

Graeme Samuel's Address to the Communications and Media Law Association

On 4 May 2010, Graeme Samuel, Chairman of the Australian Competition & Consumer Commission, presented the following address to CAMLA. This is an edited version of the speech.

Past predictions

I am sure that if I asked each of you here this evening to forecast the state of play in the media and its convergence with telecommunications, I would receive perhaps 100 different views. So let me repeat some of my own predictions made just a couple of years ago to an audience of mainstream media reporters and members of the business community.¹

I suggested that internet blogs would become a credible threat to established and mainstream news outlets and that competition to break the latest news would be fiercer than ever. I said consumers of news and entertainment would abandon brand loyalty to one or two sources and increasingly put their trust in new websites and new technologies. It followed, I argued, that advertisers would chase consumers to these new and different mediums in order to get their messages across to the somewhat nomadic tribe that is the modern media consumer. With declining advertising revenues and changes to cross-media ownership laws I also foreshadowed that traditional news outlets may need to merge or acquire new territory. The picture I painted was that soon would come the day when there would be no such thing as a stand-alone newspaper, radio station or television station. The modern media company would be a blend of all three with an online presence as well delivering content across multiple platforms. Finally, I said this brave new world would mean that regulators like the ACCC would have a substantial role to play to ensure these changes would benefit competition and consumers.

Of course I was not alone in analysing future trends in journalism and the media market. For media proprietors, there is a great deal riding on being ahead of the next digital wave.

Is content or distribution king?

In general, media companies provide content to the public for free – or at a substantially low cost – and rely on advertising for revenue. Consequently, media markets can be thought of as 'two-sided', with advertisers on one side and consumers on the other. In order to maximise profitability, media companies need to consider their actions on both sides of the market. For example, if a media company increases the price it charges consumers, its audience may decline, reducing the amount it can charge for advertising. If consumers can go elsewhere – and at no cost – to get the exact same news and information that was originally produced by the media company, advertisers may miss-out on reaching those consumers and decide to move their advertising elsewhere.

At the heart of this issue are internet search engines and Google in particular. When you type keywords into a search engine, the subsequent search is not of every page on the internet but rather of pages already identified and indexed by Google or other search engines. This is to ensure that relevant results are returned in a short period of time. The search can become narrower still by manipulating search results so that particular pages are ranked higher than others with the aim of directing more people to these ranked sites.

¹ 'Will the media survive the digital revolution', Walkley Business Lunch, 16 October 2007.

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ISP liability for copyright authorisation: the trial decision in *Roadshow Films v iiNet* Part Two

This is the second and concluding part (the first part was published in the April 2010 edition of the Bulletin) of an exploration of the contours of copyright authorisation liability as that liability relates to a case involving the Australian internet service provider iiNet and thirty-four film and television companies. In this part the findings in *Roadshow Films v iiNet* will be described, together with a critique of certain aspects of the trial judgment.

The UK Defamation Bill 2010: A Review

Jason Bosland examines proposals for amendment of UK libel law.

Harbour Radio Pty Ltd v Australian Communications and Media Authority [2010] FCA 478

Harbour Radio, which operates 2GB in Sydney, has successfully challenged a decision by the ACMA to investigate a complaint by an advertiser against 2GB for adverse comments broadcast on the Ray Hadley Morning Show.

The decision is the first to consider the interpretation of the complaint handling provisions of the Commercial Radio Code of Practice and the investigative powers of the ACMA. The effect of the decision is to reverse the approach historically taken by the ACMA in determining whether a complaint is a 'Code complaint' and demonstrates the discrete nature of the investigative powers granted under the Broadcasting Services Act 1992 (Cth).

Refused Classification

In this article, Jessica Azzi considers the relationship between early book censorship laws and the current classification law.

Some commentators have drawn an analogy between the indexing and ranking process of search engines to 'old fashioned' distribution methods like the paper boy delivering the morning papers. Writing in the online newsletter *Business Spectator* last month, financial journalist Alan Kohler argued that because Google – and search engines generally – 'distribute' the internet by guiding consumers to web pages, restricting access to search engines effectively shuts down content supply to consumers.² He wrote that in order to be distributed by a search engine, a web page must have free access. If it's not free, Google doesn't index it at all or the word 'subscription' appears next to the search result indicating it must be paid for.

