

Law and Journalism available at <http://www.lawpress.com.au.ezproxy.lib.deakin.edu.au/genews/ge131_M5_QP.html>

⁹ Id at 337-338

¹⁰ Id at para 38 -67

¹¹ Id at para 57)

¹² *Commercial Television Industry Code of Practice* (2004) s7.10

¹³ *Commercial Television Industry Code of Practice* (2004) s7.12).

¹⁴ Mark Pearson, *The Journalists Guide to Media Law* (2004) at 337.

¹⁵ Id at 333

¹⁶ MEAA Code (2006) point 1

¹⁷ Id, guidance clause

¹⁸ Megan Ashford, *Legislation Note: Defamation Act 2005 (WA)* (2006) at para 9, Available at <https://elaw.murdoch.edu.au/issues/2006/1/eLaw_Ashford_13_2006_Q2.pdf>; Pearson above n13 at 169; Arts Law Centre of Australia, *The Law of Defamation – For Material Published after 1 January 2006* (2006) at para 3. Available at <<http://www.artslaw.com.au/LegalInformation/Defamation/DefamationLawsAfterJan06.asp>>

¹⁹ Pearson, above n13 at 203

²⁰ Minter Ellison Lawyers, *News Alert – New Uniform Defamation Laws* (1 February 2006), at para 16.

²¹ Paul Svilans, *The Uniform Defamation Laws* (30 March 2006), at para 39. Available at

<<http://www.gtlaw.com.au/gt/site/articleDs/C7DDE6199CC75FD4CA25714100192572?open&ui=dom&template=domGT>>

²² Ibid.

²³ Ackland above n8 at para 48.

²⁴ Mark Day, 'Freedom of Speech Undefined' *The Australian* (12 April 2006) at para 11.

²⁵ Id at paras 11, 12.

²⁶ (1997) 189 CLR 211

²⁷ Pearson, above n13 at 212.

²⁸ Ackland above n8 at para 8.

²⁹ Id at para 63)

Reasserting Technological Neutrality

Matt Vitins and Andrew Ailwood search for a technologically neutral definition of television.

While creating a dynamic media environment, the processes of convergence are highly inconvenient for regulators. Broadcasting and telecommunications are both subject to carefully considered, sector specific legislative regimes and the once clear distinctions that organise these bodies of law are under fire. As boundaries are crossed, similar media experiences are being inconsistently regulated and according to capricious criteria.

The European Commission has recently suggested an update to its *Television Without Frontiers Directive*¹ in an explicit attempt to address the 'increasingly unjustifiable differences in regulatory treatment between the various forms of distributing identical or similar media content.'² The directive goes back to first principles in updating the definitions that structure European broadcasting law. The fundamental question asked and addressed is *what media experiences are sufficiently analogous to 'television' that they should be regulated as such?*

In the foreseeable future Australian regulators will similarly have to revisit the fundamental definitions of the *Broadcasting Services Act 1992* (Cth) (**BSA**). It is argued here that the foundations of Australian broadcasting law have become unstable as the regulatory principle of technological neutrality has been steadily eroded. The piece then continues to summarise some of the key features of the European proposal.

Stable Platforms, Unstable Technology

History suggests that once a media platform becomes established it remains a permanent part of the landscape. Even while showing adolescent contempt for the territorial boundaries of traditional institutions, the metaphors that structure new media experiences tend to reflect legacy formats. This might provide a reassuring sense of stability in an industry that is more often described as dizzying, however, while platforms remain reasonably constant, the technical methods associated with them do not. Consider for example, radio is approaching its centenary (constant), but it may be delivered by analogue or digital broadcast, or in an even more 'new media' manner, could be streamed or podcast (not constant). Television is evolving along similar lines.

The current challenge for media regulators is to maintain a consistent legal response while media platforms busily evolve their devices and delivery mechanisms. With all things technical in flux, the target of media regulation is some sort of ephemeral idea or concept of a particular platform.

Technological Neutrality

In light of the above, it may be overstating the point to say that technological neutrality is the holy grail of modern media regulation – but it is certainly a very good idea.

