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## **MEDIA REGULATORY FRAMEWORKS IN THE AGE OF BROADBAND: SECURING DIVERSITY**

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Professor Hitchens, writing from Australia, sees a dramatically different regulatory framework in a post-convergence “Broadband Age.” Future media policy and regulation, she says, will have to address the entire “media ecosystem,” viewed as a “regulatory space” in which self-regulation and the market are all part of the basket of regulatory tools. Its goal should be to maintain and strengthen the public sphere. Traditional rules limiting media ownership or setting content requirements are unlikely to be viable, and will be replaced by increased reliance on sectoral *ex ante* competition regulation, perhaps complemented by a code of behavior promoting self-regulation regarding content. Hitchens concludes that traditional media regulations rooted in spectrum scarcity are not sustainable in the long term.

### **INTRODUCTION**

It is a relatively common occurrence to assert that the media space is undergoing change, and that technology is a driver for change and disruption in the way media is delivered and used. However, it seems generally accepted that now something quite fundamental is occurring. Although the concept of *convergence* has had currency for a while, and many “false dawns,”<sup>1</sup> it is apparent that now, with the prospect of superfast ubiquitous broadband, full reign can be given to convergence and its use of common digital technologies. Traditional understanding and models of media are being transformed, and this is not just a localized phenomenon.<sup>2</sup> The transformations are not only about the change in the way traditional media operates and is delivered; there are changes also in the public’s engagement with media and the transformation of audience into content creator. These changes are imposing tensions on established regulatory assumptions and frameworks. Australia is witnessing these changes also<sup>3</sup> and at the end of December 2010, the Federal Government of Australia announced a review of media and communications regulation, establishing the

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<sup>1</sup> Ofcom, *What is Convergence? A Submission to the Convergence Think Tank by Ofcom*, Feb. 7, 2008, ¶ 1.7.

<sup>2</sup> Department of Broadband, Communications and the Digital Economy (Australia) [hereinafter BCDE], *Convergence Review*, Background Paper, 2010, accessed Apr. 28, 2011, [http://www.dbcde.gov.au/digital\\_economy/convergence\\_review/convergence\\_review\\_background](http://www.dbcde.gov.au/digital_economy/convergence_review/convergence_review_background), ii-iii.

<sup>3</sup> As at June 2010, 77% of the population aged 14 and over had access to the Internet at home, whilst 66% of those 14 and over had a home broadband service. Australian Communications and Media Authority [hereinafter ACMA], *Australia in the Digital Economy: The Shift to the Online Environment*, 2009–10 Communications Report Series, Report No. 1, Nov. 11, 2010.

Convergence Review.<sup>4</sup> The Review Committee commenced its work in mid-2011, and is expected to report in March 2012. Although the Australian media environment is changing, the lack of access both in terms of availability and affordability of superfast broadband has constrained this growth.<sup>5</sup> However, this too is changing. In April 2009, the Australian Government announced that it would build a national broadband network (NBN) to provide a fiber-to-the-premises network to 90% of Australian homes, schools and work premises, within urban and regional areas, delivering speeds of up to 100 megabits per second.<sup>6</sup> The remaining 10% represents the remote rural areas where broadband will be delivered by satellite and wireless services, with speeds of up to 12 megabits or better per second. This significant public infrastructure undertaking was decided upon because the Government was not confident that existing telecommunications networks could meet the growing demand for superfast broadband or deliver broadband across the nation – a challenge given Australia’s particular geographic and demographic characteristics.<sup>7</sup>

The NBN is controversial but if the rollout is completed then it will substantially change the Australian communications landscape.<sup>8</sup> Despite a high level of connectedness in Australia, services such as Internet protocol television (IPTV) have only recently begun to be available, although catch-up services delivered via the open Internet are becoming well-established.<sup>9</sup> Already the regulatory pressures are being felt as it is unclear whether IPTV services, for example, would be classified as a “broadcasting service” and therefore be subject to the licensing regime under the Broadcasting Services Act 1992.<sup>10</sup> The Convergence Review is intended to be comprehensive, although it has to be said that Australia does not have a good record on media policymaking.<sup>11</sup> Nevertheless, the Convergence Review provides an opportunity to consider how the media broadband environment

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<sup>4</sup> BCDE, *Convergence Review*.

<sup>5</sup> According to OECD statistics, Australia remains one of the most expensive countries for broadband connection: Senator Stephen Conroy, “Australians Still Pay Too Much for Broadband,” media release, Apr. 14, 2011, accessed Apr. 16, 2011, [http://www.minister.dbcde.gov.au/media/media\\_releases/2011/157](http://www.minister.dbcde.gov.au/media/media_releases/2011/157). Senator Conroy relied upon three indicators regarding average broadband subscription prices: very low-speed connections (less than 2.5 Mbps); high-speed connections (15-30 Mbps); and very-high-speed connections (more than 45 Mbps). Australia was one of the lowest-priced for 2.5-15 Mbps and was not included in the statistics for 30-45 Mbps. The statistical information can be accessed at Organization for Economic Cooperation and Development, Directorate for Science, Technology and Industry, *OECD Broadband Portal*, accessed Sept. 8, 2011, [http://www.oecd.org/document/54/0,3746,en\\_2649\\_34225\\_38690102\\_1\\_1\\_1\\_1,00.html#prices](http://www.oecd.org/document/54/0,3746,en_2649_34225_38690102_1_1_1_1,00.html#prices).

<sup>6</sup> For a discussion as to whether the commitment to fiber networks is a sound policy decision, see Catherine A. Middleton and Jock Given, “The Next Broadband Challenge: Wireless,” *Journal of Information Policy* 1 (2011): 36-56.

<sup>7</sup> Lesley Hitchens, “Broadband in Australia: First Steps in Policy and Regulation,” *The Journal of Media Law* 2, no. 2 (2010): 215-216.

<sup>8</sup> It is expected that complete rollout will take eight years, but already some sites are operating or being tested. *Ibid.*, 216.

<sup>9</sup> Australian Communications and Media Authority [hereinafter ACMA], *IPTV and Internet Delivery Models: Video Content Services over IP in Australia*, June 2010, accessed July 7, 2011, [http://www.acma.gov.au/webwr/\\_assets/main/lib311865/iptv\\_and\\_internet\\_video\\_delivery\\_models.pdf](http://www.acma.gov.au/webwr/_assets/main/lib311865/iptv_and_internet_video_delivery_models.pdf), 11-12.

<sup>10</sup> See, for example, Luke Waterson and Nicholas Dowsley, “Cold, Dead Hand? Broadcasting Regulation and the Emergence of the National Broadband Network,” *Communications Law Bulletin* 28, no. 1 (2009); David Brennan, “Is IPTV an Internet Service under the Australian Broadcasting and Copyright Law?” *Telecommunications Journal of Australia* 60, no. 2 (2010).

<sup>11</sup> See for example the critique by the Productivity Commission of the quid pro quo approach to broadcasting policy in Australia arguing that it lacked transparency and consistency: Productivity Commission (Australia), *Broadcasting: Report No 11*, Mar. 3, 2000, 55-56.

might be designed to ensure that this media space continues to offer the public the means to access information and ideas.

The purpose of this article is to try to sketch the regulatory landscape that might emerge.<sup>12</sup> The article does this by examining five regulatory tools used in the traditional media environment and the policy goals they were designed to address. It asks whether those tools are still applicable or is there a need to contemplate amended versions or new tools. The environment with which this article is concerned is established, changing, and emerging, and it is difficult to be definitive, especially as these issues are explored from the prism of law and regulation. In such a changing environment there is a particular need for a much broader disciplinary perspective to explain and predict how media in this broadband age will evolve. This is also important because the environment seems to require one to deal with competing tensions at the same time: we have one-to-many and one-to-one communications; content being pushed and pulled; the public being both audience and creator; and, concerns about piracy amidst moves to share content freely and openly. Developments like these are making the policy and regulatory task much more difficult.

