have already demonstrated, and as the two world wars did on the development of radio and television. Climate change might bring more critical scrutiny to communications policies that render large quantities of electronic equipment unusable, or that encourage higher electricity consumption to power larger screens and more equipment left permanently in standby mode. Abundance might become a more ambiguous promise. But climate change might also increase scrutiny on air travel and the movement of physical goods, encouraging greater use of communication as a substitute for transport, and accelerating demand for all sorts of devices to be linked and managed through wireless networks that use vacated spectrum.

Conclusion

Despite common global policy visions and rhetoric, DTTV has evolved differently in different places and at different times. Initial planning proceeded on the basis of an assessment about benefits

and costs that was intuitively attractive but never rigorously demonstrated. The analysis that was later done, like any business case for new media services, was fraught with uncertainty. While it was used to justify the eventual shutdown of analogue transmission, it was most convincing in making the lesser case that once DTTV was launched using a simulcast model, the case for switchover would become overwhelming. The whole process would acquire momentum for policymakers worried about falling behind international trends, for equipment manufacturers and content producers looking to exploit or develop global capabilities, and for consumers, increasingly aware that analogue-only receivers would become redundant. The emphasis has now shifted from explaining the rationale for the whole transition to the timetable for analogue shutdown. The policy goal is now more about switching off analogue than getting the best from digital.

The experience with DTTV in the markets examined in this chapter shows the impact of digital media other than DTTV, especially DVD and high-speed internet or broadband, and of highly unpredictable factors outside the normal compass of media policy, like 9/11 and Hurricane Katrina in the United States. It also shows that the costs of the transition were initially underestimated, especially consumer costs in some markets. Incumbent broadcasters were generally given central roles in the digital transition, but they have approached the task differently. The commercial broadcasters that dominate free-to-air television in the United States and Australia have been cautious, but the public service broadcaster that dominates the medium in the UK, cashed up with an increased licence fee for the purpose, has been enthusiastic. New Zealand, whose free-to-air television industry is unusually dominated by a state-owned commercial broadcaster, wants to follow the British rather than the American or Australian precedents.

In the markets where DTTV policy was set earliest, it was heavily shaped to achieve broadcasting goals, although the internet and information policy provided important context. DTTV policy now is increasingly being affected by other communications issues, especially broadband and mobile communications, and the companies proposing to build new networks to offer improved forms of them. Some of the broadcasters who most influenced the early DTTV decisions in Australia are leaving the game, perhaps for good, and the

strategic directions and influence of their successors are not yet clear. In 1998 and 2000, Australian TV broadcasters argued their medium had to go digital because all other media were about to. In 2007, the medium's former king has decided that, digital or not, it is no longer the place to be—at least for the time being.

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Notes

- ¹ Department of National Heritage, p. 1.
- ² Alston.
- ³ García, Starks and Tambini, p. 33.
- ⁴ Galperin, especially pp. 231–8.
- ⁵ Maharey.
- ⁶ Brinkley, pp. 3–27; Galperin, pp. 71–89.
- ⁷ Kwerel and Levy.
- ⁸ Coonan, 'Ready, Set, Go to Digital'; Department of Communications, Information Technology and the Arts.

- ⁹ Spectrum Strategy Consultants.
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- ¹¹ Given, pp. 111–14.
- ¹² Independent Television Commission.
- ¹³ Grant and Given, pp. 192–3; Given, pp. xiii, 275.
- ¹⁴ Spectrum Strategy Consultants.
- ¹⁵ Department of Trade and Industry/DCMS; Starks, p. 94.
- ¹⁶ Bazelon.
- ¹⁷ A. T. Kearney/Fairfax.
- ¹⁸ House of Representatives Standing Committee on Communications, Information Technology and the Arts, paras [3.202]–[3.207].
- ¹⁹ If the 3.45 million TV households in the country without pay TV or DTTV at December 2006 (assuming none have both) were each supplied with one of the cheapest SD set-top boxes available in May 2007 (\$90), it would actually cost \$311 million. If those with two or more sets were supplied with two set-top boxes, it would cost \$524 million. If US-style coupons were issued, each worth \$US40, and houses with two or more sets could claim up to two coupons each, the maximum cost would be \$284 million. All these options ignore the cost of converting sets other than main sets in houses that already have DTTV.
- ²⁰ Separate valuations were determined for new television services and new mobile phone services. Those for television services were lower, and used to inform the conclusion which was therefore regarded as conservative.
- ²¹ The study assumed the public cost of the targeted assistance would be matched by the private benefit derived by the consumers that qualified for it: see comments by the House of Commons Culture Media and Sport Committee, paras [75]–[79], [92].
- ²² In March 2007, the government announced a new licence fee settlement for the six years to 2012/13 which it described as ‘above or in line with inflation in each year of the settlement’: Oral Statement on Licence Fee by the Secretary of State, 18 January 2007: http://www.culture.gov.uk/Reference_library/Minister_Speeches/Ministers_Speech_Archive/Tessa_Jowell/dcmstjspeech_18jan07.htm. Others described it as ‘below-inflation’: Owen Gibson, ‘Below-inflation Licence Fee Deal Means Tough Choices’, *The Guardian*, 19 January 2007: <http://media.guardian.co.uk/bbc/story/0,,1994126,00.html>
- ²³ House of Commons Culture Media and Sport Committee, para [62].
- ²⁴ NZ Government.
- ²⁵ Spectrum Strategy Consultants.
- ²⁶ Cave, pp. 107–9; Galperin, pp. 221–6.
- ²⁷ Author interviews with representatives from Tasmanian Digital Television, the ABC, Digital Broadcasting Australia and electrical retailers in the areas, 24–26 April 2007. Estimates for Tasmania, where digital service now reaches 70 per cent of the population, range from a third of all households to 50–55 per cent. Darwin became the third market to get a digital-only commercial TV licence in May 2007: Australian Communications and Media Authority, ‘New Commercial Television Service for Darwin’.

- ²⁸ Brinkley, p. 288.
- ²⁹ According to Morgan data from June 2006, 33 per cent of Australians aged 14+ reported using the internet eight or more times per week, the same percentage as read five or more magazines a week. Thirty per cent read at least seven newspapers a week, 28 per cent went to the cinema at least twice in the previous three months, 18 per cent watched four or more hours of television a day and 16 per cent listened to four or more hours of commercial radio: Bryant.
- ³⁰ Commercial Economic Advisory Service of Australia data for calendar year 2006, quoted in Sinclair, 'Old Media Lose Out' and Sinclair, 'Fingers Do the Walking'.
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- ³³ Australian Film Commission, 'Revenue to Distributors from Wholesale Sales of Video' (data from Australian Visual Software Distributors Association).
- ³⁴ Bryant.
- ³⁵ Barlow.
- ³⁶ Eight of Amazon's best-selling twenty DVDs in 2006 were TV shows—two seasons each of *Grey's Anatomy* and *The Office*, and seasons of *Lost*, *Firefly*, *24* and *Gilmore Girls*: see http://www.amazon.com/gp/feature.html/ref=amb_link_3927572_4/103-9486612-5388648?ie=UTF8&docId=1000022091&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-3&pf_rd_r=10YBGB3HJ6PRTGKFF5AX&pf_rd_t=101&pf_rd_p=269536401&pf_rd_i=275030011
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- ⁴⁰ For UK estimates, see House of Commons Culture Media and Sport Committee, paras [71]–[74].
- ⁴¹ Given, p. 169.
- ⁴² Digital Broadcasting Australia.
- ⁴³ See <http://www.dba.org.au/index.asp?sectionID=18>. The continuing difference between the price of SD and HD STBs supports the case made in Australia against HDTV-only digital transmissions: see Given, pp. 161–9.
- ⁴⁴ Digital Broadcasting Australia.
- ⁴⁵ The requirements are set out in *Broadcasting Services Act 1992* (Cth), Sch. 4, Part 4, Div. 2. For annual compliance results, see http://www.acma.gov.au/WEB/STANDARD//pc=PC_100034
- ⁴⁶ See http://www.acma.gov.au/WEB/STANDARD//pc=PC_91817; *Broadcasting Services Act 1992* (Cth) ss 43A–43C and Div. 5C.

- ⁴⁷ There are two special programs with broadcasters—the Broadband Cross-Media Production Initiative (with the ABC) and Podlove (with the SBS)—as well as general support available for digital media development and production: see <http://www.afc.gov.au/funding/fd/digital/default.aspx>.
- ⁴⁸ For a general discussion of television interactivity, see Jensen.
- ⁴⁹ See Given, pp. 222–5.
- ⁵⁰ See <http://www.dtvcoalition.com>
- ⁵¹ Arqiva.
- ⁵² Moore.
- ⁵³ See <http://www.ntia.doc.gov/otiahome/dtv/>; Kwerel and Levy, pp. 25–6.
- ⁵⁴ Galperin, pp. 252–9. The firm, comparatively early switchover date also confounds the present author's speculation that the UK would find it easier to shut down analogue than the United States: Given, pp. 136–7.
- ⁵⁵ Galperin, p. 277.
- ⁵⁶ Starks, p. 13.
- ⁵⁷ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth). The overall policy and its relationship to liberalised rules about media ownership, passed at the same time, is explained in Coonan, 'Address to the Country Press Association'.
- ⁵⁸ See <http://www.topuptv.com/index.html>; http://gb.setanta.tv/gb_index.htm
- ⁵⁹ Sweney.
- ⁶⁰ Ofcom.
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- ⁶⁴ Tanner; Coonan, 'Labor Plans a Digital Disaster'.
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- ⁶⁷ Department for Culture Media and Sport.
- ⁶⁸ House of Commons Culture Media and Sport Committee, paras [64]–[67]; Starks, pp. 95–8.
- ⁶⁹ The black spots program allowed free-to-air TV services to be received without a satellite receiving dish in over 200 new and 186 existing areas of poor reception, see http://archive.dcita.gov.au/2005/09/television_black_spots_program

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- ⁷⁴ Introduction to sole subscriber daily email, 29 May 2007, <http://www.crikey.com.au>
- ⁷⁵ Bodley.
- ⁷⁶ Sky TV.
- ⁷⁷ Robinson.
- ⁷⁸ Garrahan.
- ⁷⁹ '[W]hen his time is up or when he decides the free-to-air medium's era of dominance is over, or when politicians decide to take a little less notice of his views, it's a fair bet that Life after Television, whatever that might be, will begin in earnest': Given, p. 200.

CHAPTER 12

An Analogue 'House of Cards' in the Digital Era The Shifting Structures of Television Broadcasting Policy in Australia

*Jason Bosland*¹

And you know we have a Minister that's been standing up for the last six months saying we're going to consult with everyone, we're going to get everyone together, and we're going to come up with something that everyone can agree to. Well, there is no such media policy. There's never been one, and there's certainly not one now. People are more divided than ever, so I think our policy process leaves a lot to be desired.²

Introduction

Media policy formation in Australia has always been a prickly thorn; policy decisions rarely, if ever, meet with undivided approval.³ The latest round of media reform is no exception. The federal government's 2006 suite of reforms received mixed reactions: for example, the relaxation of foreign and cross-media ownership restrictions was heavily criticised by public interest advocates and academics on the grounds that it would further consolidate incumbent media

interests⁴; at the same time, the commercial free-to-air networks launched a very public campaign against threats posed by the government's reform of the anti-siphoning regime.⁵

These reactions indicate two things about media policy: first, that it is 'hard'; and second, that it cannot, at least in this instance, be explained as *simply* reflecting dominant incumbent power.⁶ The latter observation is contrary to the emphasis, both anecdotally and in much academic commentary, on past media policy outcomes as dictated by the demands of powerful media proprietors. The 'media mates' analysis of policymaking⁷, for example, emphasises the close relationship between Australia's dominant media (namely, Packer's Publishing and Broadcasting Ltd and Murdoch's News Ltd) and leading political figures on both sides of the political spectrum.⁸ Similarly, interest-group perspectives, which emphasise the relative bargaining strength of various interest groups in lobbying for their preferred policy options, consider the influence of the Packer/Murdoch stable to be much greater than that of other competing interest groups. But while these theories are useful in underscoring *who* has the power to shape policy, this is only part of the policy-making story. As explored in this chapter, media policy formation is more complex, and is likely to get increasingly so as new technological opportunities arise.⁹

One particular criticism of the 'media mates' and interest-group perspectives is the insufficient attention given to the structural influences on policymaking.¹⁰ Structures, here, are the various institutional, ideological, economic, technological, regulatory and normative arrangements/environments that determine the practical boundaries of policymaking. While the structural analysis of policymaking is not without criticism¹¹, it nevertheless provides a sophisticated and useful tool for policy analysis. It can help explain, for example, *why* some individuals have more influence over policy formation than others. Thus, as explained by Hernan Galperin, 'power is not an inherent property of the different political actors, but rather a *relational variable*—a function of certain institutional arrangements that make policymakers more receptive to certain demands and ideas than others.'¹² And, not only can these structures, or 'institutional arrangements' as put by Galperin, explain the varying degrees of

influence on policymaking. They can also help explain *how* and *why* policies differ over time and between jurisdictions.¹³

The purpose of this chapter is to consider the structural constraints on media policy formation in Australia. In particular, it pays attention to the ways in which technology, the central structural determinant of media policy formation, affects how media policy is made, who has power to shape it and whose interests are catered for. It explains how these constraints have resulted in a regulatory environment in Australia which is characterised by a series of trade-offs between privileges and obligations. It also describes how new digital technologies—digital television and broadband—undermine the current regulatory arrangement by removing technological barriers to entry. This, it is argued, is likely to result in a change to the way in which broadcasting policy is made. The final section considers the recent media reforms in Australia and argues that this round of reform indicates that technological change may already have led to a change in the policymaking process.

Structural Analysis of the Quid Pro Quo of Broadcasting Policy in Australia

Policy outcomes can be seen as a manifestation of structural constraints. This is because structures limit the possibilities for action by policymakers; that is, in any given policy environment, the scope of policy formulation is limited by the nature of the structures present. This section explores how structures have shaped broadcasting policy in the Australian context.

Some of the more obvious structural factors reflected in broadcasting policy in Australia (and elsewhere) include:

- technology
- ideology (in terms of the normative orientation of broadcasting policy)
- economics
- geography and population
- politics, including the actual and perceived political influence of broadcast media on voting decisions *and* constituent demands. Each is discussed in turn.

Technology

Two significant technical features of broadcasting over the electromagnetic spectrum have shaped how its use is regulated. These features are well known. First, electromagnetic spectrum, including that assigned for carrying television signals¹⁴, is a scarce resource. The limited nature of the spectrum has meant that governments have been required to regulate access to the spectrum through the issue of broadcasting licences. Without a scheme of licence allocation, it is argued that transmissions would become garbled as competing broadcasters attempt to transmit signals over the same frequency—with the ultimate effect that no-one would be heard amid the ‘cacophony of competing voices’.¹⁵ The second technological feature is that ‘broadcasting’, by definition, is a point-to-multipoint technology: if the public has suitable reception equipment, a single television or radio transmission can be received by a mass and wide-spread audience.

Ideology

These two features of broadcasting technology mean that those who have access to the broadcasting spectrum have a privileged capacity to communicate on a mass scale to the public. This has given rise to the normative ideological goal of broadcasting in the ‘public interest’. Governments around the world regulate broadcasting to achieve various social, cultural and educational goals, and to minimise the dissemination of harmful material. The notion of public interest broadcasting is normally traced to the British broadcasting system, where John Reith (later to become Lord Reith), the general manager of the British Broadcasting Company, considered broadcasting so valuable and precious a resource that it should be conducted under strict public interest guidelines¹⁶—in particular, with a view to providing a service to ‘inform, educate and entertain’.¹⁷ The public service philosophy, or ‘public service broadcasting’, has remained an enduring feature of UK broadcasting policy; it has influenced both the content and structure of private and public terrestrial broadcasting in that country. It has also provided an archetypal model for other broadcasting systems around the world.¹⁸ In Australia, the ‘public interest’ orientation of television broadcasting is reflected in matters such as Australian content and children’s programming

obligations, the national broadcaster's public interest obligations in their respective charters, and the objects of the broadcasting regulatory scheme under the *Broadcasting Services Act 1992* (Cth).¹⁹

The other 'strand' of 'public interest' broadcasting regulation relates to media diversity. This is premised on the belief that a democratic, mediated society requires a plurality of media outlets.²⁰ Traditionally, media diversity has been achieved in a number of different ways: content diversity, structural diversity and ownership diversity. Content diversity relates to the range of content broadcast on television. This type of diversity is currently achieved in Australia through content regulation, noted above. Structural diversity, on the other hand, relates to the provision of different types of services—for example, national broadcasters, commercial broadcasters and subscription broadcasters. The third approach to diversity, 'ownership diversity', requires that privately owned media outlets be subject to measures designed to avoid consolidation of ownership. In Australia, consolidation is avoided through various cross-media ownership restrictions.²¹

Economics

The technology of television broadcasting also raises certain economic implications which act as structural constraints on policymaking, at least in relation to commercial broadcasting. First, broadcasting entails high barriers to entry, including extremely high costs of establishing broadcasting infrastructure, and is characterised by economies of scale in both the production and distribution of television programming.²² This means that power easily becomes consolidated in the hands of a limited number of established players. Commercial broadcasting is, in this sense, a natural oligopoly.²³ The second economic implication of commercial broadcasting relates directly to the advertiser-funded free-to-air business model. Free-to-air broadcasters sell audiences to advertisers. The greater the audience share, the more a broadcaster can charge for advertising time. Audience share is determined by: (1) the total number of channels/licensees; and (2) the popularity of screened programming compared to programming on competing channels. However, audiences are, generally speaking, a finite resource: there are only so many potential viewers within each transmission area. An increase in

the number of channels in any given licence area will result in a fragmentation of audience share and, consequently, much higher per-audience programming costs. This means that there is a limit to the number of advertiser-supported free-to-air commercial channels that can operate at a profit in each broadcasting market.²⁴

Geography and Population

This, however, is where geography and population play a crucial role in determining national broadcasting policy. Due to a dispersed geography and relatively small population, it can be assumed that Australia has the capacity to support far fewer advertiser-funded broadcasters in each licence area than in comparable jurisdictions, such as the UK.²⁵ In this sense, geography and population, combined with the technology of broadcasting, directly dictate its economics. Geography and population, however, also have broader implications as to how public interest goals, particularly media diversity, can be achieved. Fewer services would, at least ostensibly, have a negative impact on diversity.

