September 2007 Update: Convergence of Telecommunications, Broadcasting and the Internet: A Regulatory Perspective

Convergence of content across platforms – such as broadcasting, telecommunications, and the Internet – presents great opportunities.

With the opportunities come considerable challenges, including the prospect of shifting concentration of control of content and content delivery platforms. There are other challenges as well, such as content regulation across broadcasting and Internet platforms.

This paper updates our June 2007 paper, as part of our presentation to the Digital Media & Content Summit on 25 September 2007.

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1. Introduction

In June 2007 we did a comprehensive review in our paper, Convergence and Telecommunications, Broadcasting and the Internet – a Regulatory Perspective. [1] This paper updates that report.[2]

[1] http://www.wigleylaw.com/Articles/LatestArticles/convergence-of-telecommunications-broadcasting-and/ .

[2] We assume familiarity with the June 2007 paper.

2. Broadcasting regulatory review

The Ministry of Culture &Heritage/MED options paper, within the broadcasting regulatory review, is due out in the next month or two.

The paper provides an important opportunity for stakeholders to comment on the regulatory path going forward. Many possible issues are identified in our June paper.

3. Content Regulation

On 24 September, *The Dominion Post* reported that the Broadcasting Standards Authority (BSA) could have its role extended to cover mobile and Internet content.

As we identify in our June paper, the content regulation models overseas generally vary in their approach, depending on the particular content platform and whether, for example, the content is provided by linear (push) or non-linear (pull) means. As we noted, there is not always a bright-edged line between the two.

Against that background, the BSA notes that there could be a co-regulatory regime for Internet and mobile content. The BSA could be the regulator in that scenario (working in with, say, InternetNZ and the Telecommunications Carriers Forum).

While content regulation could be undertaken by a stand-alone content regulator (and there is sense in this being the BSA), there are alternatives. For example, there is the Australian model, which has

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put content regulation responsibility within the broader media and communications regulator (ACMA). That would have the BSA (and maybe other functions such as the Press Council) rolled into a single media/communications regulator.

While there is an argument that content regulation could remain separate, the same may not apply to other media related requirements (such as the MED role as to spectrum).

4. Public Broadcasting and funding of programmes

We have not covered this in detail in our June paper, but we note in passing the August 2007 Bill, introduced to amend the Broadcasting Act. If enacted, this will enable NZ on Air and Te Māngai Pāho to fund programmes and content in different forms, such as Internet, mobile and video-on-demand platforms.

For an excellent and concise summary of one person's views on policy considerations underlying public broadcasting see the address by Barry Cox to the August 2007 New Broadcasting Futures Conference.[3]

5. Rugby World Cup: TV3 versus Sky – one-nil or a draw?

We've written on this September 2007 court case.[4]

It's a copyright decision about whether, where a broadcaster has exclusive broadcast rights to a live event, others are entitled to play short clips taken from the broadcast.

Copyright issues are part of the complex matrix of matters relevant to regulatory policy and decisions.

There's an illustration of this point. The judgment refers to academic writing that recognises the potential for overlap in the "market definition" (or its equivalent in copyright law) under both copyright and competition law.

But the significance is more practical and fundamental: there is a tension between (a) protection of copyright interests, to encourage broadcasters to invest; (b) the public interest and freedom of speech and (c) commercial realities and dynamics.

6. The C7 case: a big Murdoch win

To get an idea of just how important premium sports events are in broadcasting, the 31 July 2007 judgment in the case brought in Australia by C7 against NewsCorp and others says it all.

The parties in that case spent over A$200M in legal costs, fighting over competition law issues arising out of broadcasting premium rugby league and Aussie Rules games.

Broadcasting the footie is a big-time issue. It can move where control is concentrated and can have widespread ramifications in this converging world. And the issue is by no means limited to who gets the primary broadcast rights.

Does this play out under the radar (to the benefit of some players) pending further regulatory developments and a focus on issues like LLU?

The judgment is also useful for framing many of the competition law issues (most of which are applicable in New Zealand as our competition legislation (the Commerce Act) is similar.

The case is very complex, and this summary highlights only some of the key points in a 1,100 page judgment.

The Seven Network says it was forced to shut down C7, a producer and distributor of sports channels for Pay TV. Seven claimed this happened as the Foxtel partnership (made up of NewsCorp, PBL and Telstra) in particular, engaged in anti-competitive conduct under provisions similar to our Commerce Act provisions.

Seven said that, after NewsCorp got the Aussie Rules broadcast rights, the Foxtel partnership refused to negotiate with C7 for carriage of C7's sports channels on Foxtel's retail pay TV platform. Seven said this was designed to harm C7 and favour the interests of Fox Sports, C7's competitor in the market for supply of sports channels to retail Pay TV platforms. Seven went further and claimed that NewsCorp and PBL intended to "kill" C7.