Mark Day writing in *The Australian's* Media section in response to Kohler's piece challenged the theory that if you lose Google you lose your entire audience. He argued – and his boss Rupert Murdoch agrees – that content is what supports the supply chain and drives purchases.³

The difficulty so far has been restricting access to content. This is where the iPad comes in.

Will the iPad be the saviour or death of newspapers?

Depending on who you read, the iPad will either save newspapers by making users pay for content – or, by locking content away, it will reduce the number of readers and therefore advertising revenue will decline and newspapers will be worse off.

In a nutshell, media organisations such as *The Australian* will provide content to Apple to distribute via the iPad for a fee, thereby cutting Google and other search engines out of the picture. To become a successful distribution method this will require consumers to purchase an iPad and a plan from a provider as well as pay for the newspaper application.

There has been a great deal of hype generated by the latest offering from Apple but it is worth noting that neither a mobile platform for reading books or large documents is new – Amazon released the Kindle in 2007 – and paywalls for content have been in place at media outlets like the *Financial Review* in Australia and the *Wall Street Journal* for some years. In June this year British titles *The Times* and *Sunday Times* will have paywalls and from January 2011 the *New York Times* website will have a 'hybrid' system where a visitor to the website will be allowed to view a certain number of articles free each month but to read beyond that, the reader must pay a flat fee for unlimited access, much like the 10 article per month limit imposed on registered but unpaid readers by the *Financial Times*.⁴

I currently use a Kindle to purchase and read the latest books – although I can't let this opportunity pass to note my increasing frustration at the restrictions imposed by publishers on what I can download to my Kindle – restrictions imposed simply because I am an Australian resident.

I am also well served by my Blackberry which has all but replaced paper and ink in my daily life. The thud of newspapers at 6am on

2 Alan Kohler, 'Publish and be damned', *Business Spectator*, 9 April 2010. Republished in Crikey.

3 Mark Day, 'iPad could save newspapers and attract ad dollars', *The Australian*, 12 April, 2010.

4 Paul Harris, 'Rupert Murdoch defiant: 'I'll stop Google taking our news for nothing'', *The Guardian*, April 7 2010.

my doorstep has been superseded by the buzzing of my Blackberry at 3am with tomorrow's headlines and news clips sent directly to my email inbox.

But with all these techno gadgets, we need to accept that the future is not all mobile and wireless. Indeed wireless will probably never replace fibre optic cables when it comes to another growth area for digital media – IPTV.

Drivers for high speed broadband – IPTV and other uses of fibre optic cables

Last month ISP iiNet announced it had teamed with content aggregator FetchTV to be the first in Australia to offer this IPTV service later this year.⁵ Telstra has announced its T-Box download and streaming service. These IPTV products will compete with existing internet enabled devices including Foxtel IQ; TiVo; and Sony's PlayTV accessory to the PlayStation 3 console.⁶ And for some time now a number of ISPs have been offering unmetered downloads of audio visual content, for example the ABC's iView.

I note that senior management at Foxtel consider free-to-air channels on the digital platform as their serious competition, but I wonder if they should be glancing over their shoulder at the new entrants in the IPTV market as the potential challengers to Foxtel's dominance of Pay TV.

While entertainment is obviously a strong driver for high speed internet data transmission, there are a range of other important social, environmental and economic benefits of a fully operational high speed broadband network.

there is overwhelming agreement that Australia needs to develop a high speed broadband network

I will refrain from entering the political debate over the Government's NBN project. Whether we achieve the ultimate objective of high speed broadband by extensive fibre or wireless networks is a policy decision that will be debated and ultimately resolved by our legislators in Canberra. But I think it is fair to say that there is overwhelming agreement that Australia needs to develop a high speed broadband network.

Blogs a credible threat?

Two years ago I suggested that internet blogs would become a credible threat to established and mainstream news outlets and that competition to break the latest news would be fiercer than ever. Many in the mainstream media then and now treat weblogs with derision.

Tonight I'll just share three examples of well resourced blogs that are taking it up to traditional publishing houses.

I have already mentioned *Business Spectator* – a free financial news source which has been giving the websites of major newspapers a run for their money since it launched in late 2007. This is not surprising when you consider that its writers are former heavy hitting reporters from *The Age* and *The Australian*.