The principle of technological neutrality states that media laws should be expressed in terms that are indifferent to the technical means by which content is delivered to a particular platform. Free-to-air television should be consistently regulated whether delivered by satellite, terrestrial broadcast or cable; internet content should be consistently regulated whether delivered by DSL, a dial up connection or a 3G network.

The BSA

The BSA was originally intended to be technologically neutral.³ The definition of 'broadcasting', for example, covers any service that 'delivers television programs' to 'equipment appropriate for receiving that service', and is thus not limited by the mode of carriage or means of reception.⁴ The BSA also adopts a regulatory structure that is platform centric. The traditional media 'silos' of print, radio, free-to-air TV and pay TV,⁵ are the organising concepts that shape the Act.

It is important to articulate the interaction between these two regulatory tenets. Technological neutrality is directed at the technical means of delivery *within* a platform – it says that similar experiences should be similarly regulated. Platform based regulation allows for different media experiences to be differently regulated. The regulatory coherence of the BSA is failing as it moves away from these foundations.

The principle of technological neutrality has been steadily compromised with specific territory being reserved for internet content,⁶ and for mobile devices.⁷ In addition, point-to-point services are spe-

cifically excluded from the definition of broadcasting and the most recent amendments to the BSA have actively abandoned the principle by introducing the concept of a 'domestic digital television receiver' (i.e. 'not hand held'⁸) in an effort to divide territory between Channel A and Channel B.⁹ The net effect is that the BSA is anything but technologically neutral in its operation, and there is very little clarity on where 'television', as a platform, starts and finishes.

Mobile TV

Mobile TV is a pure example of convergent media and provides an excellent case in point. There are three primary methods of delivering audiovisual content to a mobile device. Through a DVB-H point-to-multipoint broadcast (which is roughly analogous to regular television broadcasting); by way of a point-to-point communication through a 3G network; or finally, by accessing the public internet and downloading content in the usual manner. To the end user, the distinction is irrelevant. Most users will not know how the content has arrived, and if they do know, they are unlikely to care. However, each method of delivery invokes a different part of the BSA or indeed the *Telecommunications Act 1997* (Cth).¹⁰

Harmonisation could be achieved, and technological neutrality re-established if new regulatory space were created for Mobile TV as a platform in its own right. This approach is imperfectly reflected in the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005*, and industry self-regulatory schemes made pursuant to the determination.¹¹ Here again, however, the platform has been defined according to a device, that is by technical criteria, rather than a neutral understanding of the service that is being regulated. Consequently, as the internet also exists independently of mobile devices, regulators are faced with a choice of introducing device specific inconsistencies, that is, differently regulating internet content when it is accessed on a mobile phone as opposed to a PC, or of regulating according to the lowest common denominator.

The drama that arises over Mobile TV is representative of broader challenges presented by media convergence. This problem is repeated with conventional television and IPTV. When it becomes common place for the lounge room set to have a broadband connection of some descrip-

tion, it will be increasingly uncomfortable for 'broadcast content' and 'online content' to be subject to different parts of the BSA and to different regulatory conditions.

It is suggested that these issues will only be settled when a sufficiently clear line is drawn around television proper from within the field of available audiovisual media services, and a technologically neutral definition of the platform is reasserted.

Solutions

To summarise the argument thus far, it can be anticipated that inconsistencies in the treatment of audiovisual material will continue to emerge in Australian broadcasting law if the basic definitions of the BSA are retained. It is further suggested that the starting point for any revision should be an understanding of the platform (television) in its conceptual, rather than its technical sense.

The fundamental questions are therefore, what is TV? and once that is answered, perhaps to ask what divides television proper from emerging audiovisual services that resemble television.