Seven also claimed that, under an agreement between NewsCorp, PBL, Foxtel and Telstra, there was a successful bid by NewsCorp and Fox Sports for National Rugby League broadcast rights. Seven said that the consortium shut out C7. Seven said this was anti-competitive, in circumstances that C7 was deprived of the two premium sports.

There were other allegations too, such as in relation to a Content Sharing Agreement between Foxtel and Optus.

To decide whether there is the statutory "substantial lessening of competition" (SLC), it is necessary to determine the relevant market in which it is said there is SLC.

Seven claimed there were four markets, ranging from the wholesale sports channel market to the retail pay TV market. Importantly, the Court decided only one relevant market existed: the retail pay TV market (Seven heavily relied, unsuccessfully, on there being the wholesale sports channel market).

[3] http://www.newfuture.govt.nz/BarryCoxspeech.pdf
[4] http://www.wigleylaw.com/Articles/LatestArticles/rugby-world-cup-tv3-versus-sky-one-nil-or-a-draw/

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Based on all the facts, the judge concluded there was no substantial lessening of competition in the retail pay TV market. Nor was the objective to "kill" C7 established: the defendants did not cross the boundary that "*distinguishes legitimate, albeit aggressive and even ruthless, competitive conduct, from anti-competitive conduct …*" in breach of the competition legislation.

This doesn't mean there would be the same outcome in other cases, or that market definition will be the same in a converged world, as the Chairman of the ACCC notes in his observations quoted in our June 2007 paper.

7. Virgin Media, BSkyB and ITV

This case is now with the Competition Commission, with a decision due out in January 2008.

For those wanting to address policy issues underlying potential media regulation, the parties' submissions contain a wealth of information, additional to that produced by Ofcom and OFT.[5]

It's hard to avoid the impression that the structure of our media industry in New Zealand would be different if the regulation in the UK was applicable here.

For example, would we have ended up with Sky owning FTA channel, Prime?

8. Telecommunications Regulation

As "convergence" escalates, this is increasingly relevant to media and content creation and delivery.

Interestingly, Professor Noam, in a chapter referred to in our June paper, concludes that media regulation will increasingly take an approach based on the telecommunications regulatory model (ie, it will become telco-centric not media-centric).

For a more recent overview of Telco regulation, after our paper noted in our June 2007 report, see our article in the August edition of the UK journal, *Computer and Telecommunications Law Review*, 'Demystifying what's happening in New Zealand Telecommunications Regulation'.[6]

Triple- and quad-plays are building momentum rapidly, demonstrated particularly by the Vodafone/ihug bundled offerings in the market.

The freeing up of DSL broadband wholesale access is going faster than we expected would happen. The Commerce Commission is taking a path by which Telecom put up a proposal for supply of DSL wholesale services,[7] for consideration by the Commission and stakeholders. This is going through the new Standard Terms Determination process, which is much faster than earlier Commission processes. It's looking like a final decision will be made by the Commission before the end of the year.

In broad terms, this will get practical traction on wholesale broadband increasingly over 2008. This will rapidly expedite the availability of triple- and quad-play offerings.

That includes the prospect of more IPTV offerings. However, commentators in the telecommunications sector are sceptical about IPTV making significant inroads into traditional broadcasting in the short term, given fixed line bandwidth restraints and the satellite and digital terrestrial options.

The Commerce Commission's mobile services review is also proceeding toward solutions that should encourage at least a third mobile entrant to compete with Vodafone and Telecom. This will help foster the quad-play option (voice, Internet, audio-visual and mobile). The mis-match between MED oversight of spectrum, and Commission oversight of wholesale mobile services (in particular roaming and cell site co-location), appears to be resolving itself. However, the point remains that there are arguments favouring a common regulator for both aspects.

There are other significant spectrum developments such as for spectrum suitable for WiMax.

The mobile and DSL developments have direct application to content creation and delivery. Relevant, but more removed, is the operational separation of Telecom: the Minister's draft separation plan is due out within the next few weeks.

Also relevant is the MED review of the TSO, which has always been highly controversial (and complex). Parties have until 15 October to comment.

Up for discussion (beyond the complexities of calculating the financial model, service levels and so on) are issues such as:

- Whether the regime should extend to broadband, beyond voice and dial-up Internet.
- Whether providers other than Telecom should have the opportunity to provide some or all of the services, on a contestable basis.
- The impact of Next Generation Network developments.

[5] http://www.competition-commission.org.uk/inquiries/ref2007/itv/index.htm
[6] Sweet & Maxwell. Also available at http://www.wigleylaw.com/Articles/LatestArticles/demystifying-what-s-happening-in-new-zealand-s-tel/

[7] Via local loop unbundling, naked and clothed DSL options.

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