## EXPLORING THE TERRAIN

### *Mapping*

The title of this article refers to the “Age of Broadband.” The phrase is important because it implicitly acknowledges that whilst this is a period in which broadband has become the dominant technology and service driving change, it does not define or describe all media activity. It is redefining the media and engagement with it, but it is not the entire experience. This may change but for the present and the foreseeable future, there is – and will be – a mix of platforms and media experiences, from the old one-to-many institutional fixed media to the new interactive grassroots mobile media. In contemplating the response to the broadband age, this needs to be kept in mind. Policy and regulation must be considered across the entire environment; otherwise there is a risk of regulatory imbalance and pressure points in this heterogeneous environment.

One of the difficulties when considering policy and regulatory responses is how to describe the subject matter. In the pre-broadband age, it was relatively simple to do this and to determine where and how to affix the regulatory impost. The (mass) media was understood as encompassing the press, radio and television. Although technically quite different, they nevertheless operated in similar and discrete ways. In the main they were one-to-many forms of communication, and the audience had relatively limited control over when and how the content could be accessed. Content was generally distributed across the one delivery platform (even with the arrival of cable and satellite technology, there was no substantive change). The form of the content was predictable also: newspapers delivered text; radio, voice; and, television delivered voice and visual content. Content

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<sup>12</sup> This article is deliberately schematic and it begs for further and more detailed research on each of the canvassed regulatory tools.

was generally not shared between the media. Finally, the physical reach of the medium ensured that it was possible to impose some jurisdictional borders for regulatory purposes.<sup>13</sup> Of course it is possible to overstate the simplicity of the pre-broadband age. Each new communications technology development created its own disruptive policy and regulatory challenges, but it is suggested that there are developments in the broadband age which are making policy and regulatory development especially complex. Developments, such as those canvassed in this article – are changing the nature of the relationship between content provider and delivery platform and audience and producer – are upsetting the traditional vertical, silo-based approaches to regulation.

But this position has changed dramatically, and almost all of the characteristics of mass media just described can no longer be relied upon as a defining feature. Another significant change is the growth of user-generated content (UGC). Here one struggles with concepts because a reference to UGC can clearly encompass a vast array of activity – from the YouTube home video, to the teenage Facebook page, to the twitter feed, to the video or photos shot via a mobile phone during a civil uprising and distributed worldwide, to the blogs – amateur and professional, public and private. The term “social media” is also used here; but if the term was meant to connote a media which was primarily occurring within the private sphere (albeit with a public interface), designed to facilitate personal, informal and social communications (much as the telephone in its earlier vanilla form did), then clearly that meaning no longer adequately describes what is happening. Whether it is described as UGC or social media, it clearly cannot be ignored. Whilst some of that UGC may not be relevant, aspects of it are, and it is apparent that some forms of UGC are taking on media-like roles. Deciding what of this activity belongs in this space is part of the challenge. What also complicates understanding of this environment is that some of the activity takes place outside the usual market processes, and, indeed, may occur for non-economic motives and encourage open sharing and networking of content.<sup>14</sup>

Although this article has suggested that the current (and emerging) media environment is qualitatively different from the one around which the familiar policy and regulatory frameworks have been built, it is not being suggested that this is a situation in which the new is pushing out or replacing the old. Whilst there are disruptive technologies in play – enabled by broadband – there remains a more fluid scenario. The new does not replace the old – at least not yet – but it may displace it, obliging the old to adapt and accommodate to the new. One can see this in the way that, for example, the print media have adapted to the emergence of the online environment (albeit that they may not yet have developed the business model to support this).

Having regard then to these complexities and this fluidity, the concept of the “ecosystem” may be useful as a way to describe the current media environment. It contemplates the idea of a community of organisms, which are living, changing, and adapting or disappearing, and it serves as a reminder

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<sup>13</sup> It was not quite as simple as this, as the experience of Europe and the European Union’s Audiovisual Media Services Directive ([2007] OJ L 332/27) demonstrates. A codified version of the directive is now available: [2010] OJ L 95/1.

<sup>14</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006), 7; cited in John Naughton, “Our Changing Media Ecosystem” in *Communications: The Next Decade*, ed. Ed Richards, Robin Foster, and Tom Kiedrowski (London: Ofcom, 2006), 41.

that the regulatory responses must also be adaptable and responsive.<sup>15</sup> The term *media ecosystem* will be used in this article. It is a useful means of distinguishing from old descriptions of the media and it also serves as a reminder that, when talking about policy and regulation in the broadband age, it is necessary to be inclusive. So within this media ecosystem one may find the traditional media, including the press, the new broadband services such as IPTV, independent online journals, the blogs, delivery platforms, content creators and journalists, amateur and professional, and so forth. It might be thought that to contemplate the ecosystem in this way is too far-reaching, but it could be argued that some of these new players are already claiming the space themselves. For example, shield laws recently enacted in Australia recognize the citizen journalist and blogger.<sup>16</sup>

### ***Policy and Regulation – Restating the Normative Link***

The title of this article refers to “securing diversity” but this is not intended to suggest that diversity is the goal. Diversity is certainly a vital ingredient, but to mistake it for the goal in developing media policy risks building a weak policy basis. This is apparent in a paper recently issued by the Convergence Review Committee. Known as the *Framing Paper*, the paper sets out for consultation a set of principles to inform the Review’s work. “Diversity of voices, views and information” is offered as one of the principles but without any normative underpinnings that might help to explain the nature of diversity and the role it should play.<sup>17</sup> Media regulation – especially because of the differential treatment of print and broadcasting – has always suffered from weak and negative rationales for regulation. The result has been a rather grudging acceptance of regulation (usually as part of a trade-off for spectrum allocations or some other subsidy) with reasonably regular attempts by the media industry to push back the regulatory front. More so than ever, this push will be seen in the broadband age, especially because regulatory imbalances are likely to be magnified. So it seems especially important (and indeed an opportunity) at this time to be able to articulate a strongly coherent normative case for the role the media should play in the community. With that understanding one can begin to look at how the media ecosystem might need to be shaped to ensure the realization of that role.

The concept of the “public sphere” continues to be of value.<sup>18</sup> It has been much debated and refined, but in essence the public sphere provides “...an important space for the generation, consideration, and formation of public opinion, which in turn facilitates the democratic process.”<sup>19</sup> And the media have become “...the chief institutions of the public sphere.”<sup>20</sup> The media, in all its

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<sup>15</sup> Naughton, 42. The term is also used by the Federal Communications Commission (US), *Connecting America: The National Broadband Plan* (2010).

<sup>16</sup> Evidence Amendment (Journalists’ Privilege) Act of 2011 (Australia). See also Evi Werkers et al., “Ethics and Rights for Online Journalists: Inseparable and Obligatory” (paper presented at the “End of Journalism” International Journalism Conference, Luton, Oct. 17-18, 2008).

<sup>17</sup> Department of Broadband, Communications and the Digital Economy (Australia) [hereinafter BCDE], *Convergence Review, Framing Paper*, 2011, accessed June 20, 2011, [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0019/133903/Convergence\\_Review\\_Framing\\_Paper.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0019/133903/Convergence_Review_Framing_Paper.pdf), 12.

<sup>18</sup> See further Lesley Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Oxford: Hart, 2006), chapter 2.

<sup>19</sup> *Ibid.*, 58.

