

Degrees of Influence

Heidi Bruce considers the continued relevance of the 'degree of influence' principle as a regulatory philosophy of the Broadcasting Services Act.

Introduction

The foundation principle underpinning the regulatory framework of the *Broadcasting Services Act 1992* (Cth) (**BSA**) was the intention that different levels of regulatory control should apply across different services according to the degree of influence they are able to exert in shaping community views. With the emergence of new technologies and new media, and the expansion of the broadcasting regulatory regime, new and unforeseen challenges and competing objectives have arisen. This has led to a practical shift away from the 'degree of influence' principle.

Traditional broadcasting services are highly regulated. The new content services legislation now places some restrictions on internet and mobile content. However notwithstanding these restrictions, the Internet is subject to much less regulation than traditional media. New business models are emerging for the delivery of services that are similar to television and radio over the Internet, mobile and other means. As these take on greater mass appeal and usage and become more influential, this sharpens the divergence in approach to these services compared with more traditional broadcasting services, and reveals the growing lack of consistency between their actual regulation and their degree of influence.

Expansion of the BSA

The BSA was introduced at a time where there was an established set of players and platforms for media. It sought to achieve its founding objectives by describing services according to their nature and not their technical means of delivery. Since its introduction, the BSA has been expanded with the insertion of regulatory regimes for digital television conversion, Internet services, pay television expenditure on new Australian and New Zealand drama, anti-hoarding, digital datacasting services, international broadcasting services and non-broadcast media content services.

The consequence of these ad hoc amendments has been a significant shift in the original assumptions underlying the BSA, namely that regulation would be technologically neutral and proportionate to the degree of influence of each service. The Communications Law Centre takes the view that despite its central place in the rhetoric under the BSA, 'degree of influence' is not, and should not be, central to the mechanisms of broadcasting regulation,¹ as it is uncertain and the different levels of regulation reflect a number of factors, only some of which are relevant

to 'degree of influence'. The current BSA "does not contain one system of regulation. It contains several widely divergent regulatory schemes."² These divergent regulatory regimes for broadcasting, datacasting and online services appear to be based on diverging regulatory policies.

Overview

There are varying levels of regulation under the BSA.

Commercial broadcasting

Commercial television broadcasting services were deemed the most 'influential' category of broadcasting services in influencing community views, presumably because of the type of content they provide, and their ubiquity. It has been suggested this assumption was flawed in the first place and is becoming more outdated as time goes by.³

Commercial television services are required to comply with wide ranging requirements in relation to licensing and licence fees, licence conditions, content codes, Australian content, classification, advertising, and stringent ownership and control rules. Radio is perceived to be less likely than television to influence the community. It is subject to licence conditions and codes of practice which are less prescriptive than TV.

Subscription television

Subscription television requirements are less extensive, and include content rules relating to censorship, local content and anti-siphoning. It has been argued some of these are unnecessarily onerous in consideration of its 'degree of influence', including in particular the anti-siphoning rules.⁴

Open narrowcasting

By contrast, 'open narrowcasting services' are barely regulated at all, subject to a class licensing scheme and minimum licence conditions, with no restrictions on Australian content or ownership and control. This reflects the perception that they are less influential than other broadcasting services on community views, given their specialist scope.

Streaming

The advent of 'streaming video and audio' services has meant that content previously identifiable as television or radio programs can now be streamed over the Internet and accessed via a range of delivery platforms. This raised uncertainties as to whether these services would be considered 'broadcasting services'⁵ and thus regulated by the BSA. This led to concerns from the Internet indus-

try⁶ that if they were regulated, given the moratorium on the issue of new licences this would effectively give existing licence holders exclusive rights and drive other providers offshore,⁷ with adverse effects on the emerging Internet industry in Australia.

In September 2000 the Minister for Communications, Technology and the Arts formally determined that:

a service that makes available television programs or radio programs using the internet, other than a service that delivers television or radio programs using the broadcasting services bands

did not fall within the definition of 'broadcasting service' in subsection 6(1) of the BSA.⁸

Therefore streaming audio and video services are not broadcasting services if they are delivered using the Internet or via phone networks to mobile phones. This provides opportunities for content providers to provide television or radio programs over the Internet, without a licence and free from BSA regulations. However, some new limited regulation is now provided under the content services legislation.