Overseas, American political blog *The Huffington Post* was rated in 2008 by both *Time Magazine*⁷ and *The Observer*⁸ as the most powerful blog in the world. Like *Business Spectator* it recruited

professional columnists and it has attracted high-profile guest contributors.

At the other end of the news spectrum, celebrity news website, *TMZ* – which is owned by Warner Bros – has been responsible for breaking news such as the death of Michael Jackson and socialite Paris Hilton's jail-term for driving offences. Interestingly *TMZ* started as a website but now has a television show that recently screened on *Go!* – the free-to-air digital channel owned by Channel Nine. This is an example of convergence whereby a media brand exists across platforms and is not limited to print, audio or visual communication.

Reputable mainstream media organisations, must be nervously wondering what to do as they watch the newcomers, the bloggers, slowly but surely creeping their way up the ladder like pirates with daggers between their teeth. What is even more worrying for these traditional media organisations is that some of their assumptions about users trusting known brands are starting to look a little shaky.

For regulators like the ACCC, it means ensuring regulation relied on during the last century, does not become an irrelevant fallback position that fails to serve the public's best interests

For a growing base of users, blogs are all equally valid sources of news, information, entertainment, and gossip, and users are not necessarily discriminating between traditional and new sources. Where once media companies could reassure themselves that audiences would always default back to traditional houses of journalism, this is becoming less and less the case, although it must be said old media companies do still dominate many of the most visited sites.

So what does that mean for those of us here today?

Quite a lot actually. For the media it means finding new ways of remaining relevant to an increasingly fragmented and disloyal audience. For regulators like the ACCC, it means ensuring regulation relied on during the last century, does not become an irrelevant fallback position that fails to serve the public's best interests.

A media under siege

In 2007, publisher and chairman of the *New York Times* Arthur Ochs Sulzberger Jr said:

I really don't know if we'll be printing The Times in five years, and you know what? I don't care.

His statement was not meant to be a morbid prediction that one of the world's great 'old' media brands would soon be dead. What he was trying to say was that old media companies could no longer rely on revenues of the past and needed to develop ways of drawing money out of new technologies.

New models emerging

Every major newspaper, radio station and television station in this country has to some degree embraced the digital age. Blogs,

5 Jordan Chong, 'iiNet signs online TV deal with Fetch TV', *Australian Associated Press*, April 12 2010.

6 Thomas Hunter, 'T-Box' unveiled as Telstra spruiks superfast broadband' *The Age*, November 19 2010.

7 Tom McNichol, 'Time.com's First Annual Blog Index', *Time Magazine* (online edition) 2008.

8 Staff reporters, 'The world's 50 most powerful blogs', *The Observer*, 9 March 2008.

moderated by journalists, now sit alongside traditional articles and commentary on newspaper websites. Television stations are increasingly making their content available on-line and radio is finding a new lifeline through podcasting and streaming on-demand content.

In Australia this trend of convergence has continued and in the last two years three major news outlets have dramatically changed their online presence.

For example the ABC – a radio and television broadcaster – created its version of a broadsheet newspaper's opinion page of when it launched *The Drum* late last year. For the first time ABC journalists have been writing analysis of a political or economic issue.

The Drum launched after News Limited created a one-stop opinion website for all of its Australian newspapers called *The Punch*. And *The Age* and *Sydney Morning Herald* mixed a new website with nostalgia when it re-branded its online opinion pages as *The National Times* after the weekly Fairfax publication of the seventies and eighties.

In an evolving media landscape there is a substantial role for regulators to play to ensure changes benefit competition and consumers

The ABC is also testing other approaches in the convergence space. The first episode of the new season of *Doctor Who* was available on the ABC's iView service well before the show went to air. Despite 112,000 downloads on the weekend between iView availability and the episode airing on Sunday evening, the show achieved more than a million viewers on the night. Perhaps even more telling as a convergence issue are the other ABC statistics for that week. It was the biggest in the history of the ABC's catch-up viewing service with 224,000 visitors, 540,000 visits and 2.8 million page views.⁹

Social media – the explosion of public journalism

One aspect of the new digital world that I don't think anyone realised the full potential of, was social media websites in particular Facebook and Twitter. The Australian Federal election in 2007 and the American Presidential election in 2008 saw these digital platforms put to enthusiastic use by candidates as a way to directly reach an audience without relying on traditional media. Most Australian politicians have a Facebook page and/or a Twitter feed and increasingly use these to make policy announcements or give updates throughout their daily pursuits.