Politics

The last 'obvious' structural determinant of policymaking is politics. This structural constraint arises in two related ways. First, governments clearly have a vested interest in maintaining the ability to reach mass audiences with their political messages by limiting the number of broadcasting channels. Second, the power of the broadcast medium to influence political decision-making means that successive governments have had, and continue to have, a vested interest in ensuring that the regulatory environment suits existing broadcasting interests. Understanding the importance of favourable media coverage to political longevity, successive governments have engaged in reform processes which either reinforce the status quo (inaction), or which further entrench the existing positions of powerful media proprietors.²⁶ Thus, '[m]edia owners and politicians are traders in power; each group at times needing a dash of the other's influence to enrich its own'.²⁷

The Quid Pro Quo

These structural determinants have resulted in the so-called 'trade-off' or quid pro quo approach to broadcasting regulation, with the

whole regulatory arrangement built up around trade-offs between obligations and privileges.²⁸ Under this approach, broadcasters are protected against new market entry (and hence competition) in exchange for meeting certain public interest obligations, including Australian and children's programming quotas and rules relating to media diversity.²⁹ The argument is that the protection of broadcasters' revenue streams provides an 'investment engine' for culturally and socially valuable production and distribution of Australian content.³⁰ This balancing of obligations and privileges has meant that the regulatory approach to broadcasting in Australia has a number of distinct features:

- First, the structural factors, reflected in the quid pro quo, entrench a policy 'house of cards', such that removal of one of the structures may result in the whole policy regime collapsing.
- Second, this 'house of cards' has resulted in a certain amount of policy paralysis as successive governments avoid disturbing the fine balance of the existing quid pro quo.³¹

In other words, the cumulative effect of the existing structural constraints is a policy system which is closed and unresponsive to change. Indeed, successive governments have avoided disturbing the quid pro quo arrangement by resisting or holding at bay any change to existing structures. This is particularly so in relation to technology, where government has sought to impose artificial technological structures purposefully to limit the impact of technological change. One area where this is particularly evident is the government's past reluctance to embrace subscription television.

Subscription television was resisted in Australia until the early 1990s. This was despite numerous official inquiries recommending the introduction of pay TV without delay.³² However, as Tom O'Regan notes, the reluctance to introduce pay TV in Australia was not necessarily about a failure in policy, but a tendency of the government to take note of the incumbent broadcasters' concerns about pay TV eating into their markets.³³ Its introduction in Australia was for a long time blocked due to the lobbying power of the commercial networks. It has been argued that the government was concerned about political retribution from Packer if they were to introduce a fourth

commercial television licence or permit the commencement of a subscription television service.³⁴ This reluctance was formalised in 1986 by the issue of a moratorium on the introduction of pay TV which lasted until October 1992. Numerous arguments were advanced to justify this moratorium—that there was no public demand, that it would draw away important programming from free-to-air television, and that it would have a negative impact on the overall levels of Australian content. The bulk of opinion, however, according to Rodney Tiffen, was that ‘pay TV could damage the quality of free-to-air services, while delivering few benefits of its own’.³⁵

The willingness of the government to engage in microeconomic reform in the early 1990s culminated in a determined policy to reform the broadcasting and telecommunications sectors. Within the broader pursuit of deregulatory reforms there was a realisation that the future of an information-based economy rested with the telecommunications sector, and that ‘value added’ services, such as pay TV, were required for this sector to grow.³⁶ By yielding to the lobbying power of the commercial broadcasting sector, however, the subscription television regime that was finally introduced was much more restrictive than originally envisaged. Pay TV operators, for example, were initially prohibited from raising advertising revenue, and anti-siphoning measures were put in place to prevent many popular sporting programs from migrating to the pay TV sector.

Rethinking Media Policymaking in the Digital Era

Digital technologies have introduced sweeping changes to all communications platforms. The digitisation of all kinds of information (including text, sound and audiovisual) has provided the conditions for previously disparate media platforms to converge, meaning that broadcasting, telecommunications and computing technologies all have the capacity interchangeably to deliver the same ‘bits’ of information. This has resulted in the removal of technological barriers to entry in the provision of all information-based services.

Digital technologies such as digital television and internet broadband mean that the structures underpinning broadcasting policy are changing and are likely to change even more in the future. The switch from analogue to digital broadcasting means that there is

a capacity to reduce the technological constraint of spectrum scarcity, resulting in a greater amount of spectrum for new services. Further, the increasing delivery of audiovisual content over cable and satellite technologies, and over broadband internet, increases the capacity to deliver television-like content (and other media content) on alternative platforms. These technologies also mean that, unlike traditional broadcasting, content can be delivered on a point-to-point and on-demand (non-linear) basis.

As these technologies and services become increasingly prevalent, they are likely to undermine the current regulatory *quid pro quo*.³⁷ This has been recognised by academics writing about the future of broadcast content regulation in the digital age.³⁸ The ability for greater spectrum efficiencies through digital transmission means that regulation is less justified on the basis of spectrum scarcity arguments. Moreover, the ability for more services to be delivered via digital television and over broadband services will result in channel proliferation and greater competition through new market entry.³⁹ This, in turn, will disaggregate the audience share of individual broadcasters, meaning that the economic benefits that currently flow to commercial broadcasters under the *quid pro quo* cannot be sustained. Not only will this have implications for how content regulation is achieved in the future, but it will also change the structures upon which the entire system of broadcasting regulation is based.

The government's reluctance to embrace new broadcasting technologies, however, has ameliorated the immediate impact of digital delivery technologies. Like the approach that was adopted for many years in relation to subscription services, the government appears to have been determined to protect the privileged positions of the commercial broadcasters by maintaining technological and regulatory barriers to entry in an attempt to re-create the analogue environment. Since digital television commenced on 1 January 2001, for example, many of its benefits have not been realised. This is due to the regulatory approach that was taken by the government to its introduction.

The main benefits of digital transmission are increased picture and sound quality, and improved spectrum efficiency.⁴⁰ One particular benefit is the ability to 'multi-channel'—that is, to broadcast

more than one channel of similar quality to an analogue transmission (called standard definition, or SDTV) using a single transmitter.⁴¹ Alternatively, the same amount of spectrum can be used to transmit a single high-definition (HDTV) channel. The two pieces of legislation⁴² which introduced digital television, however, reinforced many of the existing *quid pro quos* and, in effect, sought to ‘reassert “scarcity” as a central feature of media and communications policy’.⁴³ The main features of the scheme are as follows.

Each of the existing national and commercial broadcasters were allocated a 7Mhz portion of digital spectrum and were required to broadcast their existing analogue service in digital mode during the simulcast period (the period leading up to analogue switch-off).⁴⁴ In exchange for the burden of broadcasting in analogue *and* digital mode, a moratorium was put in place on the allocation of new commercial broadcasting licences until 31 December 2006.⁴⁵ Reflecting the policy constraints facing the government, there were certain restrictions on the use that could be made of this digital spectrum. First, broadcasters were required to transmit a minimum of twenty hours a week in high definition (HDTV), meaning that many of the spectrum efficiencies associated with digital television were effectively lost.⁴⁶ Second, the services that could be offered on the loaned spectrum were defined around three new legal concepts: multi-channelling, enhanced services and datacasting.

In general, multi-channelling was prohibited under the regime. The pay TV companies who, at the time, had recently invested heavily in cable and satellite infrastructure argued that it would be unfair to allow commercial broadcasters to offer multi-channel or subscription services.⁴⁷ This was to the satisfaction of the commercial networks (particularly the Nine and Ten networks) who were concerned that offering more channels would disaggregate their audience share, and hence, their advertising revenue.⁴⁸ Consequently, the legislation prevented commercial broadcasters from multi-channelling⁴⁹, except in certain limited circumstances.⁵⁰ Unlike the commercial broadcasters, however, the national broadcasters had a right to provide a second digital service, although the *Broadcasting Services Act* was, until recently, highly prescriptive as to the types of programs that could be broadcast.⁵¹ While commercial broadcasters were not

allowed to multi-channel, they could provide the second type of service: digital program-enhancement content. This is defined in the Act as content transmitted simultaneously with the program where the sole purpose is to enhance a television program, and the subject matter of the enhanced service is closely and directly linked to the subject matter of the program.⁵² One example is different camera angles of sporting events.

In addition to multi-channelling and enhanced content, the Act introduced a third type of digital service—‘datacasting’. A datacasting licence would permit existing broadcasters and new players to use television spectrum to provide digital information and data services. Datacasting, however, has been of little commercial or consumer interest in Australia. This is mainly due to the restrictive definition of datacasting contained within the Act, which purposefully sought to ensure that datacasting did not provide a ‘backdoor’ avenue to provide a commercial television broadcasting licence.⁵³ Due to these restrictions, the datacasting licences failed to attract any bids at all.⁵⁴

The overall regime used to introduce digital television in Australia has resulted in minimal changes to the terrestrial television landscape and, according to Jock Given, has revealed ‘its origins as an initiative of incumbent broadcasters, politically shaped to accommodate existing industrial interests’.⁵⁵ While the impact of digital television on the regulatory framework has, to a large extent, been held at bay, the impact of broadband internet services is likely to be much more disruptive.⁵⁶ In light of the advances in broadband technology, including improved compression and increased transmission speeds, it is becoming easier to deliver audiovisual content over the internet. This means that the government’s approach to technological change is likely to be unsustainable. Such technologies have already taken away the natural barriers to entry (spectrum scarcity) and will increasingly take away the ability for governments to impose technological barriers to entry into the ‘broadcasting’ market. Indeed, governments cannot easily control the transmission and reception of internet-based content in the same way that they can terrestrial broadcasting.⁵⁷ The point-to-point and on-demand delivery of programming over broadband is likely to draw viewers away from traditional broadcasting. And, as I have argued in more

detail elsewhere, this will likely result in significant market changes for commercial broadcasters, including the reduction in and fragmentation of television audiences.⁵⁸

That the existing system of regulation is unsustainable was recognised by the Productivity Commission back in 2000.⁵⁹ The Commission was asked by the government to review broadcasting policy in Australia in light of newly established competition principles agreed upon by the states and the federal government. The Commission recommended extensive reform to almost every aspect of media policy, but was especially critical of the anti-competitive approach that was adopted in relation to digital television.⁶⁰ It recommended the immediate removal of the moratorium on new commercial licensees and the restrictions on the use of digital spectrum (multi-channelling and datacasting). It also recommended the paring back of the anti-siphoning regime: the legal mechanism which prevents many (if not, most) sporting events from migrating exclusively to subscription television. These recommendations were made on the basis that new technology and the convergence of traditional media platforms have rendered the existing regulatory framework untenable and anti-competitive. However, not surprisingly, given that the recommended reforms focused on removing the broad protection given to free-to-air broadcasters, the Commission's report was largely ignored by government.

The important question, however, is what will media policy look like when the 'technological tipping point' arrives—when barriers to entry can no longer be sustained. Presumably, what we will see is a shift away from the traditional *quid pro quo* towards a different media policy. And, of course, when this happens we are likely to see the existing power structures become much less centralised. It is through this lens that the latest round of media reforms should be considered: how has the government balanced enabling digital technologies with consolidating and reinforcing incumbent power? And, importantly, do the reforms signal whether or not technological change is having an impact on: (1) *who* holds the balance of power in shaping policy outcomes; and (2) *how* media policy outcomes are shaped? One thing that we can say with certainty, as the following section explains, is that the 2006 reforms were unlike previous

reforms processes: broadcasting incumbents did not manage to get everything their own way.⁶¹

Media Reform 2006: Signalling the End of ‘Media-Mates’?

In 2006, the government introduced a package of media reforms designed to respond to the structural challenges posed by new digital technologies. As a precursor to the long anticipated reforms, the government released a discussion paper, *Meeting the Digital Challenge*, outlining its preferred policy options. Following a brief period of public consultation, the government released its final policy package, and subsequently, on 14 September 2006, three bills were introduced into the Senate. The bills were passed by federal parliament on 18 October 2006.⁶²

The final package made a number of key changes, including:

- reform to the cross-media and foreign ownership rules
- provision for the introduction of new digital services, including new services by existing players
- introduction of a ‘use it or lose it’ scheme for events on the existing anti-siphoning list.

These changes were said to ‘comprehensively reform the media industry in Australia to create a competitive framework that will deliver consumer choice and a competitive industry in the digital media age’.⁶³ Some commentators suggested that the reforms were introduced to serve the interests of the Packer media empire⁶⁴, or at least to maintain the status quo.⁶⁵ Although there are aspects of the reform package which can be considered ‘pro-incumbent’ (such as the changes to the media ownership rules and new digital services on spare spectrum), other aspects are not consistent with at least some incumbents’ interests (such as increased multi-channelling and greater scrutiny of the anti-siphoning regime). Each feature of the reform package is considered in turn.

Media Ownership

The most controversial aspect of the reforms, and that which received greatest media coverage, was the relaxation of cross-media and

foreign ownership rules. This was also the aspect of the reforms which was highly welcomed by the incumbent commercial interests.⁶⁶ Under the repealed restrictions, a person was not permitted to exercise control over the following in any given transmission area:

- a television licence or radio licence *and* newspaper⁶⁷; or
- a television licence and a radio licence.⁶⁸

There were also restrictions which prevented a foreign person having control of a commercial television broadcasting licence, as well as a cap on foreign ownership.⁶⁹

The *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) removed these restrictions. The cross-media rules were replaced with a 'minimum voice' test, which states that the number of media groups must not fall below five in metropolitan radio broadcasting licence areas and four in regional radio broadcasting licence areas. The Act also introduced a prohibition on the control of more than two of the following in any given licence area: a radio licence, a broadcasting licence and a newspaper.⁷⁰ However, there were no changes to the existing restrictions on a person owning more than one commercial television licence within the same transmission area.⁷¹ Finally, the foreign ownership restrictions were removed, although the media will remain a 'sensitive sector' under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

The removal of the cross-media and foreign ownership rules is said to allow for the rationalisation and consolidation of media assets, leading to a realisation of economies of scale and scope for existing media players. The government's position was that the relaxation of the cross-media rules was warranted due to the introduction of new technologies and new distribution channels for media content.⁷² Media diversity, it was claimed, will continue to be met through a liberalisation of market entry, brought about by digital television as well as emerging platforms and services.⁷³

Reform of the ownership rules was also recommended by the Productivity Commission. In particular, it recommended that the foreign ownership and control restriction be abolished on the basis that it would 'improve access to capital, increase the pool of potential media proprietors, and act as an important safeguard on media

concentration'.⁷⁴ The Productivity Commission also recommended the abolition of the cross-media rules, but only: (1) following the removal of any artificial regulatory barriers to entry, including the moratorium on a fourth commercial channel; and (2) if additional spectrum were to become available for new television broadcasters. In making these recommendations, the Productivity Commission recognised that the cross-media rules should only be removed in combination with the introduction of a more competitive media environment. While the government's reform package did not extend the moratorium on the issue of new commercial broadcasting licences, the power to allocate new commercial licences was returned to the government. However, contrary to the approach of the Productivity Commission, the government also indicated that there will be no new commercial licences allocated during the simulcast period.⁷⁵

According to the government, there is no existing case for the introduction of a fourth commercial network, and the public interest will best be met through the introduction of new and different digital services rather than more television services.⁷⁶ This aspect of the reform package clearly favours the incumbent broadcasters: the removal of cross-media rules while maintaining protection against new market entry.⁷⁷

New Digital Services on Spare Spectrum

The broadcasters also won on the types of new services that are permitted to be broadcast on the remaining unused 'digital' spectrum in the broadcasting service bands that was originally reserved for 'data-casting': the so-called Channel A and Channel B licences. Services offered on these 'channels' continue to be subject to restrictions so as to make them as 'un-television like' as possible.

In relation to the Channel A datacasting transmitter licence, licensees may provide datacasting, open narrowcasting⁷⁸ and community broadcasting services⁷⁹ provided that such services are capable of being received by domestic digital television receivers.⁸⁰ Commercial television broadcasting licensees and national broadcasters, however, are not permitted to control a Channel A datacasting transmitter licence.

The Channel B datacasting transmitter licences may be used to provide services beyond those capable of reception on domestic

digital television receivers. Services might include, for example, handheld or mobile services. The types of services that can be provided will depend on the type of licensee and the type of reception equipment needed to receive the service. Channel B datacasting transmitter licensees may provide any datacasting service that can be provided under a datacasting licence, a service provided under a subscription broadcasting television licence, or any service that may be provided under a class licence (including open or subscription television or radio narrowcasting, or a subscription radio broadcasting service). However, a Channel B datacasting transmitter licensee may not provide commercial broadcasting services or a subscription television broadcasting service capable of reception on a domestic digital television receiver.⁸¹ Nor may commercial television broadcasting licensees or national broadcasters control a Channel B datacasting transmitter licence if it is used to provide services to domestic digital television receivers.⁸²

Multi-channelling

Despite lobbying by the Nine and Ten networks, the government relented on its absolute prohibition on commercial multi-channelling. The government's preferred approach, outlined in the *Discussion Paper*, was to maintain the existing restrictions on commercial multi-channelling until the end of the simulcast period, but with two main changes: first, to allow commercial and national broadcasters to use their HDTV quota of 1040 hours per year to broadcast programming different from the existing standard definition simulcast service; and second, to remove the genre restrictions on the second digital service offered by the ABC and the SBS. However, the final policy package and the amendments passed by parliament went further. While the Act included the changes just described, it also introduced an amendment to permit commercial broadcasters to offer one additional SDTV multi-channel from 1 January 2009.⁸³ At the end of the simulcast period, predicted for between 2010 and 2012, all restrictions on multi-channelling, whether in HDTV or SDTV, will be removed.⁸⁴

The Nine and Ten networks argued against all free-to-air multi-channelling on the basis that it would disaggregate their advertising revenue, leading to a decline in the quality and variety of programming.⁸⁵ The Seven Network was the only free-to-air broadcaster to

want the opportunity to provide multi-channel services, and claimed that it had established a viable business case upon which it could provide such services.⁸⁶ The subscription players argued, on the other hand, that it was anti-competitive to allow commercial broadcasters to enter the multi-channel market while the anti-siphoning regime prevented a level playing field in the acquisition of important sports rights.⁸⁷ Despite objection by leading industry players, the government was determined to allow at least some commercial multi-channelling. This is likely due to the capacity for multi-channel services to promote the uptake of digital television.