<sup>20</sup> Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London: Sage, 1995), 8.

rich and wonderful new guises, still has a crucial role to play: "...to provide a focus for citizens within that space, to provide access to different voices, and to facilitate debate."<sup>21</sup> So the crucial question then becomes what is needed to ensure that the media is able to fulfill its important civic role. A media ecosystem characterized by diversity in structure, service, and content will be essential to this role.

It has been suggested that with the growth of blogging and other forms of interactive online engagement that a re-energized public sphere has emerged.<sup>22</sup> But there is a need for caution here, even though one may be inclined to agree with this statement. It is the case that the media ecosystem seems to be characterized by abundance – there are multiple ways in which news, information and opinion, and entertainment content can be accessed. Of course, very often one is simply receiving much the same content via these new platforms, as would be received via the traditional platforms. And so there is a need for caution to ensure that one is not misled by an illusion of diversity. Scarcity may be present despite the appearance of abundance.

Nevertheless, there are clearly new and different kinds of voices out there with varying degrees of professionalism and commercialism: the independent online opinion papers, the blogs, the citizen journalists, Twitter, and even Facebook. All are contributing to the discourse. But here too there is a need for caution: if the media is to play its part in the public sphere, the public needs also to be equipped to make the best use of what the media provides. Habermas has commented: "Use of the Internet has both broadened and fragmented the contexts of communication. ...[T]he less formal, horizontal cross-linking of communication channels weakens the achievements of traditional media. This focuses the attention of an anonymous and dispersed public on select topics and information, allowing citizens to concentrate on the same critically filtered issues and journalistic pieces at any given time. The price we pay for the growth in egalitarianism offered by the Internet is the decentralised access to unedited stories."<sup>23</sup>

So within that abundance there may be chaos and here there may be a need to ensure that frameworks are in place so that the public has a means of negotiating through this content. It is worth remembering also Sunstein's concerns about the potential for the public to bypass the "general-interest intermediaries," instead restricting "...themselves to opinions and topics of their own choosing..." and "...listening to louder echoes of their own voices..."<sup>24</sup> For Sunstein this is a problem more serious even than the fragmentation occasioned by the new communications technologies.

To be seen to quibble with diversity being offered as the policy goal may seem just that: a quibble; but in putting the goal in that way it can be too easy for this to be elided into a debate over spectrum scarcity. By focusing on the need to ensure that the media is able to carry out its role and

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<sup>21</sup> Hitchens, *Broadcasting Pluralism and Diversity*, 58.

<sup>22</sup> Naughton, 48.

<sup>23</sup> Jürgen Habermas, "Towards a United States of Europe," *Sign and Sight.com*, Mar. 27, 2006, accessed Sept. 15, 2011, <http://www.signandsight.com/features/676.html>.

<sup>24</sup> Cass R. Sunstein, *Republic.com 2.0* (Princeton: Princeton University Press, 2007), 13, 31.

responsibility within the public sphere, it should be possible to have a broader discussion about what is needed to aid that.

## THE REGULATORY LANDSCAPE

### *The Regulatory Space*

In thinking about the regulatory framework and especially the regulatory tools that may be deployed, it may be more useful to consider not *regulation* but the *regulatory space*. To refer to regulation risks simplistic or even false dichotomies, such as for example the idea that the press is not regulated, whilst broadcasting is. There is a risk also that the basket of regulatory tools is conceived narrowly.

*Regulatory space* recognizes that regulatory power and authority will not be held within a single formal body, but may be dispersed between any number of entities, both private and public, within the relevant space.<sup>25</sup> In this way, it minimizes the problem of setting up public and private interests in opposition: “Instead, the idea of regulatory space emphasises a place where regulation occurs, almost a kind of physical arena which influences the practices that happen within it.”<sup>26</sup> The regulatory space allows for a more complex mix of regulatory activity which may be especially relevant in the emerging media ecosystem.<sup>27</sup> It can accommodate a variety of regulatory tools from the market through self-regulation to centralized command regulation, and it enables different jurisdictional responses to similar policy objectives.

The *regulatory space* concept also avoids the idea of the market or the discipline of the market as being non-regulation or beyond regulation. It sees the market as simply another regulatory or disciplinary instrument within the space, which can be used when it is appropriate. This avoids also the perception of regulation as a departure from the norm, namely the market,<sup>28</sup> or as second-best.<sup>29</sup>

### *Regulatory Review and Mapping*

The following sections review five regulatory approaches that have been used to promote or protect diversity in the traditional media environment. These regulatory approaches were relied upon, rather than the market-as-regulator approach, because it was considered that the market could not deliver the range of content deemed important for a thriving and engaged public sphere nor prevent the tendency towards concentration.<sup>30</sup> In reviewing these approaches, this article will consider whether

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<sup>25</sup> Colin Scott, “Analysing Regulatory Space: Fragmented Resources and Institutional Design,” *Public Law* (Summer 2001): 331. See also Leigh Hancher and Michael Moran, “Organizing Regulatory Space” in *A Reader on Regulation*, ed. Robert Baldwin, Colin Scott, and Christopher Hood (Oxford: Oxford University Press, 1998), 148-172.

<sup>26</sup> Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge: Cambridge University Press, 2007), 59.

<sup>27</sup> Scott, 330-331.

<sup>28</sup> Thomas Gibbons, *Regulating the Media* (London: Sweet & Maxwell, 1998), 9-10.

<sup>29</sup> Tony Prosser, “Regulation and Social Solidarity,” *Journal of Law and Society* 33, no. 3 (2006): 365.

<sup>30</sup> Carolyn Fairburn, “Serving the Public Good in the Digital Age: Implications for UK Media Regulation,” in *Communications: The Next Decade*, ed. Ed Richards, Robin Foster, and Tom Kiedrowski (London: Ofcom, 2006), 73.

they are necessary in the media ecosystem. (If they are not necessary, one is suggesting that the discipline of the market will suffice.) If some intervention is necessary, are these approaches still viable or can they be refashioned, or, is it necessary to look to new approaches to meet the policy objectives?

One of the challenges in the media ecosystem is how to make regulation “bite.” The familiar trade-off or *quid pro quo* of spectrum for regulatory obligation may not be as attractive or as viable. Furthermore, the heterogeneity of the ecosystem makes it much more difficult to use uniform regulatory approaches such as licensing, whilst the online platform means that there is much more scope for regulatory bypass. The difficulty of framing the regulatory bite and achieving the required scope is illustrated by the European Union’s Audiovisual Media Services Directive.<sup>31</sup> This directive sought to bring within the regulatory net online and mobile media services (termed “non-linear audiovisual media services”) as well as the traditional television broadcasting services (termed “linear audiovisual media services”). Not all these audiovisual media services would be captured though, for example licensing regimes, and so the directive continues to rely upon a “country of origin” approach – that is, the place (member state) where the media service provider is established. However, the directive only covers those media service providers who exercise editorial responsibility. This means that those content providers who only package content are outside the directive’s regulatory reach.<sup>32</sup> The third parties that exercise the editorial responsibility may of course be outside the European Union’s jurisdiction.

The other regulatory challenge is determining the scope of regulation in relation to the range of actors in the media ecosystem. With the growth of UGC activity within the public sphere, how broadly should the regulatory net extend? The Audiovisual Media Services Directive has confined its reach to commercial activities through the definition of an “audiovisual media service” (and there would be constitutional limits on regulating non-economic activities).<sup>33</sup> In the dynamic media ecosystem, it is likely that the question about the reach of the regulatory net will change over time and for different purposes. One approach may be to ask whether the service offered has become or is likely to become “...a ‘mainstream’ means of media consumption for many people.”<sup>34</sup>

### ***Regulatory Tool I: Structuring the Broadcasting Market***

The term *structuring the broadcasting market* is intended to refer to the way in which rules have been in place to ensure that the broadcasting market is comprised of differently constituted broadcasting sectors. The most familiar examples of this are those jurisdictions that have publicly funded and

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<sup>31</sup> Audiovisual Media Services Directive, [2007] OJ L 332/27 and codified version: [2010] OJ L 95/1.