During question time in the Federal parliament, Canberra press gallery journalists tweet commentary on the performance of the Government and Opposition members and in doing so completely bypass their newsdesks and editorial control.

Along with content, social media sites have created a new market for advertising. Facebook has allowed advertising for some time and a joint study released by Nielsen Company and Facebook last month reported that advertisements placed in a 'social' context where a Facebook user can become a 'fan' of the product or service advertised had more impact than standard webpage advertising. It is worth keeping in mind that Facebook is a co-author of that report.¹⁰ Twitter is soon to enter the advertising

arena with 'promoted' tweets being trialled in the US by big corporate advertisers such as Starbucks and Sony Pictures.¹¹ And advertisers are chasing consumers to whatever new platforms are adopted by users. And media proprietors are, from commercial necessity examining the opportunities for acquisition and merger, recognising the ever changing landscape for sources of revenue, in the form of advertising dollars and content subscription fees.

In this evolving media landscape there is a substantial role for regulators to play to ensure changes benefit competition and consumers.

New roles for regulators

We have now experienced several years under the new regime passed into law last decade bringing about significant reforms to Australia's foreign and cross-media ownership laws. These rules limit owners to controlling no more than two of the three media platforms of television, radio or print in any one market. There is of course also a voices test in the legislation, which prevents the number of independent media operators falling below five voices in metropolitan areas and four in regional and rural markets.

These in themselves are important tests that media companies need to satisfy to gain approval of a merger, and these safeguards will be monitored by ACMA. It is important to remember that these hurdles are additional to existing requirements, including perhaps one of the most important tests, the need to satisfy section 50 of the *Trade Practices Act 1974* (Cth) (the **TPA**), which is the ACCC's focus.

Section 50 of the TPA specifically requires the ACCC to consider the dynamic characteristics of the market. This presents a challenge in an industry characterised by constant changes in technology and consumer taste. It is important to remember that the prohibition contained in section 50 is against any acquisition of shares or assets that "would have the effect, or be likely to have the effect, of substantially lessening competition in a market".

In connection with its assessment of the application of this prohibition to any acquisition of shares, the ACCC must consider whether the acquisition gives rise to circumstances which, after taking account of the analysis of relevant markets, and competition in those markets, would be likely to lead to a substantial lessening of competition.

The TPA does not prescribe the circumstances where the acquisition of specific shareholding interests, for example small minority shareholdings, might give rise to these competition concerns. That becomes a matter for examination by the ACCC having regard to all the relevant circumstances. Without being prescriptive, issues that we would initially examine are whether the shareholding interest concerned either alone or taken together with other 'friendly' or 'supportive' shareholding interests would enable one or more parties to control or substantially influence the operations of the target company.

Under the current media ownership legislation, owners of one form of media in a market, say, a newspaper, are not allowed to control another form of media in the same market, for instance a radio or television station. Acquiring more than 15 percent of another form of media is regarded, by the media ownership legislation, as gaining control. Some interpret this limit of 15 percent as the point where ownership begins to look more like a controlling interest under the TPA, and thus potentially throws up questions of competition. Others would point to other numbers as the point where alarm

9 Staff reporters, 'ABC scores 112,000 video streams for Doctor Who premiere' *mUmbRELLA online*, 19 April 2010.

10 Jack Neff, 'Nielsen: Facebook's Ads Work Pretty Well', *Advertising Age Online*, April 19, 2010.

11 Mikael Ricknäs and Juan Carlos Perez, 'Update: Twitter to start pushing advertising to users' *Computer World Online*, April 13 2010.

bells should start ringing. However the matter is more complicated than a simple line in the sand. An ability to influence control over a company may kick in well below the 15 percent mark, if for example two significant shareholders decide to use their combined voting powers to influence the direction of a company. It is impossible to give a concrete answer on when competition concerns might be triggered, as every case is unique. I note simply for comparison that under the *Corporations Act 2001* (Cth), the threshold at which control becomes an issue in the context of a takeover is generally accepted to be 20 percent.

