

Whither the Benefits of Privatising Telstra: the CEPU View

Ros Eason discusses the tension between the competing objectives of the privatisation of Telstra and the policy to be adopted when the duopoly ends and argues against the privatisation.

I gather from some of the media interest here this morning that the Communications, Electrical & Plumbing Union (CEPU) is expected to run up the red flag this session. Let me begin, then, by affirming the Union's implacable opposition to the sale of any portion of Telstra. We do not believe that such privatisation will deliver any of the benefits that are claimed for it by the Coalition. The overseas experience offers no evidence to suggest that privatisation, of itself, produces greater efficiencies in companies or delivers lower prices to consumers. Indeed, as we have pointed out several times, the Coalition's own policies give the lie to these essentially ideological claims: if privatisation is so good for the consumer, what need is there to introduce the Customer Service Guarantee?

However, what I want to discuss today is not the proposed sale of Telstra per se, but the relationship between privatisation and the range of very complex regulatory issues and choices we face as July 1997 approaches. For I think it is in this context that we can see most clearly why privatising Telstra is a lose-lose proposition for the Australian community.

Privatisation involves inevitable tensions between regulatory objectives - whether these be designed to protect consumers or the competitive process - and the goal of maximising Telstra's sale price. A light handed regulatory regime will suit investors, but will offer less comfort to Telstra's customers. If

Telstra's sale price suffers, on the other hand, as a result of tight regulation, it is the taxpayers who will lose out. It is they who will ultimately have to make up the difference between Telstra's value under public ownership-measured by the discounted stream of its future profits and the final amount made available from a sale for the retirement of Government debt.

The equation will always end up in the negative. Privatisation inevitably involves undervaluation of assets, because of the premium private investors demand for carrying risk. But every pro-competitive safeguard and pro-consumer requirement exacerbates this problem. Nor can it be avoided by "learning" from the British experience because it is built into the privatisation process itself.

These are dilemmas that the Government now has to confront at the same time as it attempts to work its way through the thicket of issues arising from the duopoly review. We are indeed now less than 18 months away from the duopoly expiry date and are facing a policy black hole. Industry debate on the Exposure Draft of the 1997 legislation was curtailed by the Federal Election and the extent to which the Draft will be

re-worked to reflect Coalition policy is unclear. There are tensions between several aspects of Government policy and the privatisation objective and there has yet to be any wide public discussion of the potential impacts of privatisation on access, investment, service availability and quality and on prices. All this adds up to a state of considerable uncertainty for the industry and for its customers.

It is a fact universally acknowledged that we still have a long way to go to get the 1997 legislation right. There are the problems of carrier definition; the need to balance the claims of carriers and service providers; the questions of both process and pricing that arise from the Exposure Draft's extensive unbundling provisions. There is the need to strike the right balance between discouraging uneconomic entry, with further wasteful replication of infrastructure, and the need to preserve appropriate incentives for investment, particularly in the newly emerging service areas.

Then there are the issues (on which the new legislative turf has yet to be turned) of defining, costing and funding the Universal Service Obligation. What, in future, will be the "standard service"? It is not too hard to see that the wider the

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definitional net is cast here, the more problematic the funding question becomes. For instance, I'm sure that Optus must have been aghast at John Howard's suggestion that ISDN could become the standard service under a Coalition Government, given the very large sums it would require to make this technology universally available. Would the industry as a whole be expected to pay for this qualitative leap forward, through the Universal Service Levy?

Above all these issues there sits the overarching question for the new legislation: What are the guiding policy principles for 1997? The Exposure Draft contains no general objects. When you combine this fact with the quite sweeping discretionary powers the draft gives to the Australian Competition and Consumer Commission, you have a recipe for ongoing uncertainty of a quite high order.

The *Telecommunications Act* 1991, of course, specifies twelve general objects, including

- the efficient and economic supply of the standard telephone service
- maximising the efficiency of the carriers
- optimal rates of infrastructure expansion and modernisation
- accessibility of the standard service

In addition, the current Act sanctions the carriers' exploiting the economies of scope and scale open to them as infrastructure owners (Section 173). Similarly, the 1995 Ministerial Direction governing access to broadband networks acknowledges the efficiencies offered by vertical integration.

