"Content Regulation in a Converged World": Competition and Business Implications

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Speed read

Content regulation, at least in this context, is mainly about ensuring safe access to content, such as by classifying films and broadcast content based on maintenance of community values, protecting children, fair treatment of people, and accuracy.[1] But there are impacts on competition in the marketplace too, creating economic distortions if there are the wrong settings (for example, content gets through via On-Demand, when it's treated differently over another platform).

That's one of the themes that emerges from the Government's discussion paper, *"Content Regulation in a Converged World."* That paper is part of the Government's broader review of digital convergence issues, ranging from telecommunications regulation to cybersecurity.

The Detail

Some background

With content available over multiple platforms (internet, On Demand, broadcasting, etc.), the differing regimes to manage content are out of date. No longer is it is sensible to have films reviewed by the Office of Film and Literature Classification (OFLC), TV and Radio via the Broadcasting Standards Authority (BSA) and online content falling into, largely, a no-man's land (with some self-regulation). The same sort of content is delivered over multiple parallel platforms such as the internet, TV (Free to Air and Pay TV), radio, On Demand, etc. That's the idea behind so-called "digital convergence". Increasingly sensible too is convergence of content regulation: the same content regime for all content, no matter the way it is provided.

Well, not necessarily exactly the same. As the discussion paper notes:[2]

> *"Another consideration is whether the different platforms justify different restrictions…[T]raditional television broadcasting is usually considered to be transmitted on a one to many basis, compared to on-demand content, which is transmitted on a one to one basis. This additional choice and control by the consumer may justify less stringent restrictions on the on-demand content. Whether this applies also to online streamed content, which is considered to be transmitted on a one to many basis, should be considered."*

Ideally, the same sort of regulatory approach across the board, but with differing standards, depending on how it is delivered? This is an issue to be played out.

Out of scope in the discussion paper is personal content such as YouTube material. The focus is the classification of AV content provided professionally to consumers.[3]

The paper presents a number of alternatives, ranging from retaining the status quo, to a completely new regulatory regime. In between, there's possible juggling of the current regimes (e.g. by extending BSA powers to cover video On Demand and streaming). But that may be moving a deck chair or two on the Titanic.

As to a completely new regime:[4]

> *"This option would be free from the constraints the other regimes have in being required to work within definitions of "broadcasting", "films" and other terms defined in a way that does not reflect the current environment. "Starting from scratch" would allow the government to devise a technology-neutral regime that regulates the classification of content without reference to how that content is accessed or delivered. This would ensure an even playing field between different providers."*

Impacts on competition in the market place

The Government's discussion paper acknowledges an additional objective of content regulation and intervention: that of supporting "…healthy competition in the sector, encouraging innovation and enabling choice for consumers":[5]

> *"Our regulatory system should 'treat likes alike' across the converged sector, and be flexible and durable enough to cope with future change. Policy and legislation should enable innovation and growth, while ensuring a fair and even playing field for competition. They should enable change in the market without steering it. Policy and legislation should, for the most part, be technology neutral to allow innovation and change within the market, and it should be clear on how it handles cross border issues."*[6]

As an example of how regulation can distort competition, the present regimes, which apply differently and often not at all, lead to an uneven playing field. The paper therefore points to the need to have technology neutral regulation: regulation that can work with new technology as it evolves.[7]

At present, each statutory regulatory regime (OFLC and BSA) has related self-regulation by industry, which largely triages only the more serious or disputed issues to the regulator. This helps speed up the clearance of new content. Without such an approach, it may be that one channel to market will be disadvantaged, competitively, relative to another.

In the increasingly larger cracks between film and broadcasting classification, there's the big area of online content, much of which is unregulated,[8] or there is some uncertainty as to what regime applies.[9] This may create unfair competitive advantages for online content providers:

> *"This lack of clarity may cause unfair competition, with some providers facing the costs associated with pre-classification while others do not, which could harm the sector and stifle innovation."*[10]

Offshore content providers[11]

A major gap in the ability to classify and control content is that the regulatory regimes don't apply to content providers outside New Zealand:

> *"Our classification frameworks currently only apply to content providers located within New Zealand. There is a difference between sending material to New Zealand to be screened here, as distributors do when a film is released locally, and allowing material to be accessed, as SVOD and TVOD providers*

do when they grant New Zealanders access to material stored on overseas servers.

