Regulating over-the-top services in Australia – from universal service obligation scheme to OTT regulation

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Abstract: Despite the fact that there is no widely accepted definition, over-the-top (OTT) content normally describes broadband delivery of video and audio services without a multiple system operator being involved in the control or distribution of the content. OTT starts from online streaming TV programmes or videos. To date, it has extended into other services such as instant messaging services by using smartphone apps. OTT providers are not the content owners but the network operators. At the same time, they are independent and separated from the network carriers. In the past few years, the OTT services have entered into the content field with a rather quick pace and competing with the traditional players in many ways. With the entry of OTT providers in this field, the current USO scheme can become problematic.. In this context, this paper examines the current USO scheme in Australia against an overall examination of OTT related regulations in the country. It finds that there is a lack of regulation on OTT service provision in Australia. This paper attempts to argue that although there might not be a specific reason to include the OTT players in the current USO scheme, there should be a general policy consideration on the OTT service provision to avoid possible confusion in the coming years, especially in implementing the Convergence Review recommendations.

Keywords: over-the-top; OTT; USO scheme; content provider; telecommunications.

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1 Introduction

With the development of the internet and communication technology in the last few decades, users are now and increasingly at the centre of content service delivery. They are able to create their own content and share it with their own audiences on YouTube,

Facebook or Tweeter and so on. Users also have the control of what content they want to access, when they want to access it and how they want to access it. For example, podcasts of popular radio programmes and catch-up television services provided by free-to-air networks have become popular for users to decide their own way of access. As a result of this, the so called over-the-top (OTT) services is becoming an emerging trend in the recent years.

2 The OTT services

2.1 OTT vs. traditional media

It becomes very clear that people throughout the world are spending more and more time on the internet nowadays. Looking at the recent statistics, from 2003 to 2008 the average household in the USA allocated an average of eight minutes a day to using the internet for leisure. By 2011 that had increased by 50%, to over twelve minutes a day. By 2013, Americans spend 23 hours per week online and texting.[1] In Australia, similar trend was found that the Australians use up nearly a day on the internet every week by 2013.[2] Many commentators forecasted that the increase in time on the internet would come at the expense of television viewing, the activity to which households devote more than half of their leisure time.[3] In the age where pay-TV had always been the realm of service providers who manage end-to-end delivery of cable, satellite or IPTV content over their dedicated networks, a new pack of companies are disrupting the status quo. They are riding 'OTT' of service providers by streaming video content over the internet, sidestepping operator participation and control. Companies like Netflix and Hulu are leaders in this trend.

Netflix began as a DVD-by-mail company back in 1997 and started to offer streaming content over the internet ten years after.[4] It consequently established partnerships with Starz Entertainment in 2008 and with CBS, NBC and Disney shortly thereafter. Netflix has now achieved over 44 million members in more than 40 countries.[5] Hulu is another typical OTT provider with a business model of free ad-supported delivery of contents. It was first launched in 2008 with a strong focus on streaming television contents. With the success of its operation, consequently in 2010, Hulu Plus was launched as a subscription-based service charging a monthly fee of USD$7.99 (as of this writing).[6]

With Hulu and Netflix firmly in place as early OTT content providers by 2009, other OTT providers are emerging in the market throughout the world, including some major global companies such as Amazon, Apple, Google, BBC and Yahoo. The non-English speaking regions also embraced their own OTT providers including Softbank and Matacafé in Japan, Youku Tudou in China and CJ HelloVision in South Korea.

To the extent that households weigh the content offerings of OTT when choosing a content provider, OTT could become an even stronger contributor to cord cutting behaviour if OTT content increases.[7]

2.2 OTT vs. mobile services

Apart from providing media services (TV or video), the OTT providers are invading other service fields, especially, the mobile communications market.

With the enhanced penetration of mobile network coverage and sharply increased smartphone penetration in many countries, the world has witnessed an increasing interest in mobile VoIP apps such as Skype, Viber, mig33, and Google Talk and alike. In the regions where there is a pervasive high speed mobile coverage and deep smartphone penetration, the mobile VoIP has become a major trend for mobile voice communication. For example, in Australia, VoIP accounted for more than 40% of fixed calls in 2013. Nonetheless, the increasing of mobile VoIP does not necessarily lead to the decrease of traditional mobile voice service. Australia tops OECD mobile broadband penetration in 2013 with a 114% penetration rate, however, there has been little decline of mobile voice in the past years in Australia.[8]