In short, the achievement of technical efficiency is put high on the Act's list of stated objectives and regulatory mechanisms (including the current conception of the BCS as an unbundled, end-to-end service) are enlisted in support of that outcome. At the same time, these protections offered to carriers provide incentives for investment, which in turn helps ensure the ongoing accessibility of both existing and new services.

The new framework does not, as yet, appear to have the same degree of coherence. For instance, the Exposure Draft contains no recognition of the existence of economies of scope and scale in the industry - a basic fact of economic life, one would have thought -

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or of the claims of technical efficiency. On the contrary, the unbundling provisions are a recipe for inefficiency, through loss of economies of scope. The final economic impact of such proposals will depend, of course, on the pricing of the unbundled network "components", but the point is that the draft offers no guidance in this area, through general objects, to the ACCC.

Indeed, it seems to the Union that there is a strong presumption throughout the draft in favour of what the economists like to call dynamic, as opposed to technical, efficiency - in favour of competition rather than the pursuit of scope and scale economies. In practical terms, this may produce a regime that favours service providers at the expense of carriers. This has always been a central danger of the review, given the Government's desire to see further

competition in an industry where opportunities for large scale infrastructure investment are limited. The Union's concerns in this regard are heightened by the absence from the draft of the protections of intellectual property offered by Part IIIA of the *Trade Practices Act* (s.44B) and by the fact that the rights of facilities owners are accorded less systematic recognition than in the *Trade Practices Act*.

What, we need to ask, are the implications of this regime for investment and innovation, and hence for the development and accessibility of new services? (It must be remembered that the broadband networks of the current carrier associates will come under the new carrier definition after June 1997.)

The Coalition have indeed inherited a complex set of problems. Unfortunately,

their own policies are likely to compound, rather than resolve, the difficulties the industry currently faces. The Coalition proposes, for instance, to have wholesale prices subject to a Ministerial pricing guideline in the post-1997 regime. How will this possibly work, given the variety of products and the multiplicity of "wholesale" prices that the unbundling provisions, together with rapidly changing technology, will create? Will the same set of pricing principles be applied to both narrowband and broadband networks? Is such regulation compatible with the Part IIIA approach to access upon which the Exposure Draft is generally based? What will be the effect of such pricing constraints on carrier margins and hence - to come back to the privatisation issue - on Telstra's sale value?

The Coalition position on wholesale price regulation is one of several instances of an interventionism which sits uneasily with the privatisation objective. Others are the requirement that Telstra accelerate its exchange digitalisation programme (FMO) to allow completion by mid-1997 and that it ensure availability of ISDN services within the same time frame. Simple supply constraints mean that the Coalition's FMO targets are unlikely to be met, though even a more modest speed-up will have cost impacts, particularly in the staffing area, when they will be least welcome. Figures quoted during the Federal Election suggest that these could be of the order of \$1-1.5 billion.

The costs of universal provision of ISDN are of an even higher order of magnitude. Coalition policy requires Telstra to "offer" ISDN where digitalised exchanges are available, but such offers can have little meaning unless lines are also conditioned for delivery of ISDN services. The costs of an Australia-wide programme could be more than \$10 billion, without including the costs of ISDN customer equipment.

Other Coalition promises, such as the prohibition on carriers' charging for operator assisted calls, will also have their impacts on Telstra's bottom line. The Union has always opposed charging for Directory Assistance, so this is one area where we find ourselves quite comfortable with the Government's approach. Investors may be less impressed, however. Not only will Telstra be unable to raise revenues and contain staffing costs (by suppressing demand) through the introduction of DA charges; it would seem they will also have to drop charges currently in place for operator assisted ISD and IDD connections. Again the impacts on shareholder value are likely to run into the hundreds of millions.