Our analysis is an exhaustive process of examining and defining the market, talking to involved parties, their competitors and their customers and making a sober, informed decision on the level of competition based on the facts, rather than emotive responses or comment in the press.

Companies are not required to notify the ACCC of mergers before they proceed. However, we encourage them to do so, as the ACCC will conduct its enquiries regardless of whether the parties involved have approached us in the first instance or not. Where a merger is likely to raise concerns, the ACCC does not hesitate in seeking injunctions to block deals proceeding, or where they have already occurred, seeking forced divestitures or unwinding of arrangements.

Media merger guidance

Before we can make any assessment of whether a merger is likely to raise competition concerns, the ACCC first needs to define the markets that the two parties involved operate in, and how much overlap there is and whether they provide competitive tension for each other. In mid-2006 the ACCC released a paper providing broad guidance on the Commission's approach to assessing future media mergers. This paper is available on the ACCC's website.

In the past, the ACCC has regarded the media as four distinct products – free-to-air television, pay television, radio and print. Those products have been thought of as having little overlap in content or advertising. With the technological changes I have just mentioned under way, it is clear we can no longer rely on these neat pigeon holes that have been reasonably reliable in the past. No longer can traditional media boundaries be used to define separate markets when there is an increasing blending of the lines between mediums. And as we witness even further levels of convergence in the market, it is likely that how a market is defined will need to evolve over time.

As those traditional media boundaries blur, focus may shift from the way information is delivered to the actual products media companies offer. If, television stations, newspapers and radio stations begin offering content in a similar format - let's take video updates of selected news stories as an example - do they suddenly cease to be different? And does that mean that where in the past they may have been considered to be separate markets, does this now make them direct competitors? For a consumer, it may make little difference if they are downloading their morning update from the *NineMSN*, *Sydney Morning Herald* or *3AW* websites.

In this regard, we now consider there are three main categories the ACCC will investigate as part of its assessment of any proposed merger: the supply of advertising opportunities to advertisers; the supply of content to consumers; and the acquisition of content from content providers. Other more specific products – such as premium content; classified and display advertising; and the delivery of news, information and opinion – may also be critical when considering particular mergers.

So if we take supply of content as an example, if the price of one source of content rises, or its quality falls post merger, the

question is the same one that arises in all mergers – what are the real alternatives for consumers?

Where new services develop or look likely to do so in the foreseeable future, we will take them into account in assessing media mergers and acquisitions under the provisions of the TPA. And at all times, the ACCC will be looking closely at any content, advertising or news and information markets where concentration appears to be occurring. Not only in Australia as a whole, but also in regional markets, as the TPA requires.

As traditional media boundaries blur, focus may shift from the way information is delivered to the actual products media companies offer

Regional markets

There have been specific concerns raised about the level of media diversity in regional markets that do not enjoy the same level of choice as the larger metropolitan areas. It is a perfectly valid concern from those living in regional areas that they not be left with reduced choice as the result of mergers or acquisitions proceeding. This has been an issue of particular concern to operators of radio stations in regional areas, who have expressed concern that diversity safeguards introduced with the new media rules may impose onerous obligations that threaten the viability of some of their operations.

There are specific protections built into section 50 of the TPA that require the ACCC to consider the impact of proposed mergers on markets in regional Australia. Consequently, the ACCC will take into account the differing circumstances in rural and regional Australia compared with urban areas. The ACCC understands the importance of local content in these areas and that consumers rely heavily on local suppliers of news and information, as compared to consumers in urban areas who have greater access to a variety of media choice. We also understand that much of the additional choice being opened up by the internet and other more global forms of communication is not always a suitable substitute for local information. *CNN* or the *BBCWorld Service* might be very handy for finding out what's happening in the Middle East, but you're likely to be disappointed if what you really want to know is what time the local dog show starts.

Competition in those local markets may be more vulnerable following a merger than competition in the larger cities. As such, the ACCC will continue to consider implications at the local and regional level when assessing mergers proposed for those areas, as we did in the Macquarie Bank case.

Media diversity

One of the major issues has been the issue of diversity, and it's about that that I want to make a few comments.