Anti-siphoning Reform

The other area where the incumbent broadcasters 'missed-out', at least to some extent, was the government's change of policy in relation to the anti-siphoning regime. The anti-siphoning rules have been a key factor in shaping the broadcasting industry in Australia. These rules prevent pay TV licensees from acquiring exclusive rights to the live coverage of certain high-interest (sporting) events, determined by the minister, before they are acquired by a commercial or national broadcaster.⁸⁸ Events are automatically delisted six weeks prior to their commencement, unless the minister makes a declaration otherwise.⁸⁹ This means that if a commercial or national broadcaster has not obtained the rights to an event six weeks before it occurs, a subscription licensee is able to negotiate for the rights.⁹⁰

At the time the anti-siphoning regime was introduced it was seen as necessary to ensure that audiences could continue to watch events of national importance without being forced into subscribing to a pay TV service.⁹¹ At the time of writing there were effectively over a thousand individual events on the list⁹², with most events listed in terms that cover all of the matches and rounds rather than simply popular finals or semi-finals.⁹³ There has been growing concern that free-to-air broadcasters have not been 'using' many of these rights and that, as a result, the list has been in need of revision.

In addition, restrictions on the ability of pay TV companies to broadcast coverage of key sporting events has been seen as impacting on the adoption rate of subscription television in Australia.⁹⁴ As noted by the Productivity Commission, the anti-siphoning rules 'prevent subscription broadcasters from using exclusive sports coverage to

attract subscribers'.⁹⁵ Warren Lee and Brendan Moylan describe the effect of the anti-siphoning rules as follows:

[Section 115 of the *Broadcasting Services Act*] allows free-to-air broadcasters to act as de facto arbiters of what can and cannot be seen, not only on free-to-air television but also on pay-TV ...

Free-to-air operators are in effect given a statutory monopoly to act as rights brokers to the detriment of everyone else in the sporting rights 'food chain' including players, clubs and sporting associations.⁹⁶

Numerous reports have also criticised the anti-siphoning rules, arguing that the provisions are anti-competitive and unduly favour free-to-air broadcasters at the expense of pay TV operators.⁹⁷ The Trade Practices Commission (the predecessor of the Australian Competition and Consumer Commission), for example, has noted that the effects of s. 115 of the *Broadcasting Services Act* result in the 'artificial constraint on competition in the relevant markets for programming, with the potential consequential effect of placing pay-TV service providers at a competitive disadvantage vis-à-vis free-to-air broadcasters'.⁹⁸ A later report by the Australian Competition and Consumer Commission (ACCC) on the emerging market structures in the communications sector similarly suggested that the anti-siphoning regime 'has substantial anti-competitive effects and is more intrusive than is necessary to achieve the policy objectives of ensuring key sporting events are available to viewers on FTA television'.⁹⁹

While the government did not go so far as to abolish the regime, it is now subject to a 'use it or lose it' policy, under which events which are not adequately 'used' by free-to-air broadcasters will be removed from the list. This means that the list will be subject to much more scrutiny than in the past. Indeed, the government has already instructed the Australian Communications and Media Authority (ACMA) to monitor the 'use' of listed events by free-to-air broadcasters and to report to the minister every six months. From 1 January 2007, the minister started using the information provided by ACMA to determine whether or not listed events should remain on the list.¹⁰⁰

Furthermore, a government review of the anti-siphoning regime will also be conducted prior to 31 December 2009.¹⁰¹

Conclusion

This chapter has argued that changes in technology are likely to change the way media policy is formulated. In particular, the impact of new technology is likely to diminish the influence of traditional media moguls¹⁰², and lead to a gradual rethink of the protectionist regime that has characterised broadcasting policy in Australia. A number of aspects of the latest round of media reforms suggest that this may have already begun: unlike previous media reform processes, not every component of the 2006 package was consistent with incumbent demands.

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Notes

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- ² Anonymous interviewee, experienced in the Australian television industry, who was spoken with as part of 'The Future of Television' project (see note 1 above); see also Wright, Kenyon and Bosland.
- ³ Tiffen, 'Media Policy', pp. 345–6.
- ⁴ See, for example, Given, *Submission to Meeting the Digital Challenge*.
- ⁵ This campaign included a run of television commercials: see Bodey.
- ⁶ Interest-group theories are particularly convenient in explaining media policy outcomes. This is perhaps because they are the most visible manifestation of the policy formation process: see Galperin, p. 248.
- ⁷ See Cunningham, p. 44; Chadwick; Griffen-Foley; Tiffen, 'The Second Age of Television'; Davies; Barry.
- ⁸ Tiffen, 'Political Economy and News', p. 28, where he says '[t]he bipartisan consensus towards currying favour with the strongest media proprietors has been a staple of Australian politics'.
- ⁹ See Flew, 'The Social Contract and Beyond in Broadcast and Media Policy'; Pearce, p. 367.
- ¹⁰ Mayer, pp. 7–8; cf Pearce, p. 367, where it is suggested that the 'media mates', or 'elite perspective', under-emphasises the agency of other interest groups, which are considered (at p. 374) to be 'so insignificant that they were not examined'.
- ¹¹ See Pearce.
- ¹² Galperin, p. 250.
- ¹³ *ibid.*, pp. 18–19. They can, for example, help explain national variations and why some nations find it more difficult than others to introduce extensive reform in broadcasting and media regulation.
- ¹⁴ In Australia, the spectrum assigned for the broadcasting of television is called the broadcasting services bands: see *Radiocommunications Act 1992* (Cth) s. 31.
- ¹⁵ *Red Lion Broadcasting Co v. FCC* 395 US 367, p. 376 (1969). The US Supreme Court said the following in upholding the government regulation

of broadcasting frequencies: 'Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard'. See also Hazlett, p. 243.

¹⁶ See Crisell, p. 18.

¹⁷ See Franklin, p. 19.

¹⁸ Hoffmann-Riem, p. 67; Hitchens, *Broadcasting Pluralism and Diversity*, p. 12.

¹⁹ For example, *Broadcasting Services Act 1992* (Cth) s. 3(1)(a) repeats the famous aims of Lord Reith, that broadcasting services should offer 'entertainment, education and information'.

²⁰ See generally, Hitchens, *Broadcasting Pluralism and Diversity*.

²¹ This type of regulation is not unique to Australia: see Brown, 'The Economics of Media Ownership'; Organisation for Economic Co-Operation and Development.

²² See Flew, 'The Social Contract and Beyond in Broadcast Media Policy', p. 286.

²³ See Brown, 'The Digital Future of Terrestrial Advertiser-Supported Television', p. 43.

²⁴ *ibid.*, p. 42.

²⁵ On this point, see Bosland, p. 107. Currently in the UK there are approximately thirty free-to-air channels available on the digital terrestrial platform, marketed under the brand 'Freeview'.

²⁶ See Tiffen, 'Media Policy', p. 337; Westfield, p. xxv.

²⁷ Chadwick, p. xviv.

²⁸ See Productivity Commission, p. 55. The Productivity Commission, for example, stated that 'broadcasting policy is a structure built by *quid pro quos*: barriers to entry are balanced against programming obligations; free-to-air networks are prohibited from multi-channeling to help subscription services which in turn are disadvantaged by restrictions on advertising and anti-siphoning rules; free-to-air networks are required to broadcast in high definition because they have been lent spectrum to do so; and so on an[d] on': p. 254. This relationship is a product of historical bargains that have been present since television broadcasting commenced: see Flew, 'Television and Pay TV', p. 174; Flew, 'Broadcasting and the Social Contract', p. 115; Hazlehurst, p. 114.

²⁹ See Bosland, p. 103.

³⁰ *ibid.*

³¹ As, for example, pointed out by Brennan, p. 80: '[i]t is this dynamic which helps to explain why successive Australian governments stymied the expansion of free-to-air broadcasting ... and ... delayed the development of subscription broadcasting'.

³² Dwyer, p. 103; see, for example, Australian Broadcasting Tribunal; Department of Transport and Communications; House of Representatives

- Standing Committee on Transport, Communications and Infrastructure; Senate Select Committee Subscription Television Broadcasting Services.
- ³³ O'Regan, p. 66; see also, Flew, 'Broadcasting and the Social Contract', p. 118.
- ³⁴ Westfield, p. xxi; Dwyer, p. 103.
- ³⁵ See Tiffen, 'The Development of Pay Television in Australia'.
- ³⁶ *ibid.*
- ³⁷ See Productivity Commission, pp. 5, 20.
- ³⁸ See Flew, 'Broadcasting and the Social Contract', pp. 118–26; Goldsmith et al., 'Asserting Cultural and Social Regulatory Principles', p. 95; Goldsmith et al., *The Future for Local Content?*; Bosland, p. 103; Feigenbaum.
- ³⁹ See Duffy, Davis and Daum, pp. 39–41; Goldsmith et al., 'Asserting Cultural and Social Regulatory Principles', p. 95; Flew, 'Broadcasting and the Social Contract', p. 123.
- ⁴⁰ See generally Hitchens, 'Digital Television Broadcasting'.
- ⁴¹ Given, 'Being Digital', p. 39.
- ⁴² *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth), which amended the *Broadcasting Services Act 1992* (Cth). Following a number of policy reviews, another piece of legislation was passed: *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* (Cth).
- ⁴³ Given, 'Being Digital'.
- ⁴⁴ At the end of the simulcast period the spectrum used for analogue transmission must be forfeited to ACMA, at which time it can be used for other services.
- ⁴⁵ *Broadcasting Services Act 1992* (Cth) s. 28.
- ⁴⁶ Prior to the 2000 amending legislation broadcasters were required to transmit in HDTV mode only. However, concerns voiced by consumer associations and receiver manufacturers as to the high costs of producing HDTV content and purchasing reception equipment resulted in a policy shift in favour of a standard definition (SDTV)/HDTV simulcast—or, more accurately, a SDTV/HDTV/analogue triplecast; see Given, *Turning off the Television*, pp. 159–86; Hitchens, 'Digital Television Broadcasting', p. 114; *Broadcasting Services Act 1992* (Cth) Sch. 4, Part 4, Div. 2 (HDTV quota standards).
- ⁴⁷ Given, *Turning off The Television*, p. 178; see also Department of Communications, Information Technology and the Arts, *Provision of Services other than Simulcasting*, p. 8.
- ⁴⁸ Given, *Turning off the Television*, p. 178. In any event, by convincing the government that the public would prefer the better picture and sound quality of HDTV, the broadcasters were hardly able to go back on their word by demanding the right to multi-channel in SDTV, which requires much less bandwidth: see also, Bourne, p. 206.
- ⁴⁹ *Broadcasting Services Act 1992* (Cth) Sch. 4, cl. 6(8)(d) (commercial) and 19(8)(d) (national).
- ⁵⁰ Where the live coverage of a sporting event runs over time on the standard service and continued coverage would interfere with a regularly scheduled news program, then the remainder of the event may be broadcast

concurrently with the scheduled program: *Broadcasting Services Act 1992* (Cth) Sch. 4, cl. 6(8)(d).

⁵¹ For example, programs which dealt with regional matters, religion, the arts, culture or history, or were directed at children were permissible. News bulletins were prohibited, unless presented in a foreign language or focused on regional affairs, but an 'occasional stand alone drama' was permitted: see *Broadcasting Services Act 1992* (Cth), Sch. 4, cl. 5A.

⁵² *Broadcasting Services Act 1992* (Cth) Sch. 4, cl. 6(14) (commercial) and 19(14) (national).

⁵³ See the simplified outline in *Broadcasting Services Act 1992* (Cth) Sch. 6, cl. 1: 'Datacasting content will be subject to restrictions. Those restrictions are designed to encourage datacasting licensees to provide a range of services that are different to traditional broadcasting services'; see also, Leiboff. There are broad genre restrictions on datacasting under the *Broadcasting Services Act 1992* (Cth): datacasting licences are subject to the condition that the licensee will not transmit a 'category A' or a 'category B' television program: Sch. 6, cl. 16(1). A category A television program basically includes anything which resembles entertainment, whereas a category B television program consists of a news or current affairs program, a financial, market or business information bulletin or a weather bulletin: Sch. 6, cl. 13, 16. Explicitly excluded from the definition of a category A or category B program is an information-only program, an educational program and a foreign-language news or current affairs program. However, a datacaster can transmit a category A or B program, provided it is no longer than ten minutes in duration and is not combined with another category A or B program, respectively, which would constitute a program longer than ten minutes.

⁵⁴ Flew, 'The Social Contract and Beyond', p. 294; cf Tanner.

⁵⁵ Given, *Submission to Meeting the Digital Challenge*.

⁵⁶ Bosland, p. 108.

⁵⁷ *ibid.*, p. 110.

⁵⁸ *ibid.*

⁵⁹ Productivity Commission, p. 6.

⁶⁰ See Thomas.

⁶¹ See Editorial.

⁶² *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth); *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth); and *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth).

⁶³ Coonan, 'New Media Framework for Australia'.

⁶⁴ See Ricketson.

⁶⁵ Knight.

⁶⁶ See Schulze and Lewis.

⁶⁷ *Broadcasting Services Act 1992* (Cth) s. 60(b), (c). This is where at least 50 per cent of the circulation of the newspaper is in the licence area: *ibid.*, s. 59.

⁶⁸ *ibid.*, s. 60(a).

⁶⁹ *ibid.*, ss 57, 58.

- ⁷⁰ This is where at least 50 per cent of the circulation of the newspaper is in the licence area: *ibid.*, s. 59.
- ⁷¹ *ibid.*, ss 53(2), 54.
- ⁷² Other countries have made similar reforms in light of digital technologies, including the UK with the *Broadcasting Act 1996* (UK), which also introduced the digital television regime.
- ⁷³ Department of Communications, Information Technology and the Arts, *Meeting the Digital Challenge*, p. 39.
- ⁷⁴ Productivity Commission, p. 340.
- ⁷⁵ See Department of Communications, Information Technology and the Arts, *Meeting the Digital Challenge*, p. 21; Coonan, 'New Media Framework for Australia'.
- ⁷⁶ Department of Communications, Information Technology and the Arts, *Meeting the Digital Challenge*, p. 21.
- ⁷⁷ Kohler.
- ⁷⁸ An open narrowcasting service is a service which can be provided under a class licence rather than an individual licence, provided it is not on a subscription basis and provided its reception is limited in one of the following five ways (*Broadcasting Services Act 1992* (Cth) s. 18):
- by being targeted to special interest groups
 - by being intended only for limited locations (arenas or business premises)
 - by being provided during a limited period or to cover a special event
 - because they provide programs of limited appeal
 - for some other reason.
- ⁷⁹ This is a service which is provided for community purpose, does not operate for profit or as part of a profit-making enterprise and is available free to the public. The provision of a community broadcasting service requires an individual licence: *ibid.*, Part 6.
- ⁸⁰ *Radiocommunications Act 1992* (Cth) s. 109A(1)(ia).
- ⁸¹ *ibid.*, s. 109A(1)(ib).
- ⁸² *ibid.*, s. 109A(1)(ic).
- ⁸³ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) Sch. 3, cl. 3. While the commercial broadcasters will be permitted to offer additional multi-channels during the simulcast periods, such services will not be subject to Australian and children's programming obligations: *Broadcasting Services Act 1992* (Cth) s. 122. The government explained this exemption on the basis that multi-channel services will need time to develop and 'become established before they are subject to the full suite of regulatory obligations': *Broadcasting Legislation Amendment (Digital Television) Bill 2006 Revised Explanatory Memorandum*, p. 53. Furthermore, an event listed as an anti-siphoning event is not permitted to be broadcast on a national or commercial multi-channel service, in whole or in part, before it is broadcast on a main simulcast service: *Broadcasting Services Act 1992* (Cth) Sch. 4, Part 4A, Div. 1, cl. 41C (commercial HDTV), cl. 41J (national HDTV), cl. 41H (national SDTV); *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) Sch. 3, cl. 41A. An exception

to this is where an excerpt of an event is included in a news or current affairs bulletin that is broadcast on a multi-channel service.

- ⁸⁴ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) Sch. 3, cl. 3.
- ⁸⁵ See Publishing and Broadcasting Limited; Network Ten.
- ⁸⁶ See Seven Network, *DCITA Multichannelling Review*, p. 3; Seven Network, *Inquiry into the Uptake of Digital Television*.
- ⁸⁷ See Foxtel, pp. 23–7; Australian Subscription Television and Radio Association, p. 16.
- ⁸⁸ *Broadcasting Services Act 1992* (Cth), Sch. 2, Part 6, cl. 10(1)(e).
- ⁸⁹ *ibid.*, s. 115(1AA), (1AB).
- ⁹⁰ Broadcasting Legislation Amendment Bill (No 2) 2001 Explanatory Memorandum.
- ⁹¹ Butler and Rodrick, p. 585.
- ⁹² Coonan, 'The New Media World', claiming over 1000 individual events listed. Productivity Commission, p. 431 cited the estimate of News Limited of over 2400 individual events. The anti-siphoning list is available on ACMA's website, via <http://www.acma.gov.au>
- ⁹³ Butler and Rodrick, p. 586.
- ⁹⁴ The pay TV industry in Australia has only recently been reported to have broken even, since it was established in 1995 (see Williams), although some channels have been profitable for longer: see Rodney Tiffen's chapter in this book.
- ⁹⁵ Productivity Commission, p. 435.
- ⁹⁶ Lee and Moylan, p. 105.
- ⁹⁷ Flew and Spurgeon, p. 71; Harran, p. 227.
- ⁹⁸ Trade Practices Commission; see also Lee and Moylan, pp. 98–9.
- ⁹⁹ Australian Competition and Consumer Commission, p. 72.
- ¹⁰⁰ Department of Communications, Information Technology and the Arts, *Meeting the Digital Challenge*, pp. 32–4.
- ¹⁰¹ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) Sch. 3, cl. 115A.
- ¹⁰² See Murdoch, stating that power was shifting away from 'the old elite in our industry—the editors, the chief executives and let's face it, the proprietors'.