Content Services

The new Schedule 7 of the BSA, effective 1 January 2008 (and related codes), places restrictions on all non-broadcast media content services delivered via carriage services, which covers the internet, mobile phones and other convergent devices. This prohibits X18+ and RC content, and requires providers to restrict access to MA15+ and R18+ content from children under 15 and 18 respectively. Content providers may be required to remove content on complaint. This extends the internet regulatory framework established under Schedule 5 (and closes some of its loopholes) and repeals those parts that applied to content services.

Effectively this provides protection to minors from unsuitable content. Otherwise however, these services are not subject to BSA requirements relating to licensing, Australian content or ownership rules.

Regulatory Asymmetries

Under the current regulatory regime, content which looks or sounds the same from the perspective of the audience may be regulated in different ways depending on how that content is delivered.⁹ Providers will be prejudiced or favoured depending on their chosen delivery method and whether they exploit the loopholes, and this will significantly impact the way services are delivered.

Television and radio programs will be subject to BSA restrictions when transmitted using conventional broadcast technology, but are subject to a more limited regulatory regime when delivered via the Internet or telephone networks.

A movie on demand service where users are able to start, stop, rewind and forward the video would not constitute a broadcasting service because it makes programs available on demand on a point-to-point basis. If movies are delivered via a carriage service they would be subject to Schedule 7 but not other broadcasting rules. Pay television channels such as Foxtel Box Office delivered continuously on a point to multi-point basis to subscribers are broadcasting services and subject to the BSA.

Computer game consoles that allow access to the Internet, personal digital assistants such as Blackberries that download and display video, and mobile phones that receive services that sound like commercial radio and television, are subject to Schedule 7 but not subject to other broadcasting rules, as long as they do not use the BSB.¹⁰

The above examples illustrate the mismatch between the amendments to the BSA and the BSA's 'foundation principles'. These distinctions do not seem appropriate in a converging communications environment. This results in competing businesses, and even services within the same business, being subjected to separate regulatory regimes, which can inefficiently distort investment and consumption choices.¹¹ Unintended consequences of regulation are likely to be particularly pronounced in markets characterised by uncertainty.¹² In such circumstances, clear and appropriate regulatory objectives are imperative.

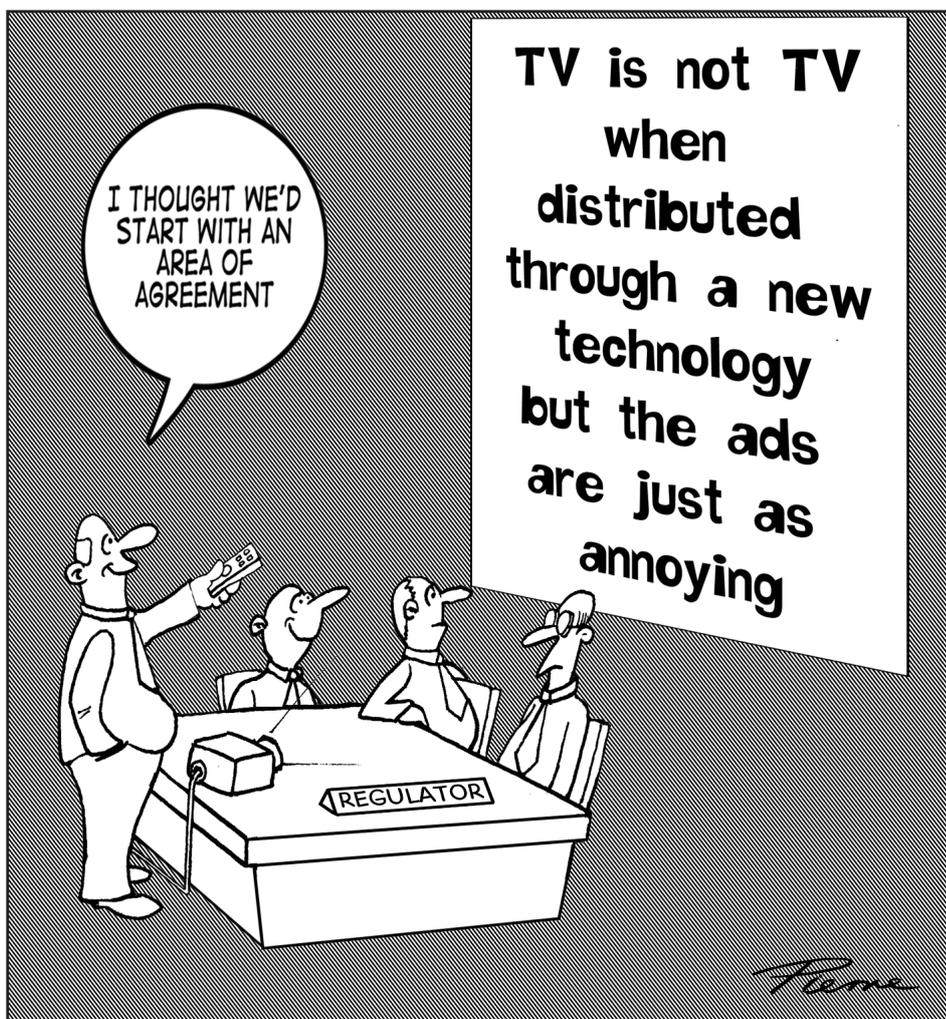
The content services legislation is a significant step in regulating content across a range of different platforms in a consistent manner. This neutral approach to the means of delivery should be embraced on a broader basis. However it is fairly limited in nature and there still remains a stark divide in how these services are treated compared with other more traditional media. This may need to be revisited as these services become more widespread and competitive.