Audiovisual Media Services Without Frontiers

The European Commission's answer to these questions is contained in the proposed directive, *Audiovisual Media Services Without Frontiers*¹² (*the Directive*). The Directive was first outlined in late 2005, however, recent amendments were published by the Commission on 9 March 2007. Whispers around the EU have it that the new directive should be adopted by the European Parliament and Council towards the end of May, with implementation by the end of 2008.¹³

The New Definition of Television

The Directive adopts an almost completely technologically neutral definition of 'audio-visual media services' that would apply across all audiovisual mass media, including television, the internet or mobile devices, and whether scheduled or on demand.¹⁴

An 'audio visual media service' is defined as moving images with or without sound, with a principle purpose to inform, entertain or educate the general public, by means of an electronic communications network.¹⁵

Exceptions to the scope of this definition include any form of private correspondence; services where audiovisual material is merely ancillary to the principle purpose of the service; and any purely non-economic activities.¹⁶

Linear and non-Linear

The Directive further establishes a distinction, between 'linear', and 'non-linear' audio-visual media services. A 'linear' service, is one where the media service provider decides on the moment in time when a specific program is transmitted. A 'non-linear service' is provided on demand.¹⁷

Linear services will be subject to stricter requirements that broadly reflect the regulation of traditional television broadcasts. Non-linear services would be subject to minimum rules involving a basic tier of obligations concerning the protection of minors, incitement of hatred, and certain advertising standards.¹⁸

Comment on the Commission's Proposal

The Commission's proposed Directive is charming in its clarity and elegance. However, aesthetics have not been enough to convince the British. The Office of Communications (*Ofcom*) has argued that the definition proposed would capture all moblogs, online video games (but not offline videogames) and all user generated content posted on MySpace or YouTube.¹⁹

In response the current working draft of the AVMS Directive has limited the definition of 'audio visual media services' to those that provide 'programmes', meaning:

a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting.

These adjustments do not necessarily address Ofcom's concerns. There is considerable scope for argument over what would be considered 'comparable to the form and content of television broadcasting'. Nonetheless, it will be interesting to see how the Directive continues to evolve as it progresses through the European Parliament.

In Practice

It is important to note the role of the directives in the legislative process of EU Mem-

ber States, and their effect at the national law level. A directive creates an obligation to on Member States to pass national legislation reflecting the content of the directive. However, national authorities are left with some discretion as to the 'form and method' of implementation.²⁰

In the result, as a caution against enthusiasm, even once the terms of the Directive are settled by the European Parliament, Council and Commission, the relevant form and effect will be found in the instruments finally drafted by Member States.

The Final Word

Although a more fundamental reframing of broadcasting laws may be delayed, it is unlikely it can be avoided. The Directive marks a genuine attempt to update regulatory definitions, however, it as not yet been implemented at the EU level, let alone filtered through to legislation enacted by Member States. The real effects of the Directive won't be felt (or understood) for some time.

Returning to the two questions posed earlier. The analysis imposed by this piece suggested a search for a genuinely technologically neutral definition of television, which has ended at the not entirely satisfying resting place of something 'comparable to the form and content of television'. This is not particularly inspiring and the search therefore continues.

As to the second question, however, (what divides television proper from similar audio visual services) the Directive provides a particularly good answer. The linear/non-linear distinction provides an excellent dividing line that could allow for a higher level of regulatory attention to be imposed on legacy media and similar services, while deference to anarchy online is maintained.

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(Footnotes)