CHAPTER 13

Citizen Versus Consumer in the Digital World

*Lesley Hitchens*¹

Introduction

The 2006 digital reform legislation is a welcome attempt to address some of the deficiencies of the original digital television policy and legislative scheme. However, it represents an inward focus—that is, a focus on traditional media, traditionally delivered, albeit with the prospect of some new digital channels, potentially over different platforms. Increasingly, however, traditional content and new content is being delivered over a variety of platforms, and the public is accessing that content in its own time, making its own selection. An article in the *Sydney Morning Herald* made the following statement about a 22-year-old media user:

[She] is one of a growing number of people who are drawing from a smorgasbord of media and entertainment options that is not dependent on what the networks decide to screen, what radio stations put on their playlists, or what daily newspapers think is fit to print. Rather than heading straight for the most popular or best publicised option, they are using technology to find the books, television, music and journalism that best fit their particular tastes.²

It is commonplace now for governments and rule makers—certainly this can be seen in Australia, as well as the United Kingdom and the United States—to assert that the ability to access content via the internet, especially, and via other delivery platforms, is making superfluous much of the regulation of traditional media. This can be seen especially in relation to ownership and control regulation and reform.³ In other words, it is argued, we no longer need to be so dependent upon regulation for the assurance of diversity in our media: instead we can look to this array of new media to provide us with diversity. A degree of scepticism is appropriate here for two related reasons. However, before addressing this, it is important to clarify the type of content with which this chapter is concerned. The focus of this chapter is upon content which would be understood as news, current affairs and commentary or opinion; what we might term ‘informational content’. This is not to suggest that other types of content—the more entertainment-focused content, for example—do not have value in themselves or a role to play in the issues discussed here, but they are not of primary relevance for the concerns which will be explored in this essay.

As suggested, a degree of scepticism is appropriate for two related reasons. The first relates to the comment from the *Sydney Morning Herald*, quoted above. Not all retrieved digital content will be the result of a free-wheeling exploration of the relevant delivery platform. Much of it will be accessed via a package of some sort—for example, a mobile phone provider’s walled garden of content. In this sense, the content will be delivered to us—there may be many ‘channels’ but what is available will be determined for us, even if we have control over the ‘scheduling’ as it were. What channels are available and what content is delivered over those channels may well depend upon the established media corporations, who, as Dwyer and Tiffen examine in their chapters in this book, will be keen to ensure that they have access to these new platforms. Secondly, and relevant to the first point also, much of the content being delivered over these newer platforms is content which has been or is available over the more traditional platforms, whether it is provided by the BBC, CNN, the ABC or Fairfax (allowing here for the idea of the print media as a delivery platform, although the regulatory model might be quite different). More often than not, then, the content available is simply

repackaged content from the traditional and established media operations. New content is either less well-developed or caters to a relatively niche audience. Of the new content emerging, there is a range from the professional commentary sites, such as Open Democracy, Salon.com, and Crikey, to the amateur sites (but not necessarily unskilled or of 'lesser quality'), such as the citizen reports and the individual weblogs. In that sense, one needs to be cautious about the new media/diversity arguments. Diversity of delivery platforms should not be equated with diversity of actual content.

Nevertheless, even in relation to this repackaged content, the internet obviously provides the user with access to a far greater variety of such content. A few clicks of the keyboard constitute a passport into media available all over the world, limited only by our ability to speak the language of delivery. We should at least anticipate that new content will eventually emerge, which ranks alongside the traditional news and current affairs reporting sources. After all, radio and television were rather amateurish affairs when they began. Although this collection is grouped around the idea of digital television, I want to focus more broadly on the content. It is digital technology that is enabling the delivery of content across different platforms—both the traditional delivery platforms and the new—and I would argue that that is what we need to be addressing in terms of regulatory policy: what is the nature of this digital space and how should we approach it in policy/regulatory terms? In this chapter, 'digital content' will be used to describe the content product, and, for the purposes of this discussion, will be confined to informational content (that is news, current affairs and commentary) which might be available across a variety of platforms.

Although, as already noted, the 2006 digital reforms were focused on television, and there were legitimate reasons for that focus, the Australian Government is nevertheless beginning to address the implications of digital content. In April 2006, the government completed a review of options to provide more uniform regulation of audiovisual content delivered across different delivery platforms⁴, and, in June 2006, the communications minister, Senator Coonan, responded to the review by announcing her intention to introduce legislation that would provide uniform safeguards for content distributed across these different delivery platforms (or

'convergent devices' as the review referred to it). It is intended that this legislation will address what is regarded as 'inappropriate or harmful material' with a view in particular to the protection of children.⁵ Although at the time of writing the legislation has not been introduced, the government's intentions were strengthened by a particular incident associated with the reality TV program *Big Brother*, which occurred in July 2006. Now infamously known as the 'turkey-slapping' incident, the content had not been broadcast but had been made available as streamed online content.⁶ Although a variety of regulatory schemes are already in place to cover broadcasting content, as well as content delivered over other platforms, such as the internet and mobile phones, the *Big Brother* incident highlighted regulatory gaps when it became clear that regulation of the content in question was dependent upon how the content had been transmitted, and, in that instance, fell into a regulatory vacuum. However, I would suggest that the current focus gives rise to some concerns. It seems that there are two dilemmas about the current focus or approach.

First, there is an absence of debate about the policy which should inform the regulatory approach to digital content. This is perhaps not surprising—considered policy discussions about the media are not at the forefront of government agendas in Australia. Secondly, and perhaps as a consequence of the first point, there is a very narrow view of what needs to be considered regarding the regulation of digital content. The government's focus is only on content that might be deemed as harmful or offensive—the concern is primarily about content safety. I would suggest that there is a need for a wider focus. If it is the case that the traditional media—in the sense of media traditionally delivered—are increasingly less significant or dominant, then there needs to be a renewed (or perhaps new) debate about what we mean by media, and what 'public-regarding' role we expect them to play. In the past, the traditional media have been expected to bear that role, even though it might be argued that, in Australia, we have had a very under-developed expectation of what that might entail. However, if the space occupied by the traditional media within the media environment is to diminish, or, in other words, to become one of many mechanisms for the delivery of content, then we need to reconsider where that public-regarding role should be focused. This

chapter is a start at addressing these issues; that is, what might be an appropriate policy response to digital content, specifically informational and commentary content, and what might that mean for the regulatory focus.

Regulatory Space

Before addressing these issues, it is worth first clearing up one matter. Inevitably, when one begins to speak of regulation there tends to be something of an alarmist reaction, possibly because of a narrow conception of what regulation might constitute. This is why it is helpful to speak of the 'regulatory space'. To talk of 'regulation' of digital content might create the impression that what is being proposed for digital content is some form of heavy-handed, command-and-control legal regulation.⁷ The 'regulatory space' concept enables one to avoid stark dichotomies, such as regulated/unregulated, regulator/regulated and public/private.⁸ The regulatory space concept recognises that regulatory power and authority will not be held within a single formal body, but can be dispersed between any number of entities, both private and public, within that space.⁹ There will almost certainly be a variety of 'regulatory modalities' within the regulatory space.¹⁰ Those modalities are not unknown to the Australian media regulatory environment, which already uses statutory and self- and co-regulatory models, although the design of some of these regulatory models is open to criticism.¹¹ For the purposes of this chapter, the concept of the regulatory space (even in the somewhat unsophisticated way in which it has been presented here) is useful, because it can provide a broader conception of the resources and tools which might be relevant 'to support the public policy objectives of the regulatory regime'.¹² The concept is also helpful because it avoids setting up a false construct whereby the market, and, more particularly, the discipline of market forces, is viewed as outside regulation, or as non-regulation. As Gibbons has suggested, this allows a different way of viewing regulation. Rather than viewing it as a departure from the norm, that is the market, one can instead view the market as simply another instrument within the regulatory space, which may be selected to serve the public policy objectives of the particular regulatory environment.¹³

Digital Content and the Citizen

I have argued elsewhere that a normative case can be made for the regulation of media based upon Habermas's public sphere model, appropriately adapted.¹⁴ This of course is not novel. Nancy Fraser refers to the public sphere as 'an institutionalized arena of discursive interaction'.¹⁵ The public sphere, then, can provide an essential space for the generation and consideration of public views and opinion, in turn facilitating the democratic process. Despite the concerns that Habermas has expressed about the media, it would be difficult today to envisage the public sphere operating without media participation. In fact, as Dahlgren suggests, the media have become 'the chief institutions of the public sphere'.¹⁶ Thus, the media

are able to provide a focus for citizens within that space, to provide access to different voices, and to facilitate debate. However, the mere presence of the media within the public sphere will not be enough to secure this role. It is essential that the media are not subverted by political or economic power, but are able to function as independent servant-actors within the public sphere. This requires careful attention to the way in which the media are structured and operate. In turn, the recognition of the public sphere model, and media's role within it, can provide the normative basis for determining the shape of, and practices within, the media environment. A media environment which values and promotes pluralism and diversity will help to guarantee that the media fulfil their proper role within the public sphere.¹⁷

The public sphere model can also be helpful in thinking about digital content. With broadcasting (and also with the print media, although the regulatory response has been quite different), there has been a sense, however poorly articulated and realised, of it having a role in serving the public interest, a public-regarding role: its use of public spectrum, its ubiquity and its homogeneous delivery all contributed to its perception as an influential medium. The print media have similarly claimed this public-regarding role. Although they have not been subject to the same type of sector-specific regulation as

broadcasting, adherence to press codes of ethics can be seen to reflect this same sense of fulfilling a public-interest role. However, in relation to digital content that is delivered over non-traditional platforms, there seems to be a quite different sense in which it is perceived. It seems much less likely to be imbued with this public-regarding character. Some reasons for this can be suggested:

- It might be a cynical suggestion, but it suits political leaders to have the digital content environment entertainment-focused, rather than focused on what is happening in public life. Indeed, Monroe Price has thoughtfully argued a similar point in relation to the broadcasting media.¹⁸ Thus, there is little incentive to develop policy which might imbue digital content with a public-regarding role.
- Digital content is not a homogeneous product. In other words, it is not delivered within the framework of a regular schedule, and so there is not the same sense of collective impact.
- It is largely discretionary content. We have now much more control over whether we access it or not, and we often pay for the content (in addition to the delivery platform). Of course, there has always been a cost associated with the media, but in the case of broadcasting, it has usually been an indirect and disguised cost. In another sense, the content can be described as discretionary, because it is content which we pull, rather than it being pushed at us.

These factors contribute to the different way digital content is perceived or characterised when compared to traditional media. It is seen as much more of an individual matter, a private consumer issue (subject only to consumer protection measures, such as I have already indicated). This can be seen in Senator Coonan's statement announcing plans to introduce rules about harmful content (referred to above), where the references were always to the public as 'consumers'.¹⁹ Of course, there is a legitimate consumer perspective to be considered in relation to digital content, but my argument is that this is not the only perspective requiring attention. To think about digital content—its operation and impact—as simply a private, consumer matter, means that we ignore or fail to acknowledge that it will also

have a public nature and a public role to play. As digital content increasingly contributes to the facilitation of public discussion and debate, then it too joins the coffee house, newsprint and broadcasting in the public sphere domain.

As I have suggested, it might be appropriate to assert that digital content will also have a public-regarding aspect. Because of the way in which digital content is being perceived as a private consumer matter, it is useful to talk of this public-regarding aspect in terms of citizens' interests. This might help to ground the discussion. It has already been noted that consumers' interests are being addressed in Australia, but we are somewhat behind the starting line when it comes to articulating the public interest in these matters. Certainly, there seems very little recognition of the public's interest in digital content as being the interest of citizens. There is indeed very little consideration of the public interest generally in the media regulatory field in Australia, apart perhaps from the odd token reference to the importance of diversity. The recent media reforms, which dealt with regulatory aspects of the media ownership and control and digital television frameworks, are telling in this respect. A discussion paper issued by the government in March 2006 included forty-two references to 'consumer' or 'consumers'.²⁰ The only reference to 'citizens' was a reference to French citizens. Similarly, in a later statement from Senator Coonan announcing the details of the reforms, there were ten references to 'consumer/s', but none to 'citizen/s'.²¹ By contrast, when the UK was undergoing major communications reform in 2002–03, there was a substantial and protracted debate about the need to recognise both citizen and consumer interests, and the extent to which these different interests were represented in the new regulatory framework. In another context, Brendan Edgeworth has written of 'the re-characterization of the legal subject from citizen to consumer'.²² The question then is whether there is a space for the citizen in this realm of digital content.

Marshall identified three categories of citizenship rights: civil, political and social.²³ The civil element included rights, which were viewed as necessary for the exercise of individual freedom such as freedom of speech and liberty of person. The political element comprised 'the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of

the members of such a body'.²⁴ The third element was the social element, which Marshall described in terms of the right to 'a modicum of economic welfare and security', 'to live the life of a civilized being according to the standards prevailing in the society'.²⁵ A fourth category, cultural rights, has emerged in response to Marshall's failure to recognise cultural claims as an aspect of citizenship²⁶, and his assumption that 'a common and dominant national culture' could be taken for granted.²⁷ Digital content can have a role to play in the maintenance and realisation of each of these citizenship rights—as they impact upon individuals, and their role in the community, and at a more general societal level²⁸— although for the purposes of this essay, with its focus on informational content, it is probably the political citizenship element to which digital content will be most relevant, given its ready nexus with the functioning of the democratic process. This is not an unfamiliar argument—we are used to the idea (even if we don't see it strongly expressed by policymakers, nor brought to life in the regulatory space) that if citizens are to participate effectively within their society, then the media will be an essential player and arena for the realisation of that participation.²⁹ I would argue that as the nature of media changes, we need also to expand the notion of what will be part of that public realm, thus giving rise to the need to think about digital content in this context also.

Another aspect of the nature of the citizen interest needs to be noted. We have referred to the consumer perspective or interest as being essentially a private or individual interest. However, the citizen interest is about more than an individual or private interest or right. Thus, citing Arendt, Venturelli writes that

our public interests as citizens ... are quite distinct from our private interests as individuals, and therefore the public interest cannot be automatically derived from the private interest. Indeed, it is not the sum of private interests, nor their highest common denominator ... The interests of the world ... are not the interests of individuals: they are the interests of the public realm, the realm of state action and citizenship action. As citizens we share that public realm.³⁰

A similar point is made also by Born and Prosser, who argue that concepts of citizenship and community have been stripped of their meaning by liberal individualism, and that citizenship requires a sense of commonality and plurality.³¹

So, if we are to enjoy the rights we have as citizens, and if the citizen interest is to be protected, then it is important that the media is also able to provide a space for realisation of our rights and our role as citizens. It is the media which facilitates the exchange between citizens and informs citizens, which can act as both a provider of information and ideas, and as a channel for information and ideas. So when we focus on digital content, this needs to be remembered. As we catch our favourite *Chaser* episodes on our mobile phones³², and download our songs and television programs via broadband, it is easy to think of digital content as nothing more than an entertainment filler, something to access while we are waiting for the bus, winding down at the end of a work day, and so forth. But, legitimate as this is, there is clearly more to it than that. Not only are we accessing traditional media content in different ways, but we are also accessing content which is not available by traditional media delivery—content which can be seen to have a direct relation to our role as citizens and our participation in the body politic. As noted earlier, some of that content will be the professional commentary such as that found in *Open Democracy*, some will be the amateur kind—the weblog, the citizen reporter. (Of course, some of that content is also finding its way into the traditional mainstream providers' content.) It would be difficult for policymakers to deny that digital content has a role to play in the public realm, since it is this content which is so often presented as playing such a positive role in this respect, for example by providing diversity, and, hence, as a justification for the removal or substantial relaxation of established regulatory approaches to traditional media, such as ownership and control regulation.

Digital Content and Content Integrity

There might be a number of approaches which could be taken to enhance the citizen space within the digital regulatory environment, but in this chapter I want to concentrate on some specific aspects of what might more usually be termed 'content regulation'. These

aspects I group under the term 'content integrity'. By 'content integrity' I refer to rules (or practices) which address the integrity of the information and opinions being broadcast. 'Ethical standards' is another way to refer to them. Content which observes certain standards of integrity will allow the digital content user to trust the information or opinion being distributed. The availability of trustworthy information and opinion will be crucial for the proper realisation of the citizen interest. In the context of broadcasting, content integrity rules can usually be seen in rules that address fairness and accuracy of content, that maintain separation of programming and commercial content, and that ensure that content and editorial independence is not inappropriately influenced by its commercial context. In the Australian broadcasting regulatory context, the commercial radio industry's 'cash for comment' scandal exposed both regulatory and institutional failure to recognise the importance of this area—a failure which has not been wholly rectified.³³

Nevertheless, it would seem that there is scope for applying content integrity practices to digital content, where it is appropriate to the context, and it would not be difficult to draw up a set of standards dealing with these matters. To an extent they can already be found in broadcasting codes of practices (although the Australian radio and television codes might not provide the best guide to good practice in this area), and in journalists' codes of ethical standards which apply in Australia. But despite the recent focus on media content and the recent media reforms, these issues have been absent from those considerations. However, the European Union has been addressing the issue of digital content and the appropriate regulatory response, and the next section of this chapter will examine those deliberations.

Approaches in the European Union

Since 1989, the European Union (EU) has had in place the *Television without Frontiers Directive* (the Directive), which constitutes a minimum set of standards applicable to television broadcasting content.³⁴ The Directive applies to members of the EU and enables the free flow of audiovisual material across the EU, provided the material complies with the home country's rules implementing the Directive. The Directive has been under review. The main areas currently covered by it are:

- European content quotas
- advertising rules—these include rules on scheduling and frequency; separation of programs and advertising; prohibitions on tobacco and prescription drug advertising; restrictions on children’s advertising; and restrictions on program sponsorship
- protection of major events; for example, certain sporting events for free-to-air audiences
- protection of minors from inappropriate content
- prohibitions on content conveying any incitement to hatred on the grounds of, for example, race or religion
- rights of reply.

Until now, the Directive has remained focused on the traditional delivery platforms of television broadcasting. However, the review seeks to extend the Directive to include what the European Commission terms ‘non-linear audiovisual media services’, with a view to extending the Directive’s free flow privilege. This proposed change, which would also mean that the Directive would become known as the *Audiovisual Media Services Directive*, is in recognition of the changing audiovisual market, although the European Commission remains cautious about the extent of digital content’s impact in the medium and long term, particularly with regard to whether linear delivery will remain the core experience, or whether the core experience will be a mix of linear/non-linear delivery.³⁵ Thus, it was proposed that a revised directive (and it is not without opposition) would regulate not according to delivery platform, but according to the type of audiovisual service. A revised directive would distinguish between linear and non-linear audiovisual media services. A linear audiovisual media service would be one in which the provider decides upon ‘the moment in time when a specific programme is transmitted and establishes the programme schedule’.³⁶ In other words, a linear service would look like a regularly scheduled television service, but whether it was delivered via traditional broadcasting platforms, IP TV or mobile phone would be irrelevant. Crucial to the concept of a linear service is that the viewer cannot change the order of programs.³⁷ Non-linear services would be defined as ‘an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media

service provider'.³⁸ In other words, the references to 'linear' and 'non-linear' are another way of characterising the old distinction of 'pushed' and 'pulled' content. Another proposed definition should also be noted, because both linear and non-linear services would only be captured by the proposed directive if they can also be described as an 'audiovisual media service'. An audiovisual media service is 'a service ... the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communication networks'.³⁹ Hence, it can be seen that the proposed directive would not capture, for example, all internet content.