No doubt the Coalition will soon be considering how some of these pre-election policies can be modified to smooth the path to privatisation. The point, however, is that there are bound to be trade-offs along the way. Who will pay for them? Regulatory interventions designed to silence the anti-privatisation forces in the Senate will be paid for by taxpayers in the form of a lower Telstra sale price. Consumers and competitors, on the other hand, will carry the costs of a light-handed regulatory approach.

Finally, we might ask what impact the privatisation of Telstra is likely to have on investment, especially in areas where the company is not guaranteed an economic rate of return. Here the Union would disagree with the view that corporatisation and deregulation already prevent Telstra from acting as a vehicle for Government policy. True, competition undermines the role of universal service provider that Telstra played comfortably in the monopoly era. But while the Government is Telstra's owner, it still may tolerate higher risks and agree to a lower rate of return than is likely to be acceptable in the private sector. Once Telstra is sold, however, the pressure will be on Government to bear the costs of uneconomic services directly, through subsidies either to consumers or to the universal service provider, who may in future be selected on the basis of

competitive tendering. Given the constant pressures on Governments to cut budget deficits, the availability and quality of services in rural and remote areas could become uncertain indeed.

In the Union's view then, the privatisation of Telstra cannot be separated from these larger questions of telecommunications policy and, indeed, from economic and social policy more broadly. How will the industry be structured and regulated after June 1997? What role do we expect Telstra to play in the next phase of industry development, as we move towards a broadband future? Can we reasonably expect it to act as a vehicle for an egalitarian communications policy? What role do we want it to play in the wider economy, in relation to local manufacturing and the export of advanced services to the Asia-Pacific region?

I return again to the question of the general objects of the new legislation. These need to be spelt out and, if necessary, challenged. We need some vision for the industry, for 1997 and beyond. We need greater clarity on the issues that have been raised this morning. Then perhaps the Senate may be in a reasonable position to debate whether or not Telstra should be privatised. When placed in this larger context, however, we believe the logical outcome of such a debate will be a resounding "No".

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Cable Retransmission by Foxtel of Free-To-Air Broadcasts: A Rejoinder and some Policy Reflections

Ian McGill responds to the Mallam/Palm article (CLB Vol 15 No 1) and argues the case on the re-transmission of free-to-air broadcast signals from the perspective of the pay TV operator.

On 26 April 1996 the Full Court of the Federal Court handed down its decision in the appeal from the decision of Davies J in *Amalgamated Television Services v FOXTEL Cable Television Pty Limited* (1995) 132 IPR 323 ("the Retransmission case"), concerning the issue of the retransmission of commercial broadcasting signals by pay television. The Full Court dismissed the appeal by the commercial television broadcasters, upholding the decision of the court at first instance (*Amalgamated Television Services v FOXTEL Cable Television Pty Limited*, unreported, Federal Ct (Full Ct), Lockhart Wilcox & Hill JJ, Sydney, 26 April 1996).

Notwithstanding the decision in the Federal Court, the new Federal government has stated that it will "recognise the retransmission rights of commercial broadcasters" (*Better Broadcasting*, The Coalition's National and Community Broadcasting Policy, January 1996). Presumably this will be accomplished by amendment to the *Copyright Act 1968* and *Broadcasting Services Act 1992* retransmission provisions.

Paul Mallam and Christine Palm have given an account of the decision of Davies J in the retransmission case from the perspective of the commercial broadcasters, who brought the application to the Federal Court against cable television broadcaster, FOXTEL Digital Television Pty Limited ("FOXTEL Cable") and its associated company, FOXTEL Management Pty Limited ("Management") (*Communications Law Bulletin*, vol 15, no. 1 1996).

Having acted for the Respondents in the Retransmission case I will attempt to provide a contrary view.

Commercial broadcasters contend that retransmission is a theft of intellectual property - either that of the

free-to-air broadcasters or the holders of underlying rights. Commercial broadcasters also contend that retransmission undermines not only their commercial position but also their position as "creators and surveyors of Australian culture, information and entertainment" (*Ibid*, p 4).