As new media services gain more of a foothold in the Australian media landscape the regulatory incongruence will be highlighted. In particular the regulatory constraints on traditional media such as commercial television, compared to those imposed on competing new media alternatives, will become even more out of step with their degree of influence over the community. This raises questions whether the existing regulatory approach is sustainable.

Shifts in Influence

Internet

Recent years have seen the dramatic rise in the pervasiveness and influence of the Internet as a medium. The proliferation of independent blogs, news sites, social networking and other online sources of content, has led to increasing competition with traditional media. For a growing base of users, these are equally valid sources of news, political commentary, information and entertainment. They are able to shape and indicate public



opinion and have a significant influence on popular culture and politics.

For example, sites like MySpace and YouTube have dedicated political areas, where politicians have profiles, launch policies and interact with users. Following the US where the Internet is a powerful campaigning strategy, the Australian 2007 Federal election was dubbed the 'e-election'.¹³ The Internet has growing influence on the views and experiences of the "internet generation." This raises the prospect of the role of traditional broadcasting in public discourse becoming increasingly marginalised.

Almost seventy five per cent of Australians are current Internet users¹⁴ and online advertising has been growing exponentially in recent years. In 2008 advertisers spent over \$1.5 billion advertising online, up 27% on 2007.¹⁵ New media alternatives are placing increased pressure on television and other media, with commercial TV revenue growth dropping and the profitability of commercial networks falling in recent years.¹⁶

Regulation of broadcasting is recognition that the media, particularly broadcasting, is an important and essential source of information for the community.¹⁷ Internet services are not subject to BSA requirements as to fair and accurate news reporting, or adequate coverage of matters of local significance.

**TV is not TV
when
distributed
through a new
technology
but the ads
are just as
annoying**

The Government has taken a general policy stance of not over regulating the Internet, to advance competitive Internet technologies and business within Australia. It has also responded to pressures suggesting that over regulation of new media would drive business offshore. However these overriding policy objectives have little to do with those of traditional broadcasting regulation. The ever increasing influence of the Internet only further exposes the divergence of regulatory policy from the 'degree of influence' principle. As time goes on, underestimating the influence of the Internet may result in an imbalance amongst different media platforms. To enable regulation to develop in a forward thinking, coherent way, it is necessary to re-evaluate and clarify these principles to apply across all communications.

Convergence and technology

Ongoing media convergence is eroding the boundaries between telecommunications, broadcasting and the Internet, and telecommunications networks are increasingly seeking to compete in the delivery of broadcast services.¹⁸

Increasing network speeds have allowed for the delivery of audiovisual content over the Internet. Without ownership or control restrictions, new and existing players are free to take advantage of opportunities in new media.