However, despite the inclusion of non-linear content into the proposed directive, the intention was not to extend every aspect of the Directive to non-linear content. The proposals for the revised directive recommended the establishment of two tiers of obligations: a basic tier which would apply to all audiovisual media services (linear and non-linear), and a second tier which would comprise a set of more detailed rules applicable only to linear services. The basic tier reflects the current concerns in Australia and, so, includes rules protecting minors from harmful content. Non-linear services would also be subject to rules prohibiting content which incited hatred on the grounds of race, sex, religion and so on. However, the proposed directive would also incorporate into the basic tier rules that would markedly distinguish the European Union approach from the intended Australian approach. These are rules which would be relevant to the content integrity concept, discussed above, and which I have identified as important for the protection of the citizen interest. These rules are as follows:

- Identification of the content provider: the rules would require that media service providers make accessible (easily, directly and permanently) to the users of their service identification information, including the name, geographic address and electronic contact details of the provider, and, where relevant, the competent regulatory authority. A media service provider would be defined as the natural or legal person with editorial responsibility for the selection and organisation of the service's audiovisual content.

- Commercial communications: non-linear services would also be required to comply with certain advertising rules. In part, these rules relate to prohibitions on the advertising of certain products such as tobacco, but interestingly, there are also rules which directly address the content integrity issue. Hence, non-linear services would be required to ensure that ‘audiovisual commercial communications’ are clearly identified, while surreptitious commercial communications would be prohibited. ‘Surreptitious commercial communications’ are not defined under the proposed directive, but the Directive defines ‘surreptitious advertising’ as ‘the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration’.⁴⁰
- For the first time, the European Commission is proposing the introduction of rules which specifically address product placement practices, and these rules would also apply to non-linear services. The rules would permit the practice, but would require disclosure of the product placement. Additional rules would prohibit any promotion of the product within the program and any undermining of editorial responsibility and independence. Significantly, product placement is prohibited from news and current affairs content, documentaries and children’s content. Rules on sponsorship of programs follow a similar approach.

As noted above, the proposal for the inclusion of non-linear services has not been without opposition, and there are clearly practical difficulties when contemplating this type of regulation—the jurisdictional issue being one of the most obvious. Interestingly, it has been the UK Government and Ofcom, the UK communications regulatory authority, that have provided some of the most vigorous opposition.⁴¹ Several concerns have been expressed.⁴² One of the

main concerns is that these revisions would impose undue regulatory burdens and costs which could stifle innovation and new business activity. A related concern is that, because of the potential for regulatory bypass, businesses would move offshore. It should be noted, in a way consistent with the comments made earlier in this chapter about regulatory space, that the proposed Directive encourages regulatory flexibility through the use of co-regulatory schemes. Other indirect costs have also been identified, such as the impact on the rollout of broadband services.⁴³ A major area of concern is that the proposals to extend the Directive would create legal uncertainty. There might be difficulties determining what is a linear service, and what is a non-linear service. The example is given of a concert being streamed over the internet—live and it is linear, recorded and it is non-linear.⁴⁴ Podcasting (or vodcasting) of programs would be non-linear, even though it may be an identical version of the linear content. There is likely to be a fine line between linear, non-linear, time-shifted or format-shifted content.

At the time of writing, the revision to the Directive is still going through the legislative process. The proposal has been passed by the European Parliament but is awaiting consideration by the European Council, before a return to the Parliament for its second reading. However, and significantly for this discussion, the Parliament did not accept the Commission's proposals in their entirety. In essence, and if the amendments are also adopted by the European Council, the Parliament's amendments to the proposed Directive, particularly the definitions of 'audiovisual media service' and 'non-linear' service (also to be known as 'on-demand service'), would narrow the coverage of a revised Directive to traditional television broadcasting services as well as to services such as internet television and video on demand. The revised Directive would not affect services such as user-generated content sites, as was likely under the original proposals. However, it remains the case that, subject to the newly proposed definition of 'non-linear service', the revised Directive would impose rules as indicated above. In other words, content integrity issues appear likely to be relevant to the European regulation of digital content.

Practical Measures in the Regulatory Space

The concerns expressed in relation to the original proposals to amend the Directive are not unfamiliar to Australian ears. Similar concerns were expressed when (appropriately or otherwise) Schedule 5 of the *Broadcasting Services Act 1992* (Cth), which introduced the regulation of online content, was introduced. The concerns no doubt influenced the European Parliament's amendments to the original proposals. However, it may be open to question whether the assertion that this type of regulation would be a deterrent to innovation and so forth is necessarily so. The UK Government has recently announced its intention to introduce the regulation of online gambling by offering licences. One of the justifications put forward is that this would enable operators to use the licences as a 'hallmark of quality'⁴⁵ and hence as a way of providing assurances for potential customers about the service's operations. In the same way, digital content providers could have used compliance with the revised Directive as a hallmark of quality—particularly those who are featuring news and commentary content. One of the difficulties of much new content, particularly internet content, is that it is unsifted content. Users have no easy way to evaluate its authenticity, reliability or trustworthiness. For those content providers concerned about such issues, compliance could in effect become a marketing tool—compliance with the Directive would have operated as a sort of third-party reference. This could particularly help the independent sites establish themselves in competition with the established content providers who may be able to trade on reputations developed through traditional media delivery operations. To the extent that this promotes real diversity, then it promotes also the citizen interest in digital content.

Although the proposals for the Directive do not now appear likely to be implemented as originally proposed, the discussion at least shows an awareness that digital content may have a greater role to play than one which reflects only a consumer perspective. In the European Union there is an awareness of the importance of promoting 'active citizenship'.⁴⁶ In this it represents a clear distance from Australia, which doesn't even seem to be having this kind of debate. So, where does this leave us in Australia? At this stage, the citizen interest in digital content does not seem to be a priority for the government. Indeed, there is little explicit promotion of this interest

even within the policy for the established media. Of course, the promotion of content integrity for digital content does not depend upon government regulatory measures, or even the setting up of a framework. It would be open to content providers themselves to develop common standards promoting content integrity practices. One practical measure might be the development of a labelling system. We are familiar with this as a tool in the context of potentially offensive or harmful content; for example, the ladybird labelling scheme that denotes those internet service providers who offer family-friendly sites⁴⁷, and the Internet Content Rating Association labelling schemes.⁴⁸ Content providers could develop a set of standards, and, as noted earlier, there are source materials for what might be included in it. The proposed Directive also provides guidance. Content providers who complied with these standards would be entitled to label their content. There would be issues to be dealt with, such as who would run the scheme, how to deal with compliance issues, and so forth. There would be scope also for international recognition of the label. Why would such a scheme be adopted? I suggest for the same reasons I have given for why the imposition of the Directive may not be as burdensome as anticipated. In other words, a content provider could use it positively, as a way to promote the value and quality of its digital content.

Conclusion

The Australian Government has recognised the need to develop a coherent approach to the regulation of content that can be delivered over a variety of different platforms. However, to date, that recognition seems likely to be confined to addressing only certain aspects of digital content; that is, the safety of the content. The characterisation of issues related to digital content seems to be that they are consumer issues. However, it has been argued in this chapter that there is scope for taking a wider view of the role that digital content can play within our community: namely, we should be acknowledging that digital content can also serve and promote our rights and obligations as citizens. This is a role, though, perhaps not best articulated in the Australian context, which has been ascribed to the traditional media of broadcasting and print, and it seems appropriate that digital content, as successor to the traditional media, should also be imbued

with that public-regarding role. Within the concept of the regulatory space there is great flexibility for how that role might be realised, although the practical issues surrounding regulation of digital content make it likely that a self-regulatory approach would be the most appropriate response. This chapter has only sketched what might be an appropriate policy and regulatory response to digital content. However, as Australia substantially relaxes media ownership and control rules, and makes renewed attempts to promote digital television and new digital channels, it is appropriate and timely to ask how the interests of citizens will be promoted and protected in this new digital environment.

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Notes

- ¹ I am grateful to Nardia Simpson for research assistance.
- ² Hills.
- ³ Hitchens, *Broadcasting Pluralism and Diversity*, pp. 300–3.
- ⁴ Department of Communications, Information Technology and the Arts, *Review of Regulation of Content Delivered over Convergent Devices*.
- ⁵ Coonan, 'New Safeguards for Emerging Audio-Visual Content'.
- ⁶ See, for example, ABC News Online.
- ⁷ Black, p. 2.
- ⁸ Scott; Hancher and Moran; Parker et al.
- ⁹ Scott, p. 331.
- ¹⁰ Lacey, p. 148.
- ¹¹ Hitchens, 'Commercial Broadcasting'; Wilding.
- ¹² Scott, p. 330.
- ¹³ Gibbons, pp. 9–10.
- ¹⁴ Hitchens, *Broadcasting Pluralism and Diversity*.
- ¹⁵ Fraser, p. 110.
- ¹⁶ Dahlgren, p. 8.
- ¹⁷ Hitchens, *Broadcasting Pluralism and Diversity*, p. 58.
- ¹⁸ Price.
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- ²⁰ Department of Communications, Information Technology and the Arts, *Meeting the Digital Challenge*.
- ²¹ Coonan, 'New Media Framework for Australia'.
- ²² Edgeworth, p. 137.
- ²³ Marshall, p. 74.
- ²⁴ *ibid.*
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- ²⁶ Turner, p. 37.

- ²⁷ Stevenson, p. 76
- ²⁸ Born and Prosser, p. 675.
- ²⁹ Feintuck, p. 29; see also Feintuck and Varney.
- ³⁰ Venturelli, p. 72.
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- ³² See <http://www.chaser.com.au>
- ³³ Hitchens, 'Commercial Broadcasting'.
- ³⁴ Council of the European Union, *Council Directive 89/552/EEC*.
- ³⁵ Commission of the European Communities, *Annex to the Proposal for a Directive*, pp. 8–9.
- ³⁶ Commission of the European Communities, *Proposal for a Directive*.
- ³⁷ Commission of the European Communities, *Annex to the Proposal for a Directive*, p. 12.
- ³⁸ Commission of the European Communities, *Proposal for a Directive*.
- ³⁹ *ibid.*
- ⁴⁰ Council of the European Union, *Council Directive 89/552/EEC*, Art. 1d.
- ⁴¹ See, for example, Purnell; Suter.
- ⁴² See Indepen, Ovum and Fathom; Purnell; Suter.
- ⁴³ Indepen, Ovum and Fathom, para. 5.4.6.
- ⁴⁴ Purnell, para. 40.
- ⁴⁵ BBC News.
- ⁴⁶ Council of the European Union, *Common Position adopted by the Council*.
- ⁴⁷ See, for Australia, Internet Industry Association, <http://www.ii.net.au>
- ⁴⁸ See <http://www.fosi.org/icra>

CHAPTER 14

Analogue Nation, Digital Community

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Introduction

Community television test transmissions commenced in Australia in 1987, at a time when the structure of the national media system was changing dramatically. Equalisation policy was passed by the Senate the same year, making way for a comprehensive restructuring of commercial media, including changes in the ownership and control of the networks. Regional services were to be aggregated, and the ownership of metropolitan services would be concentrated. Alarmed by these prospects, Melbourne's screen development agency Open Channel published a report which restated the case for community television. The report's editors, filmmaker John Hughes and Kim Dalton, now the ABC's Director of Television, observed how 'commercial and Government services continue to centralise, generalise, move away from the local. There is no commitment within broadcasting to innovation, to creative development, to training or to participation, local origination or local accountability'.² Hughes and Dalton did draw hope from the arrival in 1985 of Indigenous television in the remote townships of Ernabella in South Australia and Yuendumu in the Northern Territory.³ With no policy or legal

framework for Indigenous television, the communities had gone ahead and broadcast without permission, prompting the government to issue experimental licences under the *Radiocommunications Act 1992* (Cth). Community television campaigners then envisioned a 'low power micro-station network evolving on the basis of diverse and particular local initiatives and needs'.⁴

Two decades on, Australian media are experiencing another ownership upheaval with ramifications for local content and diversity, brought about by the dismantling of cross-media ownership rules. The Indigenous television sector is set for restructuring with the commitment of \$48.5 million in commonwealth funding for program production over the next four years. But community television remains a strikingly undeveloped component of Australian broadcasting. While government has focused on meeting the needs of the incumbent commercial and national broadcasters in a highly regulated transition to digital broadcasting, so far community television has not received that attention, and may be extinguished as a result. On the face of it, this is a surprising outcome. Digital television transmission is essentially a technology for increasing the capacity of broadcasting systems, and community services offer precisely the kind of low-cost, locally oriented content that one would expect to find on growing multiplexes: witness the proliferation of educational, minority language, local and public service broadcasting in the US, or the mandated carriage of Indigenous broadcasting on Canadian cable. Nor do such services threaten the commercial position of the incumbent broadcasters. From another perspective, the sidelining of community television seems to make some sense. In the era of broadband, the case for subsidising community media has become somewhat more complex than the old arguments over access, and the need for alternatives to mainstream broadcasting. Community broadcasting advocates now need to show why governments should allocate scarce public resources—spectrum—to small groups of audiovisual enthusiasts, at a time when government ministers routinely cite the internet as the final guarantee of diversity and plurality in news and information.

Our argument here is not directly about where community broadcasting should belong in media policy. Rather, it is concerned with drawing out the consequences of the somewhat accidental

relationship between the two. Although it is entirely peripheral within the broadcasting system, community television can tell us much about Australian broadcasting policy and its directions. That policy continues to be widely criticised for both failing to ensure a timely transition to digital, and for unfairly underwriting the commercial interests of the free-to-air networks. The position of community television suggests that this is only part of the story. The questions raised by Hughes and Dalton in 1985—concerning where we find localism, innovation and creative development in our media—are more pertinent than ever. Our research elsewhere suggests that the community media sector provides an institutional base for creative innovation and training, one that may be enhanced rather than diminished by the explosion of low-cost digital production and distribution.⁵ But the dynamics of centralisation and generalisation remain critical, and while the first part of this chapter tracks the strange failure of policy to date, the second part returns to the effects of those centripetal forces.

The Digital Community?

Community television is local, user-generated and governed by civil associations. It is not 'television' as traditionally understood. Although digital technology has the potential to advance community television's non-standard television forms and practices, the government has decided to leave the sector in an analogue limbo—a situation we describe below. Community television may now have to look for alternative delivery platforms.

The campaign for community television was one outcome of the video access movement in the early 1970s, sparked by the availability of affordable and portable videotape technology. Groups experimented with a range of delivery options, including cable and 'windows' of content on SBS during the early 1980s. The first community stand-alone television test transmission occurred because of a bureaucratic mistake. The student-controlled community television group RMITV, based at the Royal Melbourne Institute for Technology (now RMIT University), submitted an application to the then Department of Communications and Transport (DCT) and were awarded an experimental licence. Unfortunately, the licence was ruled to be inappropriate for the purposes of a community television

broadcast and was soon nullified. As a result of the mishap, however, the DCT were compelled to provide the Australian Broadcasting Tribunal with the authority to issue RMITV with a test transmission permit. Other groups then applied for permits and the Communications Law Centre (CLC) was asked to evaluate the test transmissions. The CLC astutely concluded that although there was sufficient interest in community television, stations would struggle unless the government provided them with high-power transmission facilities.⁶ In the end the sector decided it should have an autonomous channel. This avoided difficult questions over legal responsibility for content in a shared arrangement and appeased commercial and national broadcasters, none of whom expressed any interest in hosting a community service.

In 1992 the House of Representatives Standing Committee on Transport, Communications and Infrastructure (HORSCOTCI) held an inquiry into the possible uses of the sixth high-power television channel—the only remaining nationally available channel in the spectrum plans of the time. HORSCOTCI assessed the suitability of various non-commercial services including community access, education, parliamentary broadcasts, Indigenous broadcasting and independent film. Although the committee preferred educational use of the channel (as proposed by the Vice Chancellors' Committee), the education sector was not ready to commence broadcasting. Instead, the committee recommended that the sixth channel be made available for community television on a trial basis.

The government refused to provide funding or infrastructure for the services and the community sector was forced to sell airtime to help pay for transmission. University partners assisted some stations to meet transmission costs in the early years of the trial. With the low-power network model overruled in favour of city-wide transmission, the aspiring community television groups organised themselves into consortia and began broadcasting on temporary open 'narrowcasting' licences under what became known as the 'community television trial', a name suggesting a level of policy intent which was not elsewhere evident. These were not community broadcasting licences—narrowcasting was a regulatory device designed for niche broadcasting services, such as tourist information stations. The community stations were required to be not-for-profit, and were expected

to be guided by community broadcasting licence restrictions if they were to progress beyond the trial phase. Groups in Adelaide, Brisbane, Lismore, Melbourne, Perth and Sydney were licensed from 1993. Two additional licences awarded in Bendigo and Hobart failed to get off the ground.

The trial lasted for over a decade. The open narrowcasting licence meant that the regulator could not enforce sponsorship conditions, allowing stations to enter into financial relationships which did not technically fit within the guidelines of community broadcasting. The bureaucracy became increasingly frustrated by community television. The sector argued that the one-year temporary licence-renewal process was incapacitating, preventing stations from pursuing long-term partnerships or developing viable business models. In 1997 the regulator jettisoned the plan for an education channel and declared that the sixth channel need not be used for digital television tests. Instead, the 'sixth channel, if put to any use at all, should be used for community access television, as most socio-economic benefits presently appear likely to follow from this use'.⁷ The sixth channel report was never tabled in parliament and the stations saw no direct outcomes from its recommendations. A series of unresolved inquiries and government reviews ensued.