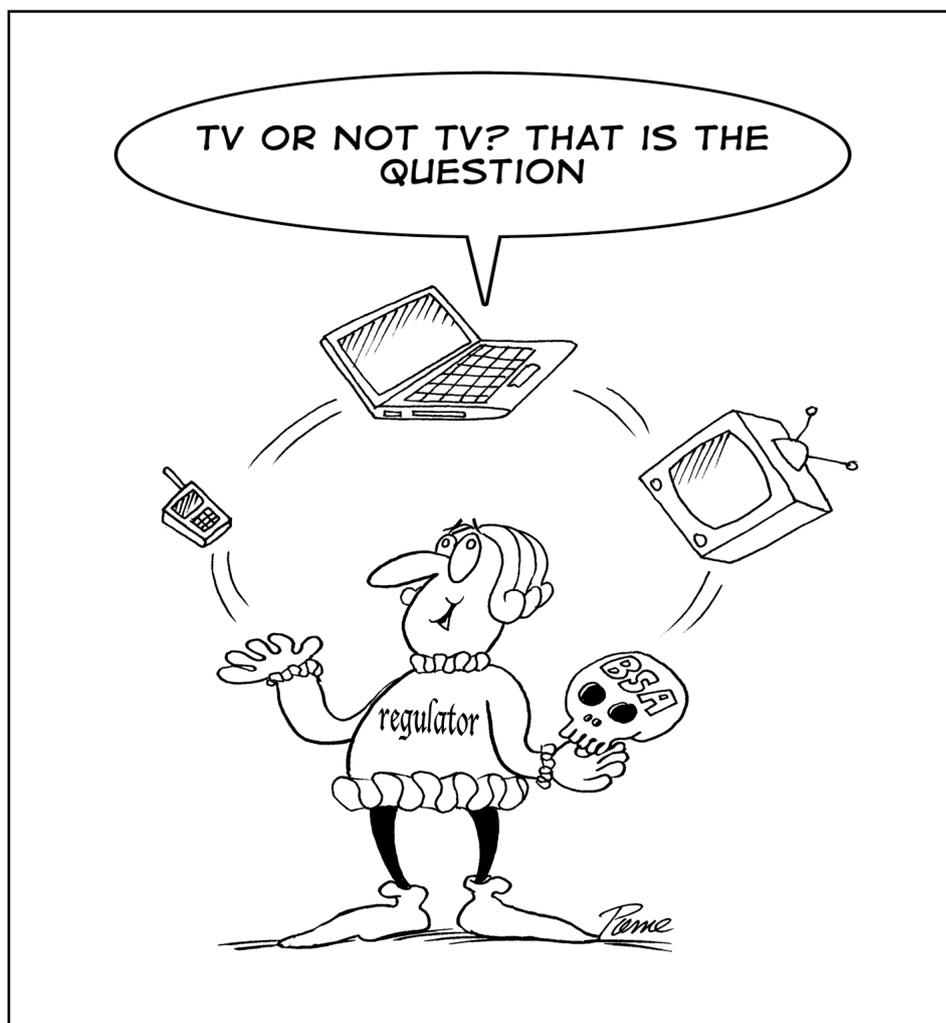
¹ Council Directive 89/552/EEC (Television Without Frontiers Directive) as amended in by Directive 97/36/EC. Also note the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) at 3.

² Ibid at Directive 89/552/EEC (2005/0260(COD))

³ Explanatory Memorandum to the *Broadcasting Services Act 1992* (Cth).

⁴ BSA s6.

⁵ The description comes from Graeme



Samuel's speech 'Grandad What's a Newspaper', delivered in May 2006. The speech is available on the ACCC's website.

⁶ Schedule 5 to the BSA.

⁷ *Telecommunications Service Provider (Mobile Premium Services) Determination 2005*, and industry self-regulatory schemes made pursuant to the determination

⁸ *Radiocommunications Act 1992* (Cth) s5

⁹ *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth)

¹⁰ There are a number of inconsistencies and definitional ambiguities surrounding the treatment of Mobile TV which are beyond the scope of this piece however. see Department of Communications Information Technology and the Arts Review of the Regulation of Content Delivered over Convergent Devices (April 2006).

¹¹ in particular the Communications Alliance Mobile Premium Services Industry Scheme (August 2006) and the ACMA Default Scheme (28 September 2006).

¹² 2005/0260 (COD)

¹³ European Commission, 'Boosting the Diversity of European TV' Press Release 9 March 2007 (IP/07/311)

¹⁴ Proposal for a Directive of the European Parliament and of the Council

amending Council Directive 89/552/EEC (2005/0260(COD)) Recital 13; Article 1(a)

¹⁵ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Article 1(a)

¹⁶ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Recital 14.

¹⁷ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Art 1(e).

¹⁸ Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) at 11; Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC (2005/0260(COD)) Arts 3b-3h;

¹⁹ Tim Suter, 'Ofcom's View' Speech delivered at the European Parliament – Public Hearing on the Audiovisual Media Services Directive (1 June 2006) available at www.ofcom.org.uk/media/speeches/2006/06/euro²⁰ *The European Community and European Union Legal and Institutional Framework* Article 249