<sup>32</sup> Ibid., art. 1(d). Recital 26 makes clear that the directive is intended to exclude providers who only transmit programs where third parties exercise editorial responsibility. See also Peggy Valcke et al., “Audiovisual Media Services in the EU: Next Generation Approach or Old Wine in New Barrels?” *Communications and Strategies* 71, no. 3 (2008): 103.

<sup>33</sup> Audiovisual Media Services Directive, art. 1(a). See also Valcke et al., 115-116. For an extensive discussion of UGC and a suggestion that some UGC activity might constitute economic activity (though the position is generally ambiguous), see Natali Helberger et al., “Legal Aspects of User Created Content,” Nov. 3, 2009, accessed Apr. 17, 2011, <http://ssrn.com/abstract=1499333>, 25-28.

<sup>34</sup> Fairburn, 73.

private, commercially funded broadcasting sectors.<sup>35</sup> The rationale being that differently constituted, governed, and funded broadcasting outlets will promote diversity of voice and content, because it will ensure that not all programming decisions are subject to commercial imperatives.<sup>36</sup> The UK has probably had the most unique example of this structured market with its mix of a publicly funded broadcaster, the BBC, and a commercial sector which was also subject to significant programming obligations – the public service broadcasting mandate, although that mandate has broken down somewhat since the UK Communications Act 2003.

As a regulatory tool designed to promote diversity of content, is there a continued need for this type of sector structuring, and can it be applied practically in the media ecosystem? The strategy of structuring the sector has sought to ensure that certain types of content would be produced, which might not otherwise have been produced if left to the market. With more scope for new content creators/providers to enter the market and the much greater opportunity users have to access a greater range of content, across a greater range of platforms, is there a need, through separate licensing or other arrangements, to continue to structure the market to ensure the availability of public interest content? Several other factors are relevant to this inquiry.

Traditional media operations are under pressure to rebuild their business models as new platforms emerge; and as competition for advertising revenue intensifies and audiences fragment.<sup>37</sup> The opportunities for greater economies of scale and scope are likely to serve as an incentive to exploit these platforms to maximize opportunities for consumption of existing content.<sup>38</sup> The “public good” nature of broadcasting content also encourages a move to multi-platform delivery,<sup>39</sup> although presumably determinations of marginal cost and the extent of competitive pressure will affect the nature of that re-use, and whether it will be a simple recycling of the content or a re-use with some added value, such as scope for interactive audience engagement. As Doyle suggests, there is now a qualitative difference in the way audiences engage with content which has to be responded to:

Research conducted by ...Ofcom, confirms that although broadcast television remains supreme in its popularity, audiences are embracing the additional choice, control and opportunities for participation offered by the internet and mobile connectivity. ...[Jenkins] argues that shifts in the strategies of media organizations towards a more multi-platform approach and towards a re-balancing of top-down

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<sup>35</sup> There are other variations of course. In Australia, for example, a community broadcast sector also operates. This has similarities with the US public broadcasting sector; see also Hitchens, *Broadcasting Pluralism and Diversity*, 76-79. The UK introduced a community radio sector in 2005.

<sup>36</sup> Federal Communications Commission (US), *Second Report and Order, In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 86 FCC 2d 141 (1981).

<sup>37</sup> BCDE, *Convergence Review*. Background Paper, 13-14.

<sup>38</sup> Gillian Doyle, “From Television to Multi-Platform: Less from More or More for Less,” *Convergence* 16, no. 4 (2010): 432. The desire to take advantage of economies of scale and scope is not of course new to the media industry. Anyone familiar with media ownership and control debates will know that this has been a familiar argument, although whether the argued economic benefits were in fact available was questionable. See for example the critique of these arguments in relation to UK media ownership reform processes in Gillian Doyle, *Media Ownership* (London: Sage, 2002). However, digital convergence may be making those economies much more realizable.

<sup>39</sup> Doyle, “From Television to Multi-Platform,” 433.

versus bottom-up participatory culture ‘is being driven by economic calculations and not by some broad mission to empower the public’. But can the two be neatly separated? If digitized, platform-neutral, interactive and multi-layered forms of content is what audiences demand, it surely follows that more resources ought to be directed towards supplying this.<sup>40</sup>

Although Doyle’s research into the UK television sector suggests that economies of scale and scope may not be the only driver for the industry to move across platforms, it is nevertheless significant.<sup>41</sup> However, her research also finds that distribution across multiple platforms is likely to increase costs, especially as audience expectations about what can be made available become (or are) much more sophisticated.<sup>42</sup> The prospect is that the availability of content across multiple platforms may not lead to greater diversity. There is no reason to expect that the commercial imperatives that were likely to lead to narrow programming choices in the traditional media environment will not apply in the media ecosystem: “...multi-platform distribution is in some senses liable to encourage standardization around safe and popular themes and brands.”<sup>43</sup>

Digital technologies and multi-platforms provide opportunities for new entrants to the content creation market. YouTube, for example, is evidence of significant user-generated content activity. That activity may move from the amateur to the professional, but regardless of how or whether it develops there is clearly a user appetite for the non-professional content production as well as the professional.<sup>44</sup> What is less clear is whether new entrants to the market can develop sufficient scale and presence or will remain marginal and/or niche. Funding will also be a factor.

There is greater scope for the user to pay for content, but the increased competition for audiences and content may also place increased pressure on subscription revenues.<sup>45</sup> Attempts to charge for content online may face the hurdle also of a cultural bias towards free access to web content.<sup>46</sup> Whilst, there is evidence of increased uptake of paywalls, it is not yet clear how effective they will be as a business model.<sup>47</sup> But requiring payment for content, especially if it is programming that may be seen as having public interest qualities, will raise concerns about access to public interest content by those who may not be able to afford pay services. Even the ability to pay does not guarantee that the public will choose the programming that provides the greatest social benefits. Even though they may

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<sup>40</sup> Ibid., 434-435; citing Ofcom, *International Communications Market Report* (2008), 118; and quoting Henry Jenkins, *Convergence Culture* (New York: New York University Press, 2006), 243.

<sup>41</sup> Doyle, “From Television to Multi-Platform,” 437.

<sup>42</sup> Ibid., 440.

<sup>43</sup> Ibid., 446. Ofcom has certainly expressed doubt that commercial players are likely to invest in certain areas of programming: Ofcom, *Putting Viewers First: Ofcom’s Second Public Service Broadcasting Review*, Statement, Jan. 21, 2009, accessed June 30, 2010,

[http://stakeholders.ofcom.org.uk/binaries/consultations/psb2\\_phase2/statement/psb2statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/psb2_phase2/statement/psb2statement.pdf), ¶ 4.24.

<sup>44</sup> Jenkins, chapter 4.

<sup>45</sup> ACMA, *IPTV and Internet Delivery Models*, 21.

<sup>46</sup> Doyle, “From Television to Multi-Platform,” 434. The threat of online piracy has forced free-to-air broadcasters to rethink their timing of screening programs of American origin to help reduce piracy: ACMA, *IPTV and Internet Delivery Models*, 31-32.

<sup>47</sup> Jim Macnamara, “Remodelling Media: The Urgent Search for New Media Business Models,” *Media International Australia* 137 (2010): 26-29.

value its availability, either for themselves or for the community at large, they may not factor in these benefits in their media purchase decision.<sup>48</sup> Regardless of the converged digital environment, the merit good problem appears likely to continue.