When the digital conversion legislation went before parliament in 1998, it made no mention of community television, other than to stipulate that a review should be conducted into the arrangements for its carriage on a datacaster's multiplex. (Many of the more complex questions in the legislation were dealt with in this manner.) Under a carriage arrangement, transmission would be provided by one of the new digital television services or by government (as a reduction of their licence fee) thereby resolving the main source of financial difficulty for the sector. The Community Broadcasting Association of Australia (CBAA) supported the plan for a carriage arrangement but stipulated that where a service was willing and capable of running a full, stand-alone 7Mhz channel, they should be allowed to do so.⁸ With current technology, a standard-definition (SD) digital channel would enable community broadcasters to simulcast their analogue service, but would not provide sufficient bandwidth for more than a single stream of content at the equivalent quality to an analogue channel. With a full 7MHz channel, community

television could broadcast multiple channels for different community uses, deliver high-definition (HD) programming, and provide interactive services. The community broadcasters' concern was that, as technical and content innovation in the broadcasting industries progressed, they would be stranded in an out-of-date single SD channel—effectively 'locked' into an analogue television paradigm within a digital environment.

Paradoxically, the proposed carriage arrangement depended on new datacasters taking up restrictive new digital licences which would preclude them from offering anything that looked like conventional television. When datacasting failed to attract any interest from potential broadcasters, community television was effectively sidelined. The sector raised the possibility of carriage on SBS once again, this time as a stand-alone SD service for the duration of the transition phase. The SBS option also had the added benefit of providing regional digital distribution, which would serve non-metropolitan communities with a community programming stream in the short term. Although SBS rejected the idea, the government still had the power to legislate carriage on the community sector's behalf. The only other option was for stations to make a 'direct switch' to digital using their existing analogue frequencies. This would mean that there would be no simulcasting period in which analogue viewers could continue to receive the station, a highly problematic scenario given that the overall transition to broadcasting was clearly going to take longer than the 1998 legislation suggested. The government indicated that this was their preferred option, presumably hoping that digital-only community channels might help encourage viewers to switch. The sector rejected the idea outright. Stations were already experiencing a decline in audiences due to the take-up of digital television, but to wait until digital television reached critical mass and then have to attempt to win audiences back was not an option. Sponsors and programmers would be long gone.

The CBAA began lobbying for an end to the trial, hoping that if full community broadcasting licences were issued, arrangements for simulcasting in digital would have to follow. A statutory review of community television was tabled in parliament in June 2002. The review recommended greater regulatory certainty as well as stronger accountability and governance mechanisms. New licensing

arrangements were put in place (which allowed the sector some leeway with sponsorship and the sale of airtime) and Sydney, Perth, Melbourne and Brisbane received permanent analogue community licences. The Sydney and Adelaide licences changed hands while the one regional station, Lismore, continued to broadcast intermittently with no staff and barely enough sponsorship income to cover electricity costs.

In 2005, the CBAA conducted a survey of the four metropolitan stations operating that year. The survey revealed that these stations were screening 164 hours of locally produced programming a week, including sixty-one hours of news, and thirty-three hours of ethnic programming. Community radio research has shown a 7 per cent growth in audience numbers between 2004 and 2006 (totalling 47 per cent of the population). When asked why they listen to community radio, the majority of respondents cited 'local information, local news'.⁹

Without doubt, community broadcasting offers a model for local media development in regional Australia. However, the revocation of the sixth analogue channel reservation in 1999 meant that only those areas with an incumbent service could be guaranteed use of the channel. The Australian Broadcasting Authority (ABA, now the Australian Communications and Media Authority) stated that they were prepared to make analogue channels available on a case-by-case basis in regional areas where there was still spectrum available. As a result, a group in Mt Gambier, Bushvision, received a trial licence in 2005. Novacast, located in Newcastle (the largest non-capital city in Australia), applied for a community television licence that same year but was informed that there was no spectrum available in the area. The group now operates on a narrowcast licence on Satellite Community TV with a limited audience and extremely limited revenue options. LINC TV in Lismore attempted to extend its transmission reach to the densely populated coastal areas—a move that would have improved its revenue stream dramatically—but discovered that the sixth channel reservation had been deleted in a 2002 Licence Area Plan (LAP).

With limited audiences and low levels of program production, regional community television's prospects have always appeared bleak. Bushvision hoped to overcome program and sponsorship

obstacles by establishing a regional programming stream that would incorporate content from rural communities across the country. ACCESS 31 in Perth decided on a similar model when it persuaded the Western Australian state government to carry its programming on Thursday nights and continuously on the weekends on its Westlink Satellite service. The townships of Albany and Bunbury have harnessed old transmitters to rebroadcast the Westlink/Access 31 service over the air.¹⁰ The ultimate aim was to achieve independently licensed community TV services in non-metropolitan areas, backed up with regional programming feeds provided by other community stations to fill the gaps. Such attempts to create viable models have, to date, received little or no support from DCITA, revealing complacency in regards to the sector's survival and confusion over what should be considered 'appropriate' services.

By 2006, the sector was reasonably well established in urban areas, with a combined national audience estimated by the CBAA at 3.8 million weekly viewers. But despite a long sequence of reviews and amendments to the 1998 legislation, there is still no policy or resolution as to the future of community television. In parliament in May 2006, the current communications minister, Senator Helen Coonan, remained tight-lipped on the issues of digital simulcast when pressured by the Labor shadow communications minister, Senator Stephen Conroy:

Senator Conroy—Has spectrum [been] reserved for the community television sector to move to digital broadcasting?

Senator Coonan—That is one of the matters under discussion, as to how they could be accommodated either as a 'must carry' or in some other way.

Senator Conroy—Are there alternative ways?

Senator Coonan—There are alternatives to 'must carry', yes.

Senator Conroy—Could you let us know?

Senator Coonan—I am not going to give you all the alternatives.

Senator Conroy—No, I am interested.

Senator Coonan—We are currently discussing ways to accommodate community television.

Senator Conroy—I am not looking for a decision. I was just wondering what those other ways would be.

Senator Coonan—They are under discussion. I am not going to go through them all for you.

Senator Conroy—If they are a secret, I am prepared to sign the national secrets Act.

Senator Coonan—No, it is not a national secret, but it is under development, so it is inappropriate, I would think, within the realm of these estimates to be talking about it.

Senator Conroy—You would not want to see us ending up with less television if we switched from analog to digital, if the community TVs did not come across. There would actually be less television available by moving from analog to digital, if they got left behind. You would not want to see that as an outcome, I presume?

Senator Coonan—Who said they wanted to see that?

Senator Conroy—That is what I am saying.¹¹

Plainly, the hope that permanent licences would resolve the long-term situation of the stations has not been fulfilled. In October 2006, legislation was passed which will see the two remaining digital channels—both earlier earmarked for datacasting—auctioned off, one for datacasting and one for mobile television services. Incumbent commercial broadcasters will be permitted to bid for the mobile

television licence; the datacasting licence will be subject to the same extraordinarily restrictive conditions which bedevilled the last attempt to find a broadcaster willing to pay for the privilege of not broadcasting television. There is no stipulation that either service should carry a community channel, although it is possible that one might. Without a datacasting option, government may yet find another solution, perhaps turning back to SBS. Further ahead, the disposition of the spectrum currently used for analogue services after the putative 2012 switch-off will remain an open issue. In any case, the minister has informed the sector that the government will not fund digital transmission or subsidise existing stations through a direct switchover period. Some of those stations will struggle to survive a further extended period of tortuous uncertainty, relieved only by the occasional cryptic reassurance.

Why is there no digital transition plan for community television? We can draw several points from the experience of the sector to date. First, the sector has gradually emerged in the absence of any foundational policy mandate, from either Coalition or Labor governments. In some respects its appearance was accidental, and its survival unintended. The sector received policy sanction through the 'sixth channel' inquiries, but was anointed by default rather than design. History would have been different if universities had been prepared to pursue their own aspirations as broadcasters. However, even without a strong policy remit, the sector has been effectively represented and recognised within the broader policy debate throughout this period: the CBAA has had a presence in every major media policy review, and there is clearly an element of support for community broadcasting among interested politicians across Australia.

Second, there are clearly doubts as to the relevance of the sector in an era of multiplying audio and video offerings on the internet; to some extent these have been answered by better research on the audiences and reach of the sector¹², although a clearer understanding of the institutional role of community broadcasters in a converged media environment is only beginning to emerge.

Third, questions remain about the financial sustainability of the sector. The issue of transmission costs, raised by the CLC in 1990, remains at the heart of the matter. Since community television's

inception, government has insisted that it must fund its own operations, including transmission and programming. Transmission has proven to be an onerous burden on stations, a situation exacerbated with the privatisation of transmission infrastructure in 1999, despite the commonwealth's assurances at the time that the new arrangements would protect community broadcasters. Melbourne's community television station, C31, pays \$180 000 a year for transmitter site fees alone (the transmitter and its maintenance are additional costs). In 1998, Senator Alston had promised the sector a SD channel free of charge, which would have meant that revenue from sponsorship, member fees and the sale of airtime could be dedicated to station operations, training and programming. The CBAA has estimated the costs of digital transmission as follows:

- for carriage on a datacasting service: \$5.65 million in one-off capital costs and \$1.797 million in operating costs per year
- for carriage by a national broadcaster such as SBS: \$7.57 million in one-off capital costs and \$2.415 million in operating costs per year
- for a stand-alone transmission facility (that is, a 7MHz digital multiplex): \$15.5 million in one-off capital costs and \$4.732 million in operating costs per year.

A 2007 House of Representatives Standing Committee recommended that the government provide \$6 million per station for digital transmission costs.¹³ If the history of community television reviews is anything to go by, the recommendation will not get far. On the other hand, substantial public funding has been devoted to defraying the costs of digital conversion for other Australian broadcasters, both public and private. In 1998, the ABC received an additional \$20.8 million over five years and SBS an additional \$17.7 million over five years to assist in the upgrade of their equipment and facilities from analogue to digital. In 2000, the ABC received a further \$36.8 million over three years and SBS a further \$29.4 million over four years for the second phase of capital equipment funding for digital. The government also made a commitment to fund the distribution of their digital television programs to transmission sites, and to broadcast their digital television programs to viewers. Further, in 2000 the

government committed \$260 million over thirteen years to the Regional Equalisation Plan (REP), which represented a licence fee rebate covering half of the total estimated costs of digital conversion for regional commercial broadcasters. As a rationale for providing this support, the government acknowledged that 'regional broadcasters do not earn as much money as metropolitan broadcasters, so paying for digital television is harder'.

The issue is not really whether community television can survive in the marketplace (these are not commercial stations, after all) but whether the cost of transmitting a digital signal is proportionate to the perceived public value of the service. Implicit within this is an overall judgment about what digital television should be for and how resources are best allocated. Innovation, creative development, training and participation—the wish-list of Hughes and Dalton back in 1986—have little place in the current television policy framework. But what then is the television future embodied in a decade of law and policy and public debate? Is there a place for community communication in digital television?

An alternative future remains an option: digital television should, in many respects, be a more suitable platform than analogue for community content, as the technology's flexibility can accommodate non-standard television forms. It allows for autonomous channels which could potentially accommodate all of the interests flagged in the sixth channel inquiry of the 1990s: education, parliamentary broadcasts (and other electronic government content), Indigenous broadcasting and independent film, as well as content produced by cultural institutions and civil society associations seeking to connect with their constituencies. If a 'community multiplex' were established, a portion of that spectrum could be leased to a commercial provider, with the proceeds funding transmission for all services. In the digital television landscape, community television has the potential to act as an intermediary between the vibrant amateur domain and high-end public and commercial television broadcasting. Such a role would build upon the existing function of community television as the major training ground for the national and commercial stations. Without these services, industry may see a significant decline in talent coming into the sector. Although media training is available in the tertiary sector, community broadcasting

provides tangible experience in station operations and hands-on technical knowledge. Moreover, community television is an established content proving ground, nurturing programs and talent, including some of Australia's most recognisable names in entertainment and news.

The Analogue Nation

The difficulty lies in locating the sources of that possible future within the policy present. In general terms, Australian media policy is often seen as an expression of economic or political liberalism, or as technology-driven, or as the creature of corporate influence. It may be better understood as the evolutionary outcome of those same dynamics of 'centralisation' and 'generalisation' that concerned John Hughes and Kim Dalton in 1986. The important point here is the extraordinarily vigorous survival of the nation-building model of broadcasting, with an increasingly high level of government intervention evident in all sectors: the directly publicly funded broadcasters, the commercial free-to-air operators, and subscription providers. The disposition of public resources has a substantial influence on market forces in broadcasting, and it is this 'national' dimension of policy which we think is now most significant in understanding the current impasse. But this is not a problem specific to digital broadcasting: the Australian regime in this area is a good example of a more general pattern of intervention across a number of service industries. As elsewhere, the broadcasting policy framework is complex and has some unusual features in comparison to other countries, involving tight content controls for new entrants (the datacasters) and new forms of content and format regulation for existing broadcasters, inhibiting their ability to go beyond conventional television services. The statutory mandate for HD broadcasting is a particularly distinctive element, constructed and regulated in a way which has reduced the multi-channel and interactive potential of the new platform.

Thomas elsewhere has described Australia's version of digital television as a digital emulation of analogue television.¹⁴ Looking back at the extended and bitterly contested development of the 1998 legislative and policy framework, the new platform appears to have been conceived primarily as a parallel broadcasting service to be

constructed alongside the analogue one, with the focus on meeting the requirements of broadcasters in establishing digital services. Although the legislation proposed a finite period of analogue and digital simulcasting, a plan to switch viewers from analogue to digital was strikingly absent, and this gap remains a glaring weakness in the overall framework, notwithstanding the amendments of 2006, and the subsequent creation of the Digital Australia agency. The government's objective, it may be inferred, has been to engineer a very gradual transition to digital while retaining key features of analogue television in digital form. This appears to include an expectation that both public and commercial television broadcasters will continue to play an important national cultural and political role, with considerable government support; and that longstanding protections for the industry should remain, thereby preserving as long as possible the analogue model of audience aggregation. The policy discourages or forestalls the fragmentation (and also the potential growth) of media audiences, both through the regulation of existing services and through the construction of regulatory obstacles to new ones. The attempts of the Seven Network to create a multi-channel service out of its digital channel have been consistently rebuffed, while the communications minister has aired her doubts as to the economic viability of new commercial services on several occasions.

At the same time, the government has resisted proposals to establish a national Indigenous broadcasting network. A fully Aboriginal-owned commercial satellite channel, *Imparja*, began transmission in 1988 and is available across one-third of the country. Alongside its main channel, which retransmits content from 9, 10, ABC and SBS, *Imparja's* Channel 31 (ICTV) screens up to twenty hours a day of Indigenous programming, news and community information. Eighty per cent of this content is in Indigenous languages and can be accessed for retransmission by 200 Remote Indigenous Broadcasting Services (RIBS). Content is provided by a number of organisations in the Pilbara, Kimberley, Warlpiri, Ngaanyatjarra and Pitjantjatjara Yankunytjatjara areas. Goolarri Media in Broome also produces content and transmits terrestrially to the Broome area via an open narrowcasting licence.¹⁵ Support for a more comprehensive service was evident in the Productivity Commission's 1999–2000 broadcasting inquiry¹⁶, which recommended the allocation of

spectrum and the development of more appropriate licensing categories for Indigenous broadcasters. In 2005, the government called for submissions on the 'viability of creating an Indigenous television service and the arrangements that should apply to the digital transmission of such a service using spectrum in the broadcasting services bands'. The Indigenous sector argued that the primary function of a National Indigenous Television service (NITV) would be 'to inform, educate and entertain'. It would allow for the expression of a dynamic and evolving Indigenous culture; help maintain language and culture; assist in the development of the Indigenous creative industries; provide community education; and present Indigenous stories to all Australians, thereby promoting a richer understanding of the nation.¹⁷ The NITV proposal was clearly an attempt to strengthen the Indigenous nation(s) by aggregating audiences under a fairly traditional, institution-building, public service television model. New Zealand and Canada provided influential precedents. But if the original NITV model conformed to the nation-building broadcasting paradigm, what eventuated was far from that. The NITV proposal was rejected by the commonwealth in favour of a plan to allocate funds directly to Aboriginal program production (\$48.5 million over four years), to be delivered by *Imparja* or community television (Channel 31) and pay TV in metropolitan areas.

The NITV decision may prove to be a practical one, with immediate benefits for Indigenous production. It is also consistent with an underlying official reluctance to establish new television services, or to increase competition in existing services. With the exception of the proposed mobile television licence, it appears that, at least at a policy level, digital television has not been seen as a way of creating new markets for television, but has been designed more defensively, to manage a technical transition for existing markets, which may then help to preserve them in the face of increasingly popular alternative forms of audiovisual entertainment. There is a tendency in the analysis of media policy to assume that broadcasting is something for everyone, because virtually all Australian households have a television receiver. However, television is not equally for everyone. Market research indicates that there are substantial variations in the consumption of television, and particularly that commercial free-to-air television is watched most by relatively older and poorer Australians,

who are also more likely to live outside the major cities. This audience is a core political constituency for a government which has thrived on what the political scientist Judith Brett has called 'national populism'.¹⁸

Rather than withdrawing from media industries, Australia's conservative government has become progressively more entangled with them, both through more complex and convoluted regulation, and as a commercial player in the market itself, as one of the most important buyers of advertising time on the commercial networks. This is one area where the centralising and generalising dynamic that concerned John Hughes and Kim Dalton has developed considerably over the two decades since their report appeared. The boundaries between public broadcasters and their commercial competitors have blurred, with both sectors now receiving substantial amounts of government money, albeit in different forms and for different purposes. The fact that the Coalition has, from time to time, encouraged the aspirations of the Nine Network to be regarded as 'the national broadcaster' is only one aspect of this shift.¹⁹ The more important aspect is the steadily increasing political and governmental investment in the aggregated audiences of commercial television, through a period of rapidly growing public revenues. Since 1999, the commonwealth has spent close to \$1 billion in advertising, with little of the accountability and evaluation that is usually attached to significant public expenditure. This does not include political advertising, although the styles of government and political advertising are becoming blurred. (It should be added that state governments have also significantly increased television spending in recent years.) Researchers have begun to examine the growth of government advertising ostensibly devoted to explaining new laws and policies, often highly contentious: examples include gun control, work choices, the new tax system, national security and Medicare.²⁰ In the period of the Keating government, commonwealth advertising also increased, spiking especially in election years. That pattern has continued, but as Table 14.1 shows, government expenditure in non-election years has also increased.