It's been suggested that the issue of diversity is purely a social issue, and not an economic one, and thus not able to be dealt with under section 50 of the TPA. Let me say quite clearly that diversity is not, in the view of the ACCC, solely either a social or an economic issue; it's both. We cannot guarantee diversity into the future, but lest this is interpreted as saying that the ACCC cannot deal with reductions of diversity flowing from media mergers, I want to make it quite clear what our position is.

Diversity needs to be seen from three perspectives: content producers such as editors and journalists in the context of news and information, advertisers, and consumers. A lot of the current

debate about diversity is flowing from content producers - editors and journalists - who have their own views as to the desirability of the diversity of opinion from their viewpoint as producers of that content. But diversity is about providing a choice of content, views and style. Competition motivates and forces suppliers of content to serve the diverse needs and demands of advertisers and consumers. As to content, in terms of entertainment, news, information and opinion, and as to the means of distributing that content to consumers so that they can receive it in the manner that they want to receive it.

Inevitably there is a desire by media outlets to distinguish themselves from their competitors. Competition will force content producers to produce diverse content. Above all, competition is directed towards and ensuring that, as far as possible - and this is important - it's the demands and preferences of consumers that are the drivers, not the views of legislators, media proprietors or content producers.

There is a connection between local content and advertising that is important in discussions about diversity

How would these principles apply to a media merger? Simply put, one way a media merger would generate competition concerns would be if the merged company could substantially reduce the quality of the content it supplies to consumers. Taking newspapers as an example, a publisher who is less constrained by competition could downgrade the general presentation and layout of its newspaper. The proportion of advertising to content could be increased. The use of colour might be decreased, and so on. But the publisher could also reduce the quality of its newspaper by reducing the diversity and coverage of content provided to readers. Clearly, the potential for the newspaper to do this is increased if consumers do not have alternative sources of equivalent content, for example, news content.

But newspapers also earn revenue from advertisers and there is an important connection between local content and advertising that is important in discussions about diversity. For free-to-air television networks and radio, advertising is their only source of revenue. And any advertiser would be concerned about their advertising reaching fewer prospective customers because the media proprietor has reduced the quality and diversity of its content. In the short term, cutting content may reduce the costs to the owners of the newspaper, but in the longer term, it is likely to impact on the number of readers bothering to pick it up.

In the case of suburban newspapers, there is a strong incentive for owners to continue to provide relevant local content, as this is what appeals most to readers of these publications, potentially increasing the number of readers and therefore making them attractive to advertisers. This is why measuring the potential effect on advertisers is a critical aspect of assessing how diversity might be affected in the context of potentially reduced competition.

Lessening the total number of media owners in an area may have the effect of reducing diversity of content, but it is important to remember that owners are constrained to a point by the reader/advertiser relationship. It is also worth noting that retaining separate owners in a market does not guarantee quality or diversity. Owners are always free to unilaterally change their format, increase the ratio of advertising to content or narrow the range of content they provide in an attempt to cut costs.

Mergers do not therefore automatically mean diversity is likely to be reduced if it is commercially sensible for the new owner to maintain

it. Likewise, separate ownership does not necessarily always ensure diversity for customers. In a merger context, a reduction in competition can lead to a reduction in diversity. Where this arises, the ACCC will take this into account as part of its competition assessment under section 50 of the TPA.

I might note that at the time of the 2007 legislative changes relating to cross media ownership, I suggested that some of the breathless predictions then being made of a merger frenzy involving the media barons were unlikely to emerge in reality.

In fact the number of applications for media mergers under the new laws has not been especially high. The Commission has overseen the acquisition of Rural Press by Fairfax and the acquisition of Southern Cross Broadcasting by both Fairfax and the Macquarie Media group, but not the subsequent exits by each organisation from Southern Cross.

Ensuring access to news content in the digital media environment

As some of you will no doubt be aware, the ACCC played a role as mediator rather than regulator in mediating solution between media outlets and key sporting organisations over access to sporting news in the digital media environment. This resulted in a new Code of Practice for Sports News Reporting that was announced by the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, in March this year.

The emergence of digital media created new opportunities for content such as sporting scores to be transmitted over new technologies. As such, digital content became a new and potentially lucrative commodity in the market place.