Most Australian media mainstays have their own new media organisations, and firms from outside the media such as Telstra are also moving into media-related activities.¹⁹ A host of players are already providing TV programs, games, movies and content via the Web and mobile phones.²⁰ BigPond has its own online TV channel.²¹ MySpace TV and Youtube have recently launched original drama series produced directly for the Internet, with distribution deals for other platforms.²² Original "snack dramas" are now available in Australia via mobile phone networks. These shows can incorporate social networking and interactivity. Traditional broadcasters are lagging in responding to these trends, although they are increasing their focus on delivery of program downloads and cross-platform content. In the UK, ITV Local, which streams full local Internet TV services, has proved so successful it is being rolled out nationally.²³ Its founders provide over 100 Internet TV channels around the world.

The rise of Internet TV and related services will shift power from broadcasters to other organisations that can provide comparable services over new platforms. These services do not have to comply with BSA requirements including ownership, fair and accurate news reporting, diversity, and community standards. Rules requiring minimum Australian content, that help promote the role of broadcasting in reflecting Australia's cultural identity, are not applicable to online or mobile services, providing little incentive for them to be culturally appropriate, or Australian. While the digital age promises increased diversity, empire building is still a natural tendency with many promising Internet businesses being snapped up by larger players.

As the platforms available for 'convergent' services become more pervasive and the boundaries between the broadcasting and telecommunications industries become increasingly blurred, the separation of the various regulatory regimes is likely to be more difficult to sustain.

What is Driving Regulation?

It can no longer be said that the driving principle of regulation is degree of influence. While the 'degree of influence' test still applies to some extent in shaping traditional broadcasting regulation, it appears to have lost its central importance in the context of non-broadcasting services which have been brought within the scope of the BSA. Other more pressing concerns have arisen with new technologies and services, including the need to preserve investment, and develop and protect local media businesses.

The decision to exclude Internet radio and video services from 'broadcasting services' was based not on their degree of influence, but on unrelated considerations such as the promotion of investment and development in Australia for these technologies and services.²⁴ It clearly showed the Government's willingness to allow Internet radio and video services to develop with a much lower level of regulation for the time being.

The main driving factor of the original online legislative regime (Schedule 5) was the protection of children, rather than the 'degree of influence'. In the Productivity Commission Broadcasting Inquiry, it was suggested the test was particularly undermined by these online amendments,

*whose interventions are informed less by any understanding of the degree of influence of online media than by the kind of naively apocalyptic vision of media power and influence which so often accompanies the introduction of new technologies.*²⁵

Australian content services legislation has recognised the growing need for consistent regulation across new media platforms and provides some restrictions. Here the policy objective was again the protection of children, but heavily influenced by the need to harmonise regulation of content, accommodate technological change and to encourage the development of technologies.²⁶ It is apparent that the degree of influence principle has taken a back seat in driving new areas of regulation. The central regulatory principles underpinning the BSA need to be restated and simplified.²⁷

New media has the capacity to rapidly become highly influential, and remains difficult to regulate. There are strong arguments why some of the traditional BSA rules may still not be appropriate to new media services, given their more flexible, fragmented and developing nature. Allowing this area to develop will enable innovative content models to prosper. However, these artificial regulatory distinctions are strained and regulation is out of step with its founding objectives.

Conclusion

The general policy rationale of the BSA for regulating some broadcasting services more than others is the intention that different levels of regulatory control be applied according to their 'degree of influence'. However as new technologies have emerged and new legislative regimes have been introduced into the BSA, there has been a shift away from this principle and other objectives have taken precedence. The regulation of new technologies has been increasingly motivated by other factors including the protection of investment, the interests of incumbent broadcasters, and the advancement of technologies. As the Internet grows in dominance, and convergent technologies facilitate the provision of more influential content, this sharpens the divide in regulation and highlights the diminished relevance of the 'degree of influence' principle. Arguably the 'degree of influence' principle is outmoded and more suited to the bygone era where you were able to 'silo' media into neat, distinct groups and treat them differently. This needs to be revisited to ensure that clear consistent regulatory objectives are established across all communications, which recognise the competing pressures in a converging environment.

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(Endnotes)

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- 27 C Lidgerwood above n 9 at 27. In 2000, a UK White Paper recommended a high level set of principles for regulation of content across all electronic communications, to be administered by one merged regulator. See: UK Departments of Trade and Industry and of Culture, Media and Sport *A New Future for Communications* (December 2000).