In comparison, the impact of mobile messaging has drawn a lot of attention; especially after Dutch telecom KPN announced in 2011 the extent to which WhatsApp has eroded its SMS traffic.[9] A similar effect is now evidenced in rapidly declining SMS usage on smart phones, a reduction that has hit 25% by 2013.[10] WhatsApp, the leading messaging app has recently passed 350 million monthly active users and is likely to continue its remarkable growth having been launched for Nokia's Asha platform in developing markets.[11] Similar trend is happening in many Asian countries too. In South Korea, nearly all smartphone users are KakaoTalk users with the service having been launched three years ago. The KakaoTalk platform provides instant messaging, photo sharing, mobile games and shopping. KakaoTalk hits 110 M users by 2013.[12] A fast-growing smartphone messaging application from China named WeChat has recorded more than 300 m users by 2013[13] and is now expanding into the US market by inviting people who hold Google accounts to connect their accounts with WeChat to win a $25 Restaurant.com gift card.[14] Similarly in Japan, the messaging app, LINE, has reached 300 million users in 2013.[15]

2.3 *OTT and the USO*

The emergence of the OTT service has undoubtedly become a global picture. Although the pace of this emergence has been different in different parts of the world, the trend is indeed happening. As a result of this trend, the OTT providers have already entered into the traditional field of communication and competing with the traditional players in many ways.

Network carriers are typical common carriers. They have an obligation to provide services throughout the geographical area. In order to keep a flat rate, deficits from high cost areas are normally subsidised by profits from low cost areas. In many nations, the universal service fund has been set up to perform such a function. In Australian, this is a statutory obligation for all the licensed network carriers and carriage service providers.[16]

It is still a worldwide situation that the OTT providers do not participate at universal service obligation (USO) schemes. This policy has effectively enabled the OTT players to utilise the internet without been included in any infrastructure development, nor the universal service scheme. There has been an ongoing debate as to whether the OTT is helping or hindering the network investment and development by free riding OTT of the network infrastructure. Some have argued that OTT applications are undermining the capacity of network operators to invest and are indeed unfair free-riding; while others believed that growth of internet-based OTT applications is a key driver of investment in higher capacity access networks, and far from free-riding creates the demand conditions

that will support investment in next generation networks and thereby contribute to achievement of broadband policy goals.[17]

In this context, this paper provides a brief explanation to the current USO scheme and examines the big picture of the OTT related regulations in Australia. This paper also attempts to discuss whether there it is necessary and feasible to include the OTT providers into the current USO scheme.

3 The USO scheme in Australia

Given the fact that Australia is a relatively large country (geographically) with a relatively small population, the USO has played some important roles in the past to make sure people living in the rural areas or doing businesses in the remote areas have equal access to the basic communication services.

Telstra, as the incumbent telecommunications company in the country, was the sole universal service provider for many years in the past. The losses from supplying loss-making services in the course of fulfilling the USO are shared among all other carriers.[18] However, this situation has been changed in 2012 by two Acts: the Telecommunications Universal Service Management Agency Act 2012 (the TUSMA Act)[19]; and the Telecommunications (Industry Levy) Act 2012.[20] Both acts provide that the USO and National Relay Service (NRS) levies be replaced with the new 'telecommunications industry levy' (TIL) scheme.[21]

Another important feature of the new scheme was the establishment of the new statutory agent, the Telecommunications Universal Service Management Agency (TUSMA), which commenced operations on 1 July 2012.[22] The TIL scheme funds the residual costs (after government funding) of activities undertaken by TUSMA to ensure continuity of key telecommunications safeguards in the transition to the National Broadband Network (NBN).[23]

The TIL will be assessed similarly to the previous USO arrangements. Under the new levy scheme participating persons are typically telecommunications carriers with eligible revenue in excess of $25 million or certain persons who do not submit an eligible statutory declaration. These participating persons are required to lodge eligible revenue returns with the communications regulator, the Australian Communications and Media Authority (ACMA). The ACMA will make a written assessment of each participating person's eligible revenue for each return period. Contributions to the TIL are proportional to each participating person's eligible revenue for the previous financial year.[24]

Under the current arrangements, decision of the TIL participating persons is based on whether a carrier, as defined under section 7 of the Telecommunications Act 1997,[25] is a participating person as defined in accordance with section 92 of the Telecommunications Universal Service Management Agency Act 2012;[26] or a non-participating person as defined in the Telecommunications (participating persons) Determination 2013 (No. 2)[27] in accordance with paragraph 92(2) of the Telecommunications Universal Service Management Agency Act 2012.[28] There has been no mentioning in the current scheme that whether the OTT players should be considered to participate at the TIL. Similar to the previous arrangements, the only persons subject to the traditional USO (the TIL) are the major network carriers and carriage service providers.

4 From the USO scheme to the OTT regulation

Deployment cycles for CSPs are significantly longer than the development of the OTT providers. The regulation of the OTT is therefore important to maintain a healthy industry growth in the way to make sure there is a level playing field and no free ride.