So it seems that there may be a sustained need for some provision to be made that ensures the availability of public interest programming. However, if the public broadcaster continues with its traditional form of delivery, there is a risk that it becomes marginalized. This risk is exacerbated if funding sources are limited. In fact, the BBC in the UK<sup>49</sup> and in Australia the Australian Broadcasting Corporation (ABC), a similar but much smaller version of the BBC, have been quite successful in adapting to the new environment, using the Internet to stream programs, provide catch-up television and radio services, enhance content, and encourage audience involvement and collaboration. Indeed, not constrained by the same commercial imperatives as commercial broadcasters, they may be able to adapt more readily to new modes of delivery.<sup>50</sup> Certainly, the ABC is clear about its ambition as a public broadcaster to claim the digital space: “By reaching all Australians, with a presence on all major delivery platforms, and a comprehensive range of news and quality, trusted programming, the ABC ensures all Australians can participate in the national debate, and is integral to the development of a population with wide-ranging intellectual and creative curiosity.”<sup>51</sup>

Nevertheless, it may be appropriate in the context of the media ecosystem – an environment in which activity will be diffuse, fragmented, one-to-one, one-to-many, push-pull, and perhaps lumpy rather than flat<sup>52</sup> – to ask whether a monolithic public broadcaster is still the best way to ensure that public interest content is available. Can the same policy goal be achieved through a more diversified approach? One advantage of the public broadcaster model is that it is likely to be readily identifiable and to have a presence. Public broadcasters such as the ABC and the BBC also have mandates that require them to have universal reach. They may be much more able to provide “easy access to and ‘discoverability’ of public service content.”<sup>53</sup> But this model is only feasible where there is an established ubiquitous and publicly funded broadcaster with a remit enabling it to move across the multiple-platforms (and a political commitment to its sustainability).

Another issue arises, however. Both of these jurisdictions have also imposed some programming obligations on the commercial sector. In Australia, this has been much more minimalist and has focused on certain types of content such as “Australian” content and children’s content, whereas in the UK there has been a much greater commitment to public service broadcasting. However, if it

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<sup>48</sup> Fairburn, 75, 82.

<sup>49</sup> Doyle, “From Television to Multi-Platform,” 434. The US public broadcasting sector also seems to have established a strong online presence.

<sup>50</sup> ACMA, *IPTV and Internet Delivery Models*, 21.

<sup>51</sup> Australian Broadcasting Corporation, *The ABC in the Digital Age – Towards 2020*, Apr. 17, 2008, accessed Apr. 5, 2011, [http://www.abc.net.au/corp/pubs/documents/2020\\_ABC\\_in\\_the\\_Digital\\_Age.pdf](http://www.abc.net.au/corp/pubs/documents/2020_ABC_in_the_Digital_Age.pdf), 1.

<sup>52</sup> Matthew Battles, “Papering over the Bumps: Is the Online Media Ecosystem Really Flat?” *Nieman Journalism Lab*, July 2, 2010, accessed Apr. 13, 2011, <http://www.niemanlab.org/2010/07/papering-over-the-bumps-is-the-online-media-ecosystem-really-flat/>.

<sup>53</sup> Ofcom, *Putting Viewers First*, ¶ 3.20.

becomes increasingly difficult to impose or sustain these programming obligations, there is a risk that the public broadcaster must become the repository of all public interest values.<sup>54</sup> This potential structural lack of diversity is a concern. Ofcom's research, conducted as part of its public service broadcasting review, indicated that audiences wanted a choice of public service provisions.<sup>55</sup> Ofcom predicted that in the longer term, privileged access to spectrum would no longer provide sufficient incentive – in the form of an implicit subsidy – to accept programming obligations.<sup>56</sup> Amongst its proposals for alternative ways of securing public service content, Ofcom canvassed additional measures such as direct funding schemes or industry levies, to encourage provision of public service content.<sup>57</sup> It favored a competitive funding scheme awarding contracts to content providers who were not necessarily traditional broadcasters, which could deliver long-term output, probably with a focus on particular genres.<sup>58</sup> In an earlier review Ofcom had proposed a publicly funded, non-profit Public Service Publisher that would commission content and then act as publisher arranging the content's distribution across a range of platforms, with a particular online focus.<sup>59</sup> Whilst the proposal ensured some sectoral diversity, there was a risk that it might actually dilute the resources of the established public service broadcasters. The concept might still be useful for operating any direct funding schemes that may be established, but the establishment of a new body may not be necessary when it is likely that there are cultural funding agencies already in place.

This section has focused on sectoral regulation. Use of a public sector to balance commercially funded broadcasting has been a common mechanism, but if it is to have a continuing role it must be able to adapt to new platforms to ensure that its public mandate extends as widely as possible. It has been suggested that there is still a role for this type of instrument but that other schemes may need to be put in place to ensure that there is a diversity of public interest content provisions. Funding schemes may be a useful model to adopt – for those jurisdictions that have a public broadcaster model in place as well as for those which do not – and indeed may be politically and commercially more acceptable than the establishment of any type of publicly funded broadcasting institution.<sup>60</sup> Spectrum auctions and license fee revenue could be potential funding sources.

### ***Regulatory Tool II: Structuring the Market through Ownership and Control Regulation***

Another form of structural regulation has been the imposition of rules restricting media ownership and control. Curiously this has been the one area in which the press has also been caught within the regulatory net. This regulatory tool has perhaps had the most common currency across jurisdictions

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<sup>54</sup> ITV plc, one of the UK commercial public service broadcasters, has already raised the possibility of handing back its public service licenses. *Ibid.*, ¶¶ 4.49-4.52.

<sup>55</sup> *Ibid.*, ¶ 3.16.

<sup>56</sup> *Ibid.*, ¶ 5.14.

<sup>57</sup> *Ibid.*, ¶¶ 5.47-74. See also Sunstein, chapter 9.

<sup>58</sup> Ofcom, *Putting Viewers First*, ¶¶ 5.62-5.72. For a proposal for contestable public service funding, see Chris Giles, "The Public Interest Challenges for the Communications Sector over the Next 10 Years: Contestable Public Service Funding," in *Communications: The Next Decade*, ed. Ed Richards, Robin Foster, and Tom Kiedrowski (London: Ofcom, 2006), 101-111.

<sup>59</sup> Ofcom, *Review of Public Service Television Broadcasting Phase Two – Meeting the Digital Challenge* (2004), ¶¶ 6.33-6.55; Ofcom, *Review of Public Service Television Broadcasting Phase Three – Competition for Quality* (2005), chapter 5.