Expenditure at these levels now comprises a small but nevertheless notable portion of overall commercial free-to-air television revenue, which is now over \$3 billion annually. It is also significant in

comparison to the ABC's budget, currently around \$800 million. Further, the government is in an unusual position in relation to other commercial advertisers: it has very deep pockets, especially after Australia's long economic expansion. A lack of competition among broadcasters will raise the cost of advertising, but this is not a problem for an advertiser with the resources of the commonwealth.

Table 14.1: Federal Government Expenditures for Advertising Campaigns over \$10 000

	Nominal (in \$m)	2004–05 prices (in \$m)
1991–92	\$48	\$63
1992–93	\$70	\$91
1993–94	\$63	\$81
1994–95	\$78	\$100
1995–96	\$85	\$106
1996–97	\$46	\$56
1997–98	\$76	\$92
1998–99	\$79	\$96
1999–2000	\$211	\$250
2000–01	\$156	\$177
2001–02	\$114	\$126
2002–03	\$99	\$106
2003–04	\$143	\$149
2004–05	\$138	\$138
Total	\$1406	\$1525

Sources: Department of Administrative Services, *Annual Reports*, 1991/92 to 1995/96, 1996/97 to 1997/98, supplied by the Government Communications Unit (GCU); Department of Prime Minister and Cabinet, *Annual Reports*, 1998/99 to 2002/05, from Fiona Childs, 'Federal Government Advertising 2004–05', Parliamentary Library, Research Note no. 2 2006–07, 20 July 2006.

Government advertising functions as a commercial subsidy for incumbent broadcasters, which also politically benefits the incumbent party. It is often criticised as wasteful and partisan. The argument for our purposes is not that this increasing expenditure is necessarily a bad thing, or that it is a misuse of public funds, or that it has been a distinctive strategy of the federal Coalition. It is clearly an emerging feature of contemporary Australian and other governments, and will continue to be controversial whether or not stricter controls are

introduced. This evolving aspect of government must necessarily further complicate its relationships with media, and has done so through the long, stuttering debate over digital broadcasting. The long-term consequence is that commercial television and government media have become progressively more important to each other, at a time when technological change has also made the established analogue media system vulnerable. With the commercial sector and its audiences at the centre of the policy action, community media, as well as new market-driven ventures, have become an ever lower-order priority. The platform switch to digital thus puts at risk the very institutions that make low-cost, local innovation in television possible.

Conclusion

The argument and narrative traced here have several consequences for our understanding of the transition to digital broadcasting. First, what we are calling the ‘analogue nation’ is consistent with the concentration of media audiences, the reluctance to open the system to new services or expanded platforms, and the protection of incumbents. Analogue television works and has worked extremely well in aggregating audiences, especially in the Coalition’s key older constituency. Alongside television, the government has devoted increasing resources to direct marketing to reach individual electors. The internet has not been adopted as a major vehicle for political communication. Our argument is not that government advertising is the dominant driver of media policy—clearly there are a range of competing interests in this area, including the underlying economic value of the spectrum and the public investment in the established broadcasting system, as well as the interests of incumbent industries. But any fragmenting of the television audience across new services, networks or channels, including community television, is not only not in the commercial interests of incumbent broadcasters, but would also involve some costs and strategic rethinking on the part of government. More comprehensive media reform is therefore unlikely. Community television has not been given a home on the digital platform because, like multi-channelling, additional channels and interactive television, it is a second- or third-order service in the analogue model.

The second consequence is that studies of Australian digital television need to address the governmental construction of the 'national interest'. While policy analysis is often concerned with gauging technological shifts and consumer benefits, and shifting concepts of the public interest, the calculus of 'what is best for Australians' will necessarily be quite different. We often describe the relations between government and the media in ways which may be illuminating but also imply a normative polarisation of these domains. Terry Flew, for example, has written about the 'social contract' implicit in Australian broadcasting.²¹ In 2000, the Productivity Commission's broadcasting inquiry highlighted the problems created by what it called a *quid pro quo* approach to media policy, characterised by the construction of elaborate and ultimately unsustainable privileges and obligations. The *quid pro quo* game was propelled by the power of media proprietors to exercise political influence, and the reciprocal capacity of political leaders to dispense or withhold preferment. This analysis demonstrated the need, still urgent, for a more transparent and competitive model. However, it presupposes a separation between the government's role in pursuing sound policies in the public interest and that of the media as a regulated sector of private enterprise. If we recognise that the commonwealth itself has now become a major consumer of the services the broadcasting industry provides, its interests in media policy become both more direct and multifarious. In these circumstances a 'public interest' analysis loses traction, because it is incommensurable with the 'national interest' rationale which is driving key decisions.

Finally, this analysis suggests an opportunity to connect the analysis of media policy more frequently and more deeply with broader studies of public policy and politics. In our view, current work in political studies does help clarify the current impasse, and indeed the broader failings of innovation policy. The position of the government on media policy is consistent with its broader political style and communications strategy, particularly those of Prime Minister John Howard. Judith Brett²² and Paul Kelly²³ have drawn out some key features of this majoritarian nationalism: the government has consistently presented itself as the unique defender of the national interest, national culture and social cohesion, through a period of heightened threats to national security and continuing

military engagement in East Timor, and wars in Afghanistan and Iraq. Fairness, egalitarian informality and sporting success are frequently identified as critical national attributes. While drawing deeply on the historical profile of the Liberals as a party with a broad, non-sectional middle-class constituency, the government presents itself as embracing the interests of ordinary working Australians, in opposition to arrogant elites. Howard's own preferred medium for communication is radio, which he uses extensively and constantly. Prime ministerial press conferences, other than 'door stops', are now rare, and longer interviews on current affairs programs are occasional. All this amounts to a strategy to manage political communication as closely as possible; and to reduce where possible the influence of intermediaries who may distort or misrepresent the government's positions. Where media policy departs from Judith Brett's influential analysis of the Howard government is in Brett's emphasis on the neoliberal or public choice motivations lying behind some commonwealth policies. The case of the media draws our attention instead to another pattern of behaviour: the propensity of governments to trade off the economic benefits of competition against more immediately pragmatic outcomes, even where these involve considerable regulatory overheads. The management of media policy and practice have been central ingredients in the success of recent Australian governments; they are also important areas of failure. But media and communications is often overlooked in more general accounts of public policy; and media policy in turn is an analytic island only occasionally connected to larger bodies.

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Notes

- ¹ Research for this chapter was supported by the Australian Research Council Centre of Excellence in Creative Industries and Innovation (Grant no. CE0561908).

- 2 Hughes and Dalton, p. 11.
- 3 Michaels.
- 4 Hughes and Dalton, p. 13.
- 5 Rennie and Thomas.
- 6 Communications Law Centre.
- 7 Australian Broadcasting Authority, p. xi.
- 8 Community Broadcasting Association of Australia (Rennie and Sice).
- 9 McNair Ingenuity Research.
- 10 Retransmission does not require a broadcast licence, only an apparatus licence.
- 11 Commonwealth, p. 70.
- 12 Meadows et al.
- 13 House of Representatives Standing Committee on Communications, Information Technology and the Arts.
- 14 Thomas.
- 15 NITV Committee.
- 16 Productivity Commission.
- 17 *ibid.*
- 18 Brett.
- 19 See Inglis.
- 20 Barns; Ward; Young.
- 21 Flew.
- 22 Brett.
- 23 Kelly.

CHAPTER 15

What's in it for Children?

Dedicated Channels and the Effectiveness of Regulation

Elizabeth Handsley

Introduction

Digital technology is generally viewed as a way of allowing the provision of more specialised broadcasting, which in turn appears to be conceived as a paradigm for improving service to consumers—and in particular, to certain sub-groups of consumers. It might be useful to query just how well placed this conception is. That is, how likely is it that dedicated channels for particular sub-audiences, and other forms of specialisation, will better meet the needs of the groups in question? This chapter attempts to answer that question in relation to children.

The starting point for such an inquiry is to identify the special characteristics of the relevant sub-audience. Australian broadcasting policy has done so for children and indeed the Children's Television Standards (CTS) are premised on the existence of two special needs of children. One need derives from children's status as a small market with relatively little spending power, which makes it difficult to be

confident that the usual laws of supply and demand would lead to the provision of appropriate programming for them. Hence the CTS impose content quotas, in an attempt to ensure that children have access to quality, age-appropriate programming on free-to-air television. The other special need on which the CTS are premised is a vulnerability to being overly influenced by advertising. This forms the basis for special rules restricting the volume and content of advertising during children's programs.

In identifying both of these needs, broadcasting policy is in harmony with numerous other areas of law and policy that take a view of children as not fully able to make numerous decisions about their lives. There is a good deal of support in our practices and policies for protecting children from both the likely unwisdom of their decisions and the potential for their exploitation by unscrupulous adults. In particular, there are numerous examples of laws and policies that see children as an exception to 'consumer sovereignty' arguments. In the field of broadcasting, such arguments would tend to justify a light regulatory touch on the ground of people's ability to just switch the television off if they do not like what is on. Australian broadcasting policy takes the view that, whatever might be said of this reasoning when applied to adults, when applied to children it is unrealistic and potentially harmful.

The identification of children as having special needs leads more or less automatically to a view of children as potential beneficiaries of digital broadcasting. We can expect more of the same, including from commercial broadcasters. Or even if more children's channels do not emerge, we can expect children to feature in the rhetoric about digital television, as potential beneficiaries of the specialisation it enables.

This chapter examines the two features of the CTS mentioned above, and some other advertising restrictions contained in industry codes, in order to identify any shortcomings that risk being transferred to (and perhaps exacerbated in?) the digital platform, any relatively effective aspects that risk being lost, and any opportunities for improving the effectiveness of the system in achieving its goals.

The comments I make in this chapter are all pending the review of the CTS that is expected to be complete by the end of 2007. An Issues Paper was released in late June 2007.¹

Content Quotas

Commercial television licensees are obliged to broadcast at least 390 hours per year of special children's programs, including at least 260 hours of 'C'—or children's—and 130 hours of 'P'—or preschool—shows.² Both kinds of program are defined by reference to certain criteria relating to quality and age-appropriateness.³

This definition is sometimes misunderstood. For example, Catharine Lumby and Duncan Fine in their recent book *Why TV Is Good for Kids* give the following response to the 'myth' that 'children's television is particularly trashy':

Television aimed at children is the most strictly regulated television in Australia. The Australian Children's Television Standards ... mandate how much children's TV commercial broadcasters have to show and require them to screen programs that are of a high production quality and enhance children's experience and understanding of the world. No commercials can be run during programs aimed at pre-schoolers and no more than five minutes of ads during programs aimed at school-age children.⁴

This discussion suggests that the 'C' definition is a guarantee that all (Australian) children's programming will meet the criteria, rather than just that a quota will be filled meeting those criteria. Essentially, the quota leaves licensees free to show 'trashy' programs the rest of the time, and there is plenty of programming which we would think of as 'aimed at children' but which does not meet the 'C' criteria. Similarly, the ban on advertising is only on 'P' periods, or in other words in programs that are shown in fulfilment of the quota. If 'P' programs, or (a broader category) 'programs aimed at pre-schoolers', are shown in excess of the quota requirements, ads are allowed. The same goes for the five-minute rule: it applies only to 'C' periods, not to all 'programs aimed at school-age children'.

The CTS content quotas are linked with the Australian Content Standard. For example, 'P' programs must be Australian; and there is a sub-quota of Australian 'C' drama (with concessions, for example, as to the amount of time that can be taken up with ads during such programs).⁵

There is some potentially confusing terminology in the CTS, namely the difference between 'C' and 'P' *programs, periods* and *bands*. 'C' and 'P' programs are those that meet the definition mentioned above. 'C' and 'P' periods are the times that are notified to Australian Communications and Media Authority (ACMA) by licensees as those during which they will show 'C' or 'P' programs.⁶ Bands are the broader time slots within which 'C' and 'P' periods must fall ('C'=7–8 a.m. and 4–8.30 p.m. weekdays and 7 a.m.–8.30 p.m. weekends and school holidays; 'P'=7 a.m.–4.30 p.m. weekdays).⁷ The significance of these different terms becomes apparent below.

Preschool Children (the 'P' Quota)

The commercial television licensees must broadcast 130 hours per year of 'P' programs, of which there must be at least thirty minutes per weekday in the 'P' band.⁸ No advertising is allowed during 'P' periods.⁹

Examples of 'P' programs are *Here's Humphrey*, *Hi-5* and *The Book Place*. In the early 1990s, the show *Fat Cat and Friends* lost its 'P' classification because of a judgment as to its quality. Many people seem to have misunderstood this decision, concluding that the show was banned. It was not banned, but rather the licensee concerned could no longer use it to fulfil its obligations under the 'P' quota.

The most extraordinary thing about the 'P' quota has been the clearing of an ad-free space on commercial television stations. For those who support the goals of the CTS, this is seen as a major triumph. However, the question must be asked whether some 'P' programs are being commercialised from the other end. There are massive merchandising efforts around some of these programs and the success of such efforts raises the question of whether there is a point at which the 'programs' become program-length ads for the merchandise.¹⁰

This concern applies similarly to ABC programming which, as we know, is also supposed to be free from advertising. Yet there are merchandising empires built around many of the most popular programs. There have even been rumours that the ABC's program purchasing policy is influenced by the merchandising opportunities associated with the programs being considered. If this were true—if a program were considered to be better 'value' to the ABC because of

the potential for merchandising profits—it would be effectively the same thing as a program-length commercial.

School-aged Children (the ‘C’ Quota)

Licensees are obliged to broadcast 260 hours of ‘C’ material each year, of which there must be at least thirty minutes every weekday between 7 a.m. and 8 a.m. or 4 p.m. and 8.30 p.m. to reach a total of at least 130 hours per year. The remaining programming must be broadcast during the ‘C’ band—in other words, it can be broadcast at the weekend. The fact that a particular time is a ‘C’ period is not a guarantee that the program being shown will be ‘C’, as the program can be displaced for an ‘event of national importance’ or ‘major sports event’ that is suitable for viewing by children.¹¹

There are two major limitations to the ability of the CTS to achieve the goal of providing high-quality, age-appropriate programming for school-age children. The first is that there are no requirements for the promotion of ‘C’ programs, or for scheduling them at regular or popular times.¹² Therefore, none of these things tends to happen and the programs do not develop a following. This is so even though there are bonus points given for the broadcast of Australian ‘C’ drama during prime time.¹³ Therefore a substantial quantity of excellent material goes largely unwatched and children continue to watch primarily material that does not meet the ‘C’ criteria. For example, the ten programs that attracted the highest audience of 0–14 year olds in 2005 included *Ten’s AFL Finals*, *Big Brother*, *Myth Busters*, *The Simpsons* and *Australian Idol*. It is worth noting that these top ten programs attracted a total child audience of 3.171 million compared to the total child audience of 2.792 million attracted by the top ten children’s programs. The top ten ‘C’ and ‘P’ programs attracted a child audience of 544 000.¹⁴

The second limitation is that, although ‘children’ are defined as ‘people under fourteen years of age’, there is no requirement that ‘C’ programs cater to all sub-groups within the age range. In such circumstances you might expect the programs to be pitched at the high end of the range, where children are likely to have some disposable income and therefore to be a more attractive audience from the advertisers’ point of view. This is precisely what tends to happen. For example, *Girl TV* taps into the lucrative ‘tween’ market of 10–13 year

olds. The result is that 6–9 year olds—those between the preschoolers and the ‘twens’—are not provided with the age-appropriate programming that the CTS appear to offer.

Advertising Restrictions

The Children’s Television Standards

There is some confusion as to exactly when the CTS advertising restrictions apply. CTS 1(2) tells us that these standards apply to ‘C’ *programs*, ‘P’ *programs*, and breaks before, during and after such *programs*. However, CTS 13 tells us that the main advertising content restrictions (CTS 10, 17–23) apply to ‘C’ *periods*. It is not clear whether CTS 13 is intended to limit the operation of those provisions to ‘C’ periods to the exclusion of ‘C’ programs, or whether it is intended to extend to ‘C’ periods that would otherwise, by virtue of CTS 1(2), apply only to ‘C’ programs. From one day to the next, it is unlikely to make any difference, as ‘C’ periods will be taken up with ‘C’ programs. But considering the scope for displacing ‘C’ programming during a ‘C’ period, and (theoretically) for showing ‘C’ programs in excess of the quota (that is, outside a ‘C’ period), there is a more than theoretical possibility that a consumer could become confused as to which interpretation applied. This would tend to undermine the effectiveness of the system, considering its reliance on consumer complaints as its only form of monitoring.

The provisions governing advertising content cover ‘unsuitable’ matter; misleading or deceptive matter; ads which place undue pressure on children to ask their parents to purchase the product; clear presentation of information about products; disclaimers and premium offers; competitions; promotions and endorsements by ‘C’ program characters; and advertising of alcoholic drinks.¹⁵ A number of further provisions are stated to relate to ‘C’ periods, including those relating to the volume of advertising.¹⁶ The only thing stated to apply (only) during ‘P’/‘C’ *programs* (as distinct from *periods*) is CTS 9, on prizes.

In other words, the vast bulk of the restrictions on advertising (content and frequency) apply during ‘P’/‘C’ *periods*, not *programs* or *bands*. Yet it is very difficult to determine when “‘C’ periods’ are as the information is not kept on any publicly accessible register. On the other hand, it is not always easy to tell even which programs are

'C'—though it is easier to make an educated guess. The significance of these aspects of the CTS is that they make it difficult for a consumer to identify any breaches. Yet, once again, consumer complaints are the only mechanism for triggering enforcement of the requirements. This must be considered a substantial limitation on the capacity of the CTS to achieve their goal of protecting children from advertising.

The Commercial Television Industry Code of Practice

There are two major aspects of the Commercial Television Industry Code of Practice (CTICP) in relating to the protection of children.