The Australian market is big, especially when linking this market with a small population. The Australians population was about 23 million in 2013.[29] In the same year, there were approximately 26 million mobile broadband subscriptions in the country. That makes a 114% penetration rate, with which, Australia beats out Finland, Sweden, Japan, Korea, Denmark, and the USA for the top spot for the mobile broadband penetration.[30] In addition, the International Communications Market Report provided by the Britain's communications regulator, Ofcom, (by comparing communications characteristics of 16 nations to the UK) revealed that Australia has highest tablet take-up in the world in 2013 with a take up of 24%. Australians, along with Spaniards, had the most tablets per capita.[31]

Unfortunately that in such a market, there has been no specific regulation on OTT service provider to date. The provision of content was relying largely upon the traditional media and communications regulations and classifications.

The Australian government also realised this situation. In 2012, the government commissioned an independent review to examine the policy and regulatory frameworks that apply to the converged media and communications landscape in Australia. That is the so called Convergence Review 2012. The Convergence Review examined the existing communications regulatory framework (was introduced in the 1990s) and brought some fundamental changes to the Australian media environment. In brief, the review recommends a new principles-based policy framework that provides the media and communications sector with reduced compliance costs, increased certainty and flexibility.[32] Also in the report, three key questions were identified: why regulate; who should be regulated; and what should be regulated.

In regarding to why regulate, the Review expressed a strong view on deregulation; it however also identified areas where continued government intervention is clearly justified in the public interest.[33] The identified areas for intervention will be discussed in the following section regarding what should be regulated.

In regarding to who should be regulated, the Review proposes a policy framework that will regulate the significant media enterprises based on their size and scope, rather than how they deliver their content. The threshold for users and revenue of significant media enterprises were set at a high level to exclude small and emerging content providers. As a guide, the Review indicates that currently around 15 media operators would be classified as content service enterprises. They are all large broadcasters and the newspaper publishers. In particular, the Review recommends that these significant media enterprises be defined as 'content service enterprises' and be subject to regulation. Organisations would be defined as content service enterprises if they have control over the professional content they deliver; have a large number of Australian users of that content; and have a high level of revenue derived from supplying that professional content to Australians.[34] This definition technically excludes most of the OTT players from the proposed regulation as the OTT players do not normally have the control over the content they deliver; it also makes a clear statement on its position of not to regulate content on the way of delivery, despite the fact that the OTT players may successfully achieve the other two requirements (as they may have a large number of Australian users

and they may achieve a high level of revenue from online streaming contents to Australians). On this particular point, this paper believes that the Convergence Review is still largely limited by the traditional business model in media industry.

In regarding to what should be regulated, the Review has identified three areas where continued government intervention is clearly justified in the public interest.[35] First, the media ownership. This is to avoid the concentration of services in the hands of a small number of operators, which can hinder the free flow of news, commentary and debate in a democratic society. Media ownership and control rules are vital to ensure that a diversity of news and commentary is maintained. Second, media content standards across all platforms. The report believes that media and communications services available to Australians should reflect community standards and the expectations of the Australian public. As an example, children should be protected from inappropriate content. Third, the production and distribution of Australian and local content. The report believes that there are considerable social and cultural benefits from the availability of content that reflects Australian identity, character and diversity. If left to the market alone, some culturally significant forms of Australian content, such as drama, documentary and children's programmes, would be under-produced.

Looking into these identified areas, all of them can be problematic in the OTT age, especially the third area of 'maintaining production and distribution of Australian and local content'. Starting with the media ownership, unlike the traditional media company, most of the OTT players do not normally own or control of the content.[36] They can, and in fact, normally create business partners with the content owners to distribute their content through its own online operation. In doing so, they could partnership with multiple content owners. On the other hand, the traditional content owners (the media companies) would have a natural advantages to go OTT due to the fact that they do have the full control of the contents. Classification can also be problematic. For example, a US-based OTT provider can online stream a video produced and classified under the US content regulation to Australians once the company establishes its business in Australia. A question arises here as to whether they need to seek a second classification of the video they plan to stream from the Australian authority. There has been a lack of regulation on these questions. The third area of regulation identified by the Convergence Review is to maintain a certain level of local content to reflect the Australian culture and identity. This has already become a difficult task in a globalised world (especially in the English speaking regions like Australia) and can only become more complicated in the future. People are spending more and more time online and it would not be feasible to regulate the free flow of content provided by many OTT players, such as Amazon or YouTube.

In addition, this report also recommends to establish a new communications regulator, who should be empowered to instigate and conduct market investigations where potential content-related competition issues are identified. The new communications regulator should also have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the Australian Competition and Consumer Commission to deal with anti-competitive market behaviour.[37] Moreover, this report recommends a new content services legislation should replace the Broadcasting Services Act 1992 and existing classification legislation.[38]

It is fair to say that the Convergence Review has created a positive move in content regulation by successfully loosening the current regulations and focusing on the

identified areas of regulation. Unfortunately t the review does not address the emerging issue of OTT service provision.