On the one hand you had sporting organisations such as Cricket Australia and the AFL recognise the value of sporting information and images and maximising this value by restricting access to a handful of media outlets who, in turn, traded on this exclusivity. On the other hand, you had other media outlets excluded from this information and images and they were forced to purchase the content – if they could afford it – off their competitors to use in their own publications and broadcasts.

What sort of newspaper, website or mobile phone application would be without sports coverage? Some smaller regional newspapers had no choice. APN News and Media – a publisher in northern NSW and Queensland, did not run a contemporary AFL picture for two years. And independents, such as Shepparton News, had to restrict images, too. Publishers faced other issues, such as restrictions on the number of updates of match reports and how many photographs could be published or sold on.

In early 2009 a Senate Standing Committee on Environment, Communications and the Arts recommended that media outlets and key sporting organisations negotiate among themselves access to sporting events for bona fide journalists and photographers, regardless of the technological platform they use to distribute information and images.

A further recommendation of the Committee was that failing a successful resolution between parties, a mandatory code of practice under the TPA be developed.

The Minister, Senator Stephen Conroy, asked the ACCC to find a way forward and following a number of roundtable meetings mediated by the ACCC, a voluntary code of conduct was achieved. There now exists a voluntary code supported by an administration committee on which sit the major players from sport – including the AFL, the NRL, Cricket Australia, Tennis Australia and Australian Rugby Union – and the major players from the media – Fairfax, News Limited, APP, Getty Images and Agence-France Press.

The code requires these organisations to allow all bona fide news organisations, to be accredited to report sporting news subject to the principles of fair dealing and where syndication occurs, the recipients of the content should be bound by the same principles of fair dealing.

Protecting the public interest

This brings me to the question of how we go about ensuring the public is the winner as a result of all this upheaval. Convergence is potentially opening up a vast array of new channels for distribution of audio visual and print entertainment, news, information and opinion. With new delivery channels comes the possibility of new forms of content emerging as well, thereby potentially increasing choice for consumers.

The ACCC's challenge during this evolution of the media market will be to promote competition and not allow incumbents to impede the development of competitive choices for consumers.

Thus, the ACCC is focussing on ensuring minimal roadblocks to efficient investment in new infrastructure that will open up channels of distribution. Where it is economically inefficient to duplicate infrastructure our job will be to ensure access is provided on reasonable terms to competitors and the owners of the infrastructure, thereby providing competitive choices to consumers. In other words, we'll be trying to keep the pipes clear of blockages.

it is essential that content and content production is not concentrated in a manner that can inhibit competitive choices for consumers

The ACCC is also focussing on control of content and content producers. With an increasing diversity in distribution channels, it is essential that content and content production is not concentrated in a manner that can inhibit competitive choices for consumers. As regulators we need to ensure that content does not become locked in the hands of the few, to the detriment of consumers or advertisers. Where content isn't locked – and in fact there is an increasing range of distribution methods such as IPTV – it is important that the content available provides greater choice for consumers rather than more of the same over a different platform.

On first blush it would appear convergence is already working in the consumer's interest by providing a range of new content. New forms of distribution, be it over the net, portable devices, time-shifting, IPTV or other formats promise more flexibility and new services. Extra competition is also good news, as it means potentially better prices, more innovation and wider choices for advertisers and consumers. Despite the apparent increase in diversity that the digital age promises, there are still very real risks that we may end up the poorer if we do not keep our eye on just where control lies for the material we want to receive. As I've mentioned before, with the actual distribution models constantly changing, second-guessing and trying to control the dominant platforms isn't likely to be a successful strategy.

What remains important is access to eyeballs, and the content those eyeballs are seeking is becoming increasingly important to our considerations when assessing media mergers and other arrangements.

Conclusion

Rupert Murdoch thinks the last newspaper will be printed in 2040 – and maybe he'll be right. After all, the world scoffed in 1975 when Bill Gates predicted the world would one day have a computer

in every home. But even predicting the death of newspapers is becoming old-hat and it seems the death of broadcast TV is now firmly on the pessimists' agenda. How long will it be before we are talking about the imminent demise of the internet?

Coping with change will require flexibility from both the media and regulators and that change will only continue to accelerate. But the legacy of that change is that technology and the growing swell of community input is placing the future of the industry in the hands of the public.

I for one can't wait see what they do with it.