<sup>60</sup> Macnamara, 29-30.

such as the US, Australia, and Europe, even though one might find significantly different approaches in these jurisdictions in other aspects of media regulation. It has been highly controversial even when the media environment was in a more static form, no doubt because it interferes directly with the ability of business to determine its own investment decisions and direction. As a regulatory tool, it is also a highly sensitive one for governments and regulators. It would not be surprising to see that pressure to relax ownership and control rules will be at the forefront of deliberations about how regulation should respond to the broadband age. The Australian Convergence Review has already flagged ownership and control rules as problematic.<sup>61</sup> One of the difficulties is that media control rules are vulnerable to challenge because there are inherent design weaknesses. For example, in Australia the rules apply only to free-to-air radio and television services, and to the press, under a cross-media regime. This leaves subscription services completely outside this specific regime and has, for example, allowed News Corporation Ltd. (associated with Rupert Murdoch) to hold a 25% stake in Foxtel, the dominant subscription television provider in Australia, in addition to significant print media control. Examples of such design weaknesses – the result often of uneasy compromises between governments and industry – can also be found in the US and UK ownership and control schemes.<sup>62</sup>

What is the future of ownership and control rules as a regulatory tool? It is worth noting that despite reforms or attempts to reform in the last decade (the US in 2003, the UK in 2003, and Australia in 2006), some form of ownership and control regulation has remained in place. However, it is likely that the pressure for reform and even abandonment of these rules will build. The Australian Convergence Review Background Paper comments that “existing media diversity rules... do not reflect the diversity represented by other content services including subscription television, new managed IPTV services and the range of internet services such as download services catch-up TV, and social media.”<sup>63</sup> An underlying policy assumption for ownership and control regulation is that diversity of ownership will produce a diversity of voice and view. Whilst this is a problematic assumption,<sup>64</sup> it nevertheless has a role in the diversity regulatory basket because the contemplation of monopoly control of mass media seems instinctively at odds with its very role within the public sphere. As Baker has suggested, “[t]he key goal, the key value, served by ownership dispersal is that it directly embodies a fairer, more democratic allocation of communicative power.”<sup>65</sup> The Convergence Review’s focus on other content services as evidencing diversity is a familiar rationale, but it fails to investigate whether these services constitute diversity of delivery modes or true diversity of content. Instead, what we are likely to see is a move across platforms and services to seek control of the value chain, across content and distribution.<sup>66</sup>

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<sup>61</sup> BCDE, *Convergence Review: Background Paper*, 17-18.

<sup>62</sup> Hitchens, *Broadcasting Pluralism and Diversity*, 86-138.

<sup>63</sup> BCDE, *Convergence Review: Background Paper*, 17-18.

<sup>64</sup> Hitchens, *Broadcasting Pluralism and Diversity*, 135.

<sup>65</sup> C. Edwin Baker, “Media Structure, Ownership Policy, and the First Amendment,” *Southern California Law Review* 78 (2005): 735. See also C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (New York: Cambridge University Press, 2007), 16-19.

<sup>66</sup> Council of Europe, Media Division, Directorate General of Human Rights, *Media Diversity in Europe* (Dec. 2002), ¶¶ 62-68 and generally.

While controls over ownership may be important as a diversity measure, it seems difficult to envisage this regulatory tool being adapted to suit the new media ecosystem. First, it may not be easy to capture meaningfully the differing points of control within the regulatory net, especially as the distribution and content functions increasingly operate separately. Furthermore, established ways of articulating these rules may be difficult to sustain. For example, under the Australian rules (Section 53 of the 1992 Broadcasting Services Act 1992) a commercial television (free-to-air) broadcaster is prevented from controlling licenses reaching more than 75% of the Australian population. However, the major television networks that are subject to this rule offer Internet television services that can reach all Australians provided they have an Internet connection. Second, it is probably unrealistic to expect that governments will have the political will to extend these rules. This in turn will add to the pressure for relaxation or removal from the media sectors subject to such rules. Nevertheless, at least while the traditional media platforms remain mainstream, these rules in some form are likely to stay in place.

One way of addressing the difficulties of adapting this regulatory tool is to adopt a more discretionary-based approach such as a public interest test, which might allow intervention when for example a particular control situation threatens diversity. Such an approach allows for flexibility in being able to take into account new technologies or services, but it also generates uncertainty if one has to rely upon case-by-case decisions.<sup>67</sup> Furthermore, unless the determination is in the hands of an independent regulatory body, there is a risk of political interference.

The situation seems unsatisfactory and to leave one dependent upon the application of general competition law. It will be suggested below that competition law does have an increasingly important role to play in the media ecosystem, but it is not satisfactory in all circumstances. Media ownership rules were generally introduced because it was considered that competition rules, with their focus on particular markets, did not sufficiently safeguard diversity. This has been acknowledged by the EU which has permitted member states to impose additional rules to protect diversity.<sup>68</sup> The UK has introduced a media plurality public interest test into its competition law,<sup>69</sup> but its potential for flexibility is limited. The test was introduced directly in relation to the 2003 relaxation of media ownership rules, and was an acknowledgement of the limits of competition law. However, in general it only applies to merger situations affecting the media that would have been captured under the old ownership and control rules, hence, free-to-air radio and television and newspapers. The UK test reflects the tradition of UK public broadcasting principles and, in addition to considerations such as the necessity for a plurality of persons with control, takes into account the need for a wide range of broadcasting that is of high quality and caters to a wide variety of tastes and interests.<sup>70</sup> Alternatively, a public interest test could focus more specifically on matters such as a diversity of sources of information and opinion.<sup>71</sup> This might raise for consideration matters broader

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<sup>67</sup> *Ibid.*, ¶¶ 36-37.

<sup>68</sup> *Ibid.*, ¶ 26..

<sup>69</sup> Enterprise Act of 2002 (United Kingdom).

<sup>70</sup> *Ibid.*, sec. 58(2C). The public interest test also considers whether the persons carrying on the media enterprise have a genuine commitment to attainment of broadcasting standards.

<sup>71</sup> Productivity Commission (Australia), 358-364.

than just who is in control. Such public interest tests have been developed or proposed in the context of the traditional media, but a public interest test in the broadband space may have to be substantially reconfigured. So while this regulatory tool may have a continuing role for some time and in relation to some elements of the media ecosystem, it seems difficult to envisage a way in which it will adapt and survive. This may seem a weak position to adopt, and there are suggestions of ways to adapt this regulatory tool. Baker, for example, suggests a prohibition on media firms creating new media enterprises.<sup>72</sup> However, the inherited design flaws militate against the extension of these rules to accommodate effectively the complexity of the new environment. Subject to the comments made above, the most useful way to move forward may be the development of a comprehensive public interest test to be applied to media mergers, although market definition may continue to be a hurdle.

### ***Regulatory Tool III: Content Diversity***

For some jurisdictions, structuring the market has not been seen as sufficient to guarantee content or program diversity. In Australia for example, specific measures have been in place that require commercial free-to-air broadcasters<sup>73</sup> and subscription television services<sup>74</sup> to meet certain requirements in relation to Australian content, to avoid the risk that broadcasters would otherwise opt for cheaper imported programming. Such concerns about local content, and associated measures, are familiar in Canada and the European Union. Children's programming is another such area of concern, one to which even the US has responded.<sup>75</sup> There is much that is problematic about these types of rules, especially the local content regimes with their mix of cultural and trade motivations. Indeed, this can produce curious outcomes. In Australia, as a result of a trade agreement with New Zealand, Australian content also includes New Zealand-produced content.

Such obligations have been able to be imposed as part of the trade-off for access to valuable spectrum. But such compacts come under pressure as television-like services appear on alternative platforms and there is incentive to sell off spectrum. As indicated earlier, it is as yet unclear in Australia whether IPTV services will be treated as a "broadcasting service" under the Broadcasting Services Act. Nevertheless, the free-to-air commercial broadcasters, represented by FreeTV Australia, have already raised concerns about the potential for regulatory imbalance.<sup>76</sup>

In Australia, like other jurisdictions, the switching off of analogue television services as they convert to digital will free up spectrum.<sup>77</sup> In Australia this is referred to as the "digital dividend." Australia has elected to auction off the spectrum frequencies that will be particularly suitable for mobile

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<sup>72</sup> Baker, *Media Concentration and Democracy*, 168-171.

<sup>73</sup> Broadcasting Services Standard of 2005 (Australia).

<sup>74</sup> Broadcasting Services Act of 1992, Pt 7, Div 2A (Australia).

<sup>75</sup> Children's Television Act of 1990 (US).

<sup>76</sup> FreeTV Australia, *Submission to the Department of Broadband, Communications and the Digital Economy: National Broadband Network: Regulatory Reform for 21st Century Broadband*, Discussion Paper, June 3, 2009, accessed Apr. 12, 2011, [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0013/115321/Free\\_TV\\_Australia.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0013/115321/Free_TV_Australia.pdf), 5-7 and generally.