This has implications for competitors and consumers. Overseas providers may be subject to different policy and legislative requirements. They may not incur the same compliance costs as domestic businesses, and they may provide different, or less, information to consumers about the appropriateness of content, which may not be easily comparable to the information provided by domestic providers."

TV ads on Sunday mornings and some public holidays

TV ads at those times are banned (contrary to most other comparable countries).[12] But other platforms can freely advertise, including online versions of TV broadcasts over the air waves. So, this is another requirement that creates an uneven playing field and could adversely affect competition. Advertising revenue during those Sundays and public holidays goes to platforms other than radio.

The paper points out, though, that removing the TV restriction creates another problem, as the advertising free space creates:[13]

"....a non-commercial space in television programming, which can be used for minority or special interest content that, without high rating support, is not popular with advertisers. One of the statutory roles of the funding agency NZ On Air is to fund content for minority interests within the total audience, and there is a risk that removing the Section 81 restrictions on advertising would make it even more difficult for the agency to place such programmes on television channels. Parliament's purpose in including Section 81 was, in part, to maintain a place in the television schedules for such programmes."

The paper raises various options to handle this, ranging from keeping the status quo, to removing the restriction but requiring minimum special interest and minority interest programming (via legislation or agreement between Government and broadcasters).

Government funding of content and of broadcasters, and mandating minimum content

...and that segues nicely into some tools identified by the paper,[14] by which Government can support and control aspects of content and the sector, including:

- Maintaining publicly owned broadcasters (and providing funding in the case of Radio New Zealand, which now has online services too);
- Making funding available contestably for certain kinds of content (via NZ On Air and Te Mangai Paho);
- Spectrum licensing requires certain kinds of content;
- Minimum quotas for specified levels of content.

Use of such tools already raises concerns for some people that, for example, Radio New Zealand is funded while multiple commercial radio stations receive none, creating an unfair and uneven playing field, as their audiences can overlap. Now, such issues extend more widely given the multiple platforms over which similar content is now distributed. Typically however, comparable countries strike some sort of balance between commercial competition and public funding of broadcasting.

What is made clear, though, is that the Government is not revisiting the broad policy approach in this review:[15]

"It is timely now to consider whether further updates to policy are required

to ensure it remains fit for purpose in a converging sector. This is not intended to be a review of the fundamental principles behind government intervention in the media sector, nor is it a review of the funding of the sector. Government remains committed to supporting a sustainable media sector, and forecasts continuing support of approximately $207 million to the public broadcasting sector in the 2015/16 financial year.

This paper seeks to act only as a "health check" to the existing policy frameworks, to ensure they reflect the current media landscape and remain fit for purpose. In particular the questions below are intended to start discussion on whether there are now inconsistencies in policy as a result of convergence, and whether the current trends in the sector suggest further policy amendments may be required in future."

1. Content Regulation in a Converged World, page 13.
2. Ibid., page 25.
3. Ibid., page 12.
4. Ibid., page 21.
5. Ibid., page 7. Those drivers are balanced by the right to freedom of expression under the NZ Bill of Rights Act 1990.
6. Ibid., page 10.
7. Ibid., page 15.
8. Ibid., page 13. *"The Ministry for Culture and Heritage and other relevant Government agencies consider that on-demand content, whether available for free or subscription, does not fall within the provisions of the Broadcasting Act or the labelling provisions of the Classification Act." "However, on-demand content does fall within the definition of "publication", and if it is "objectionable" the possession and distribution of this content is an offence with maximum terms of imprisonment of 10 and 14 years respectively."*
9. Ibid., page 11.
10. Ibid., page 15.
11. Ibid., page 13.
12. With some exceptions.
13. Ibid., page 26.
14. Ibid., page 35.
15. Ibid., page 36.

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