5 Conclusions

Today, it is clear that the internet is not only a technology which may have a specific effect on how business is conducted in certain sectors, but it is also a market place *per se*, as the enormous success of OTT providers demonstrates.[39]

Linking the OTTs to the TIL in Australia, clearly that there is little room spared for OTT in the current scheme. Perhaps the fact was that the OTT service provision is still at its infancy stage regardless it's the fast growth in the past few years; also perhaps that the OTT providers should not even be considered as the TIL participating persons due to the fact that the OTTs do not own the infrastructure and do not own the contents. Nonetheless, as Prof. Hitchens pointed out that a reconsideration of the concept of universal service may be helpful in the broadband age. The concept is familiar within the telecommunications sector but it has not been as clearly articulated within the media context, although it has had an implicit role in regulatory arrangements to ensure that broadcasting services were available and accessible. USO may be necessary in the converged environment: "Historically, communications platforms, such as fixed phone lines or TV, were either available everywhere at a uniform price or not available at all. Increasingly, platforms do not display these characteristics and companies only wish to roll out platforms where it is profitable to do so."[40] In addition, Prof. Hitchens also points out that the USO may be helpful in responding to growing expectations that users will pay to access content. Increasingly, access to distribution services and content requires payment with the risk that a significant section of the public may be locked out of access to information and opinion. Thus there may be a role for universal service in ensuring that there is affordable access to mainstream distribution platforms and to the content that enables the public to continue to be engaged in and connected to the community. USO may be imposed as an end in themselves or the elaboration of universal service principles may help in the selection and design of the regulatory space.[41] Further on this point, this paper believes that the newly introduced TIL scheme in Australia is just a updated old version of the traditional USO scheme with a new operator (TUSMA). The scope of the new scheme remains similar, the objectives remains the same, the emerging market landscape is not reflected anywhere in the new scheme. In fact, the new scheme looks more like a temporary mechanism in transiting to the full roll-out of the NBN rather than a long-lasting policy initiative. This paper therefore firmly supports the suggestion to reconsider the USO scheme with more care and a forward looking perspective.

On the same token, it has been a controversial topic as to whether the OTTs should be regulated more strictly by the State authorities to maintain the healthy growth of the communications industry by protecting the network carriers and their profitability from infrastructure investment. European Commissioner for the Digital Agenda, Neelie Kroes, made her position clear in May 2011: "I am ready to prohibit the blocking of lawful services or applications. It's not Ok for Skype and other such services to be throttled."[42] Whilst Europe has a policy framework which supports competition based on network access, this has not prevented anti-competitive discrimination and does not address the hold-up problem. There are other academics attempts to view this issue from 'net neutrality' perspective by arguing that any restriction placed onto the OTT service

provision from the network carrier is a violation of the net neutrality principle.[43] More recently, A/Prof. Jayakar pointed out that net neutrality ruling delivered by the Federal Court of Justice (FCC) in Jan 2014 opens a door for asking OTTs to pay for access to consumers.[44] Yes, this could be an ongoing debate as to whether the OTTs are helping the development and investment in the infrastructure or they are cutting the profitability of the traditional network carriers. The revenue generated by OTT service provision has already been massive and will keep increasing in the coming years. The impact on the traditional communications access providers and content providers is significant. For example, Global SMS revenues predicted to fall from $120 billion in 2013 to $97 billion in 2018.[45] In addition, OTTs impose costs on access providers in the form of bandwidth. Large shares of peak time downstream traffic on fixed broadband networks were attributable to Netflix (32.2%) and Youtube (17.1%).[46] Because of all these, many traditional players viewed the OTTs as a true enemy and so promoting ways to slowdown or hinder the growth of the OTTs.[47] Nonetheless, this paper believe OTT applications, by increasing demand for more ubiquitous, higher capacity higher speed networks, support achievement of digital economy goals. Experience of discrimination to date suggests policy action to support the freedom of OTT to innovate and compete is required and would benefit all in the value chain, including the telecommunications industry.

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The enforcement of foreign arbitral award merged with foreign judgement under the United Arab Emirate Civil Procedure Law

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Abstract: The argument of this paper is based on the fact that since the methods of enforcement of foreign arbitral awards are different from their counterparts which are provided for foreign judgements. The question arises as to whether foreign arbitral award merged into judgement will be enforced by methods of enforcement pertaining to foreign awards or those pertaining to foreign judgments in UAE.

Keywords: arbitral award; merger; foreign judgement; legal theory; law; justice; UAE.

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1 Introduction

This paper focuses on the enforcement of foreign award merged with foreign judgement. It is generally recognised that the enforcement of foreign arbitral awards is more easy, straightforward, uncomplicated and inexpensive process than the enforcement of foreign judgements.[1] This is because:

> The network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better