<sup>77</sup> The switch-off of analogue services in Australia commenced in 2010 and is planned for completion by the end of 2013.

telecommunications and broadband services.<sup>78</sup> The impact of these spectrum auctions will be likely to limit the willingness or scope for trade-off of regulatory obligations as has been past practice. To enable the digital dividend, it will be necessary to move current digital broadcasting services out of the digital dividend spectrum and to “restack” the spectrum.<sup>79</sup> While in principle this does not change the ability for free-to-air commercial broadcasters to offer existing digital services, FreeTV Australia has expressed concerns that the restacked spectrum will not allow any spectrum capacity to enable them to take advantage of future technology and innovate new services.<sup>80</sup> Of course, in one sense this represents another attempt by the incumbents to entrench further their position, but what one can also see here is the breakdown of the traditional compact. No longer will spectrum be handed out to the incumbent broadcasters; but in turn it may make it more difficult to extract regulatory promises, especially if similar new services are developing alongside without the same regulatory obligations.

If one argues that other platforms such as IPTV are becoming mainstream then there is a case for arguing that the regulatory tool should be applied across the similar new services. However, is it necessarily the best course to map the old paradigm onto the new? Will this create sufficient incentive to produce quality innovative public interest content? There are practical issues as well. The new IPTV services will most likely be subscription-based and the users might be looking for a different type of programming. If the regulatory burden is seen as too onerous, there is likely to be regulatory bypass which may further limit the prospect for investment in public interest content. As canvassed earlier, creating funding schemes might be a more useful way to encourage investment in public interest content. Other incentives could involve a reduction in license fees or spectrum pricing in return for investment in certain types of programming.<sup>81</sup>

Here again, it seems that the old familiar regulatory tools may not be sustainable in the longer term. However, the media ecosystem may hold out hope in some areas. Over the past decade there has been a concern about the closure of local radio and television newsrooms in regional areas of Australia and the consequent loss of local information and news. The availability of broadband sites may assist with the delivery and creation (locally) of local content.<sup>82</sup>

### ***Regulatory Tool IV: Ethical Standards***

Ethical standards are an area of content regulation that can be easily overlooked in the broadband space. Although the approach and especially the regulatory design may have been very different,

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<sup>78</sup> Senator Stephen Conroy, “Size and Location of the Digital Dividend,” Media release, June 24, 2010, accessed Apr. 12, 2011, [http://www.minister.dbcde.gov.au/media/media\\_releases/2010/062](http://www.minister.dbcde.gov.au/media/media_releases/2010/062).

<sup>79</sup> Government of Australia, Digital Dividend Green Paper, Jan. 2010, accessed Apr. 12, 2011, [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0005/125267/Digital\\_dividend\\_green\\_paper.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0005/125267/Digital_dividend_green_paper.pdf), chapter 4.

<sup>80</sup> Julie Flynn, on behalf of FreeTV Australia, “The Future of Television,” paper presented at ACMA Radcomms 2010 Conference, Melbourne, May 5-6, 2010, accessed Apr. 12, 2011, [http://www.freetv.com.au/media/News-Media\\_Release/Radcomms\\_2010\\_presentation-JFlynn\\_030510\\_PDF.pdf](http://www.freetv.com.au/media/News-Media_Release/Radcomms_2010_presentation-JFlynn_030510_PDF.pdf), 4-5.

<sup>81</sup> The free-to-air commercial broadcasters have already expressed concerns about the license fees they are obliged to pay in relation to their digital multichannel services: FreeTV Australia, *Submission to the Department of Broadband, Communications and the Digital Economy*, 7-8.

<sup>82</sup> Australian Broadcasting Corporation, *The ABC in the Digital Age*, 6-7.

Australia, Europe, and the US have all imposed at different stages various rules or standards that can also encourage diversity, and control who has access to the medium. The US Fairness Doctrine was one such example, as are rules relating to no-editorializing (in the UK) or fairness in the way opinion is presented. For example, rules about the relationship between editorial and commercial content are relevant to matters of who has access to the media space and the public's access to information and ideas. In part, these rules are also concerned with the quality or integrity of the information and opinions being communicated. In other words, they provide a way for the content to be mediated for the audience in terms of its authenticity, trustworthiness, and reliability. As noted earlier, Habermas and Sunstein have suggested that, in the absence of this mediation role, it may be difficult for the public to negotiate the vast mass of information that can be accessed through the Internet. Therefore ethical standards, in relation to content creation, are important for diversity. When content regulation is discussed in the broadband environment, it is generally in the context of regulation of harmful or illegal content, but there is rarely discussion around how to protect the civic space. To some extent the EU's Audiovisual Media Services Directive has attempted this because the basic tier of obligations imposed on both linear and non-linear services includes obligations such as separation of commercial and editorial content. However, the scope is limited in terms of the obligations imposed and the activities covered.

Although this article has tended to focus on the professional or corporate sector, here there is an opportunity for a much broader regulatory net. There is scope for the development of a basic set of principles that represent those ethical standards that can help the mediation process. The following principles<sup>83</sup> could serve as a starting point for the development of a simple code of ethical standards:

- Accuracy and fact-checking.
- Fairness – ensuring that viewpoints are not misrepresented.
- Transparency – disclosing any potential or actual conflicts.
- Independence – not accepting a benefit from someone who might seek to influence the content.

In the media ecosystem, the regulatory imposition of this code might vary depending upon the media involved and the extent to which they represent the mainstream media voice. But for the blogger, citizen journalist, or the small independent online journalism endeavor, adherence to the code could in fact become a marketing or promotional tool. Unlike the established media that is able to trade off reputations established through other delivery platforms, gaining a presence and an identity may be more difficult for the independent sector. The code may assist this presence and benefit diversity by adding to the availability of trusted voices.

It is likely that a self-regulatory model would be the most effective mechanism. Adoption of the code's principles could be signaled by some labeling device, which could in turn serve as a way to

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<sup>83</sup> See also the Knight Community News Network, which developed a set of ethical principles for citizen journalists. Knight Community News Network, *Principles of Citizen Journalism*, accessed Sept. 15, 2011, <http://www.kcnn.org/principles>.

promote the activity as a trusted site. Further matters would need to be considered such as who would be custodian of the code and the role of the custodian. Would it simply act as a point for sites to obtain labeling, or would it take a more active monitoring role or even provide a complaint/breach of code handling process?

Encouraging ethical editorial standards will be important in the media ecosystem, but again may be difficult to ensure comprehensively. This small scenario illustrates the way in which regulation could be used creatively and seen positively.

### ***Regulatory Tool V: Competition Regulation***

As a regulatory tool, competition regulation has much to do with structuring the market. However, while an established regulatory instrument in the media sector, it is seen as having less direct relevance to media diversity policies. There is every reason to expect that general competition law, such as merger regulation, will continue to have a role, even if the continued use of the more specific instrument of ownership and control regulation is less clear.

Where competition regulation will have an increasing importance and relevance in the media ecosystem is in the use of industry-specific *ex ante* competition rules that can help shape the market or behavior within the market. Such rules – for example those that make provision for access, must carry, bundling practices, and transparency and non-discriminatory dealing – are useful for dealing with particular market characteristics such as natural monopolies and vertical integration, and where general competition law with its reliance on *ex post* regulatory enforcement may be inadequate. Use of these rules is already well-established in jurisdictions like the UK and the US, but much less so in Australia.<sup>84</sup> Although this type of regulatory tool operates in a context that seeks to promote economic competition, it can have an important role to play in promoting access for the public to a broader range of programming and services.