Section 1.10 applies to television advertisers the requirements of two advertising industry codes: the Advertiser Code of Ethics and the Code for Advertising to Children. The former code contains broad provisions on matters such as misleading or deceptive ads, discriminatory portrayal of persons, portrayal of violence and sex, and strong or obscene language.¹⁷ The Code for Advertising to Children applies to 'Advertisements which, having regard to the theme, visuals and language used, are directed primarily to Children and are for ... goods, services and facilities which are targeted towards and have principle [*sic*] appeal to Children'.¹⁸ It contains provisions on factual presentation, safety, social values, parental authority, price, qualifying statements, competitions, premiums, alcohol, and food and beverages.¹⁹

The second part of CTICP that is of interest for present purposes is ss 6.20–6.28. These are the provisions that directly govern advertising to children. Section 6.20 applies CTS 17–21 to 'Commercials or community service announcements directed to children' (that is, those under fourteen years of age); these are the CTS relating to misleading/deceptive ads; pressure on parents and so on; clear presentation, disclaimers and premium offers; and competitions.

Section 6.21 applies CTS 10 and 17–23 to 'C' periods plus the breaks immediately before and after. These are the same provisions as CTS 13 applies to 'C' periods—that is, it adds unsuitable material; endorsements by characters²⁰ and alcohol. The remaining provisions relate to the lower classification of advertisements that deal 'in a responsible way with important moral or social issues'²¹; advertisements for food and/or beverages which are directed to children²²;

selling performed by hosts, separation of program material and advertising, and prizes and competitions; premium-charge telephone services; and certain restrictions on ads, depending on their scheduling.²³

The Australian Association of National Advertisers Codes

The Australian Association of National Advertisers (AANA) Advertiser Code of Ethics and the Code for Advertising to Children have been discussed above because they are incorporated into the CTICP. Both of these codes extend to all advertising, not just that on television.

The AANA has recently promulgated the Food and Beverage Advertising and Marketing Communications Code. It deals separately with ads 'directed towards Children' and contains provisions against misleading or deceptive nutritional or health claims²⁴; improper exploitation of 'Childrens' [*sic*] imagination in ways which might reasonably be regarded as being based upon an intent to encourage those Children to consume what would be considered, acting reasonably, as excessive quantities of the product/s²⁵; statements or implications suggesting physical or other advantage from possession of the product; ads that aim to undermine parents; ads that contain any appeal to children to urge parents to buy the product; ads using celebrities 'in a manner that obscures the distinction between commercial promotions and program or editorial content'; and ads that feature ingredients or premiums that are not integral elements of the products or services being offered.²⁶

The Australian Subscription Television and Radio Association Code of Practice

The Australian Subscription Television and Radio Association (ASTRA) Code of Practice for Subscription Broadcast Television defines 'children's advertising' as 'advertising broadcast within a block or blocks of programming aimed at children'. There are provisions against children's advertising for products or services (or using advertising styles) that could place children in physical, mental or moral jeopardy, and children's advertising that is not clearly distinguishable from the programming in which it appears²⁷, and children's advertising that seeks to exploit children's innate credulity, loyalty and sense of fair play.²⁸ There is also a provision imposing special

restrictions on ads using premium phone services.²⁹ Each channel that broadcasts children's advertising undertakes to publish its own code.³⁰ The code also adopts the AANA Code of Ethics. It is the subject of a recent review.

Limitations on the Effectiveness of the Current Provisions

The above discussion paints a picture of a fairly well-developed set of rules and guidelines for protecting children from advertising. However, there are two very important definitional points that circumscribe heavily the impact of all of these provisions.

First, as noted, the CTS advertising restrictions (might) apply only during 'C' periods. These stipulate a maximum of 390 hours a year, and even more to the point, they are likely to be scheduled at a time when few people—and few children—will be watching. Children do the bulk of their TV watching during the weekday evening prime time; the child viewership peaks around 7.30 p.m., not 4.30 p.m. in the afternoon or 9 a.m. on a Saturday morning, which are the kinds of times in which 'C' periods are likely to fall. So, for example, during January–June 2006, the average number of children watching free-to-air television at 9–10 a.m. was 262 000, at 4–5 p.m. the figure was around 220 000 and at 7–8 p.m. it was 532 000.³¹ In other words, more than twice the number of children watch the less regulated hours than watch the hours when the more stringent regulations are likely to apply. The contrast is even more stark between 'C' programs and others: the highest child audience for any program was 438 000, but the highest-rating 'C' or 'P' program attracted only 84 000 child viewers.

Second, the industry codes' special protections for children apply only to material that is in some sense *aimed at* children. This is narrowly defined. For example, it will be recalled that the AANA Code for Advertising to Children (which is incorporated into the CTICP) applies only to 'Advertisements which, having regard to the theme, visuals and language used, are directed primarily to Children and are for ... goods, services and facilities which are targeted towards and have principle [*sic*] appeal to Children'. Few ads shown during prime time meet this description. Even those for the kinds of products described tend to contain some element that works against them being seen as 'directed primarily to Children'. For example, an ad for

a heavily sugared breakfast cereal might be scripted in such a way as to appear to be addressed at parents.

There are a number of ways in which the individual provisions referred to in this section are not as effective as they might at first appear. These deficiencies are not systemic in nature, so it is difficult to predict the impact they would have on a dedicated children's channel as distinct from a comprehensive channel. However, the outline provides important context for what can be predicted about a dedicated channel, as is explored below.

Achievement of the Policy Goals by a Dedicated Children's (Digital) Channel

The foregoing establishes that the regulations on children's television contain some elements that would tend to carry out the policy goals of providing high-quality and age-appropriate children's programming, and of protecting children from advertising. However, there appear also to be some grounds for scepticism as to how far these effects are actually felt on the ground. The provision of high-quality children's television goes only part-way towards achieving the policy goal if few children are watching the programs. Nor can we be confident that the content quotas provide age-appropriate programs to all children. The existence of special provisions to protect children from advertising looks promising, but when we consider the content and application of those provisions we realise they have little impact on what children actually see. In these senses, the broadcasting landscape under the CTS and other provisions applying to commercial television stands in stark contrast to that of the ABC. Although the national broadcaster is not subject to any content quotas, it has a very solid history of providing several hours per day of well-promoted, regularly scheduled, high-quality, ad-free television for a range of ages.

So there are two questions to be asked: first, can we expect a dedicated children's television channel to deliver material of a standard equal to or higher than what is currently available? And second, is such a channel, presuming it carries advertising, likely to have a more effective system for regulating the content and volume of the advertising that children see?

In answer to the first question, it is almost too obvious to bother stating that a dedicated channel is no guarantee of quality. Intuitively

we might expect that quality would be driven *down* by the sheer pressure of the volume of programming that would need to be purchased. It is difficult to see any incentive to invest more in high-quality drama, or other expensive formats. We would be unlikely to see any augmentation of Australian content; rather, the natural expectation would be for foreign-produced content to rise. A recent study has found that of the 2664 hours of children's programming on subscription television in 2005, which were overwhelmingly shown on dedicated children's channels, only a little over 10 per cent was Australian-made.³² Not that there is necessarily anything wrong with this from the point of view of quality, except that the current system is based on the premise that for growing children, the sense of identity provided by local programming *is* an important aspect of quality. It may be that digital channels buck this overall trend, with the digital Nick Jr having a higher level of local content than the other children's channels had.³³

All of these things could be addressed by regulation: the hypothetical digital channel could be required to show a certain amount of 'C' programming, or some equivalent category aimed at achieving quality. However, that brings us back to the lessons of the 'C' quota: without requirements as to promotion, scheduling and so on, a quality quota would prove equally useless. On the other hand, quality quota programs, in this hypothetical example, would not be required to compete for programming space with blockbuster prime time programs of general appeal. So promotion and scheduling requirements here might prove more palatable to licensees—and therefore more politically realistic—than they would on a 'comprehensive' channel.

As to the coverage of different sub-groups of children, one might expect that by dint of the sheer volume of material broadcast we would more likely find that there was a broader range. However, as long as the digital channel was chasing the advertising dollar, the systemic problem would remain. Some groups of children are more attractive to advertisers, and therefore, without some kind of restriction such as a sub-quota, we would find some groups better catered to than others. In this case there is no necessary countervailing consideration to suggest that restrictions, or sub-quotas, would be more palatable in a digital environment. Therefore, we could expect the

same political challenges in achieving the policy goal as are faced in the regulation of analogue television.

In answer to the second question, there would certainly be an opportunity to avoid the ‘loopholes’ created when protections apply only to ads aimed at children, or in children’s programs, or for products likely to appeal to children. If the political will were there to protect children from advertising, it would be relatively easy to adopt clear and stringent rules for advertising to apply *across the whole channel*. There would no longer be any need to circumscribe the rules by reference to the apparent target audience, or the type of program, or the type of product. There would be a presumption that *all* ads on such a channel are appropriately subject to safeguards aimed at protecting children. If such a presumption were made irrebuttable, the effectiveness of the system would stand in stark contrast to what we see on comprehensive channels.

If the political will were not there to put strong protections in place, a dedicated channel would provide a fertile space to develop the sophistication of marketing to children. This is already at a level that causes great concern to children’s advocates.

In either case, digital television is likely to create new challenges for those who seek to protect children from advertising in the form of product placement and other forms of embedded marketing. If the technology makes it a fairly simple matter for the viewer to edit out the ads, the natural expectation will be that the ads will be incorporated into the program. If ad breaks are in need of regulation to protect children’s interests, then product placement is too—possibly more so, considering that a central concern about children and advertising is the difficulty that young children have in distinguishing between programming and advertising. Embedded marketing will only exacerbate this problem. The chances of an effective regime being developed are, in my view, slim.

What Might a Dedicated Channel Do to Children’s Viewing Habits?

So far, discussion has centred on two policy positions: first, that children should have access to appropriate programming, and second, that they should be protected from advertising. These two

propositions are clearly visible as underlying the CTS and other rules applying to commercial television in Australia. A third proposition can be identified as attracting a broad consensus in the Australian community, even though the regulations do little to support it: that children should not spend every waking moment watching television.

Those who take this view might perceive a danger that a digital channel could lead to just such a scenario. If parents wish to control the amount of television their children watch, the unsuitability (or lack of appeal) of the material being shown at various times of the day provides a ready means of doing so. The availability of a dedicated children's channel removes that tool from parents' grasp. Once a dedicated channel is provided, any time is TV time for children. Obviously this already happens to some extent in those homes with access to the dedicated channels on pay TV; for example, Nickelodeon. It would be useful to know how those families tend to negotiate TV watching. Do children in such homes tend to watch more TV, and spend less time engaging in other activities, than others do? There is evidence to suggest that they might. The amount of time the average child spent watching free-to-air TV declined by about 15 per cent between 2001 and the first half of 2006; in the same period the time spent watching subscription TV increased by 11 per cent. The raw figures tell an even clearer story: in the first half of 2006, the 0–14 age group spent an average of 145 minutes per day watching free-to-air television, and 183 minutes watching subscription television.³⁴ The latter figure is an average of minutes watched in households where subscription television is available. It is difficult to imagine that the availability of dedicated children's channels has had no role to play in bringing about such an increase. The Australian Children's Television Foundation has put forward the availability of dedicated children's channels in the UK as a major driver of digital take-up in that country.³⁵ If the same were to apply in Australia, one might expect that dedicated free-to-air channels would drive overall minutes watched up even further.

Alternatively, parents might take advantage of the on-tap children's entertainment to provide appropriate viewing at times when it is otherwise considered that TV watching is desirable. For example, if a convenient time for the children in a family to watch television is

7 p.m., and there is nothing on the normal free-to-air stations that is appropriate for children, then the availability of appropriate programming at that time could be seen as a potential antidote to what the Australian Children's Television Foundation has called 'a serious accessibility problem' for the child audience.³⁶ There is a need for more research to establish the likely impact of dedicated free-to-air channels on the way that children balance television watching with other activities.

A related issue is that of televisions in children's bedrooms, and other arrangements that might go hand in hand with specialised viewing patterns. In other words, do families tend to go off to their separate televisions to watch their separate programs? Is this good for the families? Is it good for children's development? This is another matter on which further research is needed.

In the longer term, it is possible that the existence of dedicated children's channels could give momentum to the pressures to wind back current protections. It might be harder politically to justify the content quotas discussed above, for example, if ample age-appropriate viewing is available on the dedicated channels. The same might go for advertising restrictions, and indeed for classification bands. For example, commercial broadcasters are currently obliged to show only G- and PG-rated material at times when it is expected that children will be awake. Or in other words, prime time material should be suitable for viewing by people of all ages, even if it is not necessarily age-appropriate in the sense that 'P' and 'C' programs are. This aspect of the regime is highly significant, considering that prime time is when we know children do the vast bulk of their viewing. If there are children's programs available during prime time on the dedicated channel, licensees might feel better able to argue for a relaxation of the current restrictions—so they should be able to show higher-rated material earlier in the evening.

Not everybody would think that this would be a bad thing. Some people might think that the provision of maximum choice is the highest good. Others might expect that the reality will be that families will still watch 'comprehensive' channels in the evening. If that is the case, and the comprehensive channels are showing material rated M or higher, one of two things will happen: children will watch inappropriate material, or they will be sent to another part of the house,

possibly to watch the children's channel. The long-term impact of such arrangements on children's development and on family dynamics should be studied closely.

Alternatively, it would be possible for the government to reiterate the policy position underlying the current regulatory regime: that the community provides commercial free-to-air licensees with significant protection from competition, and expects in return that the licensees will provide a service to the community more broadly. Nothing in the current proposals changes the fundamental proposition, therefore there is no reason to question or undermine the *quid pro quo*. Some might say that digital multi-channelling can in fact be used to enhance the service that broadcasters offer to the community. Others would reply that it risks merely ghetto-ising those sectors of the community who are catered to only by means of 'specialised' channels.

Conclusion

This chapter has laid out the regulatory tools currently used in Australia to implement two policies: first, that children should have access to high-quality, age-appropriate programming on free-to-air television; and second, that they should be protected from certain kinds of advertising. We have seen that the current regulations achieve those goals only to a limited extent. In particular, the actual viewing of the quality programming provided under the quota system is not facilitated; the quota material does not cater to children at all ages and stages; and the advertising restrictions apply only at times when children are less likely to be watching, or to ads of a kind unlikely to be shown at children's main viewing times.

Digital television holds out the promise of dedicated channels for particular sub-audiences, and children are a prime candidate for such a provision. This chapter has therefore considered also how the regulatory tools described might translate into such an environment. The introduction of dedicated children's channels would remove some of the obstacles to the effective implementation of the policies: it would make scheduling and promotion requirements for quality material more palatable, and there would no longer be any need for advertising restrictions to be limited, as they currently are, to particular times and particular types of advertising.

This is not to say, of course, that any of these outcomes is inevitable. It is by no means a foregone conclusion that there would be *any* quality quotas for dedicated channels, or indeed that there would be any special advertising restrictions aimed at protecting children in such an environment. My estimation is that the latter is more likely than the former: that is, it is hard to imagine a children's channel without advertising restrictions; content quotas are another matter.

In any event, even presuming quality quotas were imposed, a dedicated channel would do little to help the problem of quality material that caters only to sub-groups of children who are more attractive to advertisers. In order to address that problem, the same thing would be needed as is currently needed, but lacking, in free-to-air television regulation, namely sub-quotas for vulnerable sub-groups of children. There is no reason to think these are any more likely to be achieved in one environment than in the other.

Finally the chapter has raised some questions about the impact of dedicated channels on children's viewing patterns. It has been suggested that the existence of dedicated channels should not be seen as a reason to relieve the commercial broadcasters of their obligation to show material during prime time that is suitable for all ages. However, considerably more research and debate is required before firmer conclusions can be reached on this matter.

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Notes

- ¹ Australian Communications and Media Authority.
- ² Children's Television Standards, CTS 2.
- ³ CTS 2.
- ⁴ Lumby and Fine, pp. 94–5.
- ⁵ CTS 14(3).
- ⁶ CTS 3(1)(e).
- ⁷ CTS 1 (Definitions).
- ⁸ CTS 3(1)(b), (d).
- ⁹ CTS 13(2).
- ¹⁰ Australian Communications and Media Authority, p. 9.
- ¹¹ CTS 3(1)(i).
- ¹² Australian Communications and Media Authority, pp. 18–23.
- ¹³ Australian Content Standards, in force under the *Broadcasting Services Act 1992* (Cth) 12(3).
- ¹⁴ Osborne.
- ¹⁵ In relation to 'unsuitable' matter, see CTS 10; misleading or deceptive matter, see CTS 17; undue pressure, see CTS 18; clear presentation, see CTS 19; disclaimers and premium offers, see CTS 20; competitions, see CTS 21; promotions and endorsements, see CTS 22; and alcohol, see CTS 23.
- ¹⁶ CTS 4A, 13(2), 14, 16.
- ¹⁷ In relation to deceptive ads, see the Commercial Television Industry Code of Practice, July 2004 (CTICP) s. 1; discriminatory portrayal, see CTICP s. 2.1; violence and sex, see CTICP ss 2.2, 2.3; and language, see CTICP s. 2.5.
- ¹⁸ CTICP s. 1.
- ¹⁹ In relation to factual presentation, see CTICP s. 2.1; safety, see CTICP s. 2.2; social values, see CTICP s. 2.3; parental authority, see CTICP s. 2.4; price, see CTICP s. 2.5; qualifying statements, see CTICP s. 2.6; competitions, see CTICP s. 2.7; premiums, see CTICP s. 2.8; alcohol, see CTICP s. 2.9; food and beverages, see CTICP s. 2.10.
- ²⁰ See CTICP s. 6.24.
- ²¹ CTICP s. 6.22.
- ²² 'There is an Advisory Note listing matters to take into account in determining [w]ho a commercial is directed to for the purpose of applying Clause 6.23'.
- ²³ In relation to selling by hosts and so on, see CTICP s. 6.24; premium charges, see CTICP s. 6.25; and restrictions depending on scheduling, see CTICP ss 6.26, 6.27.
- ²⁴ CTICP s. 3.1.
- ²⁵ CTICP s. 3.2.
- ²⁶ In relation to physical or other advantage, see CTICP s. 3.3; undermining parents, see CTICP s. 3.4; appeals to children to urge parents, see CTICP s. 3.5; celebrities and obscuring distinction between promotion and program, see CTICP s. 3.6; and ingredients or premiums not integral to products or services, see CTICP s. 3.7.
- ²⁷ CTICP s. 6.3(a).
- ²⁸ CTICP s. 6.3(b).

- ²⁹ CTICP s. 6.3(d).
³⁰ CTICP s. 6.3(c).
³¹ Osborne.
³² McCutcheon, p. 9.
³³ *ibid.*, p. 11.
³⁴ Osborne.
³⁵ MacLean.
³⁶ *ibid.*

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