Much will depend upon the business models that emerge as superfast broadband ubiquity continues to open up content distribution platforms and new content distributors emerge.<sup>85</sup> In Australia, as new delivery models produce new business models, concerns are being raised about the scope for anti-competitive behavior; a concern that is perhaps highlighted in a regulatory environment that has lacked an effective competition regulatory instrument, and where most access seekers have had to

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<sup>84</sup> An access system has been in place for services declared by the competition regulator, the Australian Competition and Consumer Commission (ACCC). However, it relies on the access provider and access seeker negotiating the terms of the access. This negotiate/arbitrate model has been subject to extensive criticism. Access has been difficult to achieve and the process has generally involved significant delay and gaming. The difficulties were exacerbated because in most situations the access provider was Telstra. For a summary of the problems see Government of Australia, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, Discussion Paper, Apr. 2009, accessed Oct. 31, 2009, [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0006/110013/NBN\\_Regulatory\\_Reform\\_for\\_the\\_21st\\_Century\\_Broadband\\_low\\_res\\_web.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf), 12-16. As part of the NBN regulatory reforms a new access regime has been introduced which enables the ACCC to make up-front determinations on the conditions of access: the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act of 2010.

<sup>85</sup> ACMA, *IP TV and Internet Delivery Models*, 9-10.

deal with a vertically- and horizontally-integrated and dominant telecommunications company.<sup>86</sup> For example, traditional broadcasters have controlled both distribution and content, either as producers or rights holders. Faced with fragmenting audiences, they will seek to find new distribution avenues in order to reach audiences who are increasingly using the Internet to access content.<sup>87</sup> These other avenues may offer new opportunities or new competition for the established broadcasting models. Currently, in Australia, most of the free-to-air broadcasters have begun to offer catch-up television services via their own websites, but these services may be more vulnerable in quality compared to IPTV services.

Convergence may also bring a change in the business model, as the platform or distribution providers change from their “common carrier” model to become also content providers.<sup>88</sup> The position held in the value chain and the potential for vertical integration will be significant.<sup>89</sup> FreeTV Australia has expressed its concern about the scope for differential pricing by carriers and ISPs to favor their own content or the content of associated providers and to discriminate against third party providers.<sup>90</sup> A related problem in Australia is that Internet service provision usually imposes caps on the amount of data a customer can download. Once a limit is reached, significant charges may be imposed or the service slowed. This practice affects the type of content that can be downloaded.<sup>91</sup> From a competition perspective, it also imposes risks because some carriers and service providers may choose to allow certain content as unmetered. Typically, this means that a provider favors content with which it has an association, or with whom it may have made a commercial arrangement.<sup>92</sup> The following example illustrates some of these tensions. An IPTV service called FetchTV recently began operating in Australia. FetchTV delivers its service via four broadband ISPs. However, it is not able to deliver its service via one of the main broadband ISPs, Bigpond, because that service is operated by Telstra which has its own interest in providing content, especially given its connection with the pay-TV provider Foxtel. Meanwhile, FetchTV is delivered as unmetered content via the ISPs with which it does have arrangements. This will make it attractive to the viewer compared to services delivered as web or Internet TV, which are likely to be included in a customer’s download quota.

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<sup>86</sup> This is a reference to Telstra. Telstra was the public telecommunications operator in Australia until privatization and it remains the dominant operator in most telecommunications markets, including wholesale and retail services, the fixed line copper network, and the cable network. In addition, it has a 50% stake in Foxtel, the main subscription television provider in Australia. As part of the regulatory arrangements for the NBN, Telstra has agreed to structural separation. For background, see Hitchens, “Broadband in Australia,” 218-219 and generally.

<sup>87</sup> ACMA, *IPTV and Internet Delivery Models*, 21.

<sup>88</sup> *Ibid.*, 32.

<sup>89</sup> *Ibid.*, 30; and Ofcom, *What is Convergence?*, ¶ 5.30.

<sup>90</sup> FreeTV Australia, *Submission to the Department of Broadband, Communications and the Digital Economy*, 8-9. Some carriers and service providers (Internet and mobile) may also be in a position to bundle the services that can be offered and thus gain further competitive advantages.

<sup>91</sup> ACMA, *IPTV and Internet Delivery Models*, 23.

<sup>92</sup> See also Australian Broadcasting Corporation, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, Discussion Paper, June 3, 2009, accessed Apr. 17, 2011, [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0015/115323/Australian\\_Broadcasting\\_Corporation\\_ABC.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0015/115323/Australian_Broadcasting_Corporation_ABC.pdf).

As indicated, competition regulation will become increasingly important in the broadband age as shown by the US Federal Communications Commission's (FCC) net neutrality rules. This may not be such a challenge for those jurisdictions with an already well-developed set of *ex ante* tools. However, it will be important to articulate clearly the role this regulatory tool has in the promotion of diversity and not see it as peripheral to the diversity discourse. The regulatory basket could include functional separation to address the potential for discrimination by those businesses that combine distribution networks and content services; access regimes to ensure fair, reasonable, and non-discriminatory terms of access; rules to prevent anti-competitive bundling of services and content; and must carry rules to ensure that public interest content is accessible across all platforms.

### A FURTHER THOUGHT: UNIVERSAL SERVICE

Whether this is thought of as a policy principle or regulatory approach may or may not be significant, but 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.<sup>93</sup> Universal service obligations 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."<sup>94</sup>

Universal service may also 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. Universal service obligations 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.<sup>95</sup>

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<sup>93</sup> In Australia, transitional arrangements have been made for universal service provision in the context of the NBN, and consultation is occurring to deal with the delivery of these obligations, but to date these arrangements have been concerned only with traditional universal service, such as access to basic telephony services and public interest services (emergency service for example). For further information on the Australian Government's arrangements and consultations, see Department of Broadband, Communications and the Digital Economy [hereinafter BCDE], *Universal Service Policy in the National Broadband Network Environment*, accessed Sept. 15, 2011, [http://www.dbcde.gov.au/broadband/national\\_broadband\\_network/universal\\_service\\_policy](http://www.dbcde.gov.au/broadband/national_broadband_network/universal_service_policy). However, there has not yet been any policy consideration of the concept of universal service in the broadband age.

<sup>94</sup> Ofcom, *What is Convergence?*, ¶ 5.16.

<sup>95</sup> Natali Helberger, "The 'Right to Information' and Digital Broadcasting – About Monsters, Invisible Men, and the Future of European Broadcasting Regulation," *Entertainment Law Review* 17, no. 2 (2006): 70. Helberger discusses universal service in the context of how to ensure fair and affordable access to broadcasting content.

## CONCLUSION

This article has tried to investigate the possible impact of the broadband age on familiar regulatory approaches and to ask whether those regulatory approaches will have a continued role in enabling the media to function within the public sphere. The media ecosystem and the regulatory space is in transition and it may be that current regulatory arrangements will have a role for some time, but it seems that in the longer term they may be unsustainable.

It has been argued that there will still be a need for some intervention in the broadband era – that the discipline of the market will not provide the diversity needed for the media to fulfill its role. Sectoral regulation will still have a role although it will need to be supplemented with regulatory incentives such as funding schemes. This article is pessimistic about the longer-term viability of media ownership and control regulation and there may be a need to rely increasingly on merger regulation, perhaps with some modification, to address media concentration. *Ex ante* competition regulation will have an increasing role. There could be scope for a more positive engagement with some aspects of content regulation, especially in the important area of content integrity.

Much of this discussion may have seemed speculative, but the advent of the Australian Convergence Review is a sharp reminder that speculation is rapidly turning into reality. The outcomes of that review will show whether the established media policy values considered in this article are to be protected or rendered more vulnerable.

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