These contentions are exaggerated. Contrary to the end of network television as we know it, the cable retransmission of free-to-air signals is consistent with the commercial reality that the underlying rights holders and the commercial television licensees have been remunerated at the point of broadcast. The simultaneous retransmission of their respective copyright, with no alteration of content and in the licence area of the free-to-air transmission, is not deserving of further remuneration. To do so would be a classic double dip.

FOXTEL has not structured its service offering to import distant broadcast signals or to alter the content of local broadcast signals that are retransmitted. The retransmission benefits subscribers to the FOXTEL service by improving poor reception of broadcast transmissions in some areas and by saving subscribers from the inconvenience of the installation of an external switch to change between the broadcast and pay channels.

The Australian legal position represents a logical mesh between the *Copyright Act 1968* and the *Broadcasting Services Act 1992* retransmission provisions and is broadly consistent with the position in countries such as Canada, the United Kingdom and the United States. In the future I believe the pay television industry will accept a statutory "must carry" obligation coupled with a compulsory licence for relevant copyright material (similar to countries where pay television has a long

commercial history). However, I am less certain of that industry's sanguine acceptance of remuneration payable to the commercial television licensees for the fulfilment of that carriage obligation in the areas of the free-to-air transmission.

Structure of FOXTEL Service Offerings

FOXTEL Management Pty Limited ("FOXTEL") is a provider of subscription pay television services. On 23 October 1995 it commenced cable transmission of its services to subscribers in Sydney and Melbourne. The package initially offered to subscribers by FOXTEL consisted of 17 channels delivered to subscribers by another company in the FOXTEL group, FOXTEL Cable, and the retransmitted free-to-air broadcasts of the national and commercial broadcasters within a subscriber's local area delivered by FOXTEL.

The free-to-air stations are available to subscribers who take the basic FOXTEL package and, with the exception of the SBS (which has channel position 25), have channel designations identical to their respective free-to-air designations (that is, for viewers they simply appear on the same channel number).

FOXTEL Cable is the holder of licences under the *Broadcasting Services Act* to provide subscription television broadcasting services to its subscribers. Because of a possible ambiguity in the meaning of section 212 of the *Broadcasting Services Act*, FOXTEL Cable was quarantined from any involvement in the retransmission of the free-to-air channels.

In reaching his decision in the Retransmission case Davies J. did not have to deal expressly with this point.

However, he did express the obiter opinion that Parliament had intended that the reference to licensee in section 212(2) was not to any licensee under the Act (such as FOXTEL Cable) but only the person who is a licensee in respect of the particular broadcast the subject of the retransmission. On this view the quarantining of FOXTEL Cable had been, strictly speaking, unnecessary.

On appeal the Full Court found it was not necessary to consider section 212(2) preferring to leave the question open.

Importance of the Retransmission Case

The Retransmission case was significant because it is the first judicial consideration of the retransmission provisions of the *Broadcasting Services Act* 1992 (section 212) and the *Copyright Act* 1968 (section 199). Retransmission has been a feature of broadcasting since the commencement of commercial television in Australia but never before in the context of the competitive threat represented by subscription or pay television. Previously retransmission had been limited to, for example, self help transmitters in areas of bad reception. There is, however, no suggestion in the *Broadcasting Services Act* that retransmission should be so limited.

FOXTEL transmits the free-to-air signals to subscribers unaltered and simultaneously with their free-to-air broadcast from transmission equipment owned by the commercial broadcasters. The actual method of retransmission involves a number of technical steps the purpose of which is to switch the signal from one technology to another, protect it from being pirated by scrambling it, whilst at the same time maintaining the quality of the picture for subscribers. There is no alteration to the content of the matter broadcast.

The ability of a pay television operator such as FOXTEL to retransmit without a licence, without the consent of, and without remuneration to, local free-to-air services is broadly consistent with the copyright and broadcasting position in countries such as Canada, the United Kingdom and the United States. In effect, FOXTEL has accepted a de facto "must carry" obligation for the free-to-air services and in so doing has

made available some of the limited channel capacity on the cable system it accesses. In addition, it has made available to the free-to-air broadcasters channel positions consistent with the channel designations of those stations - something that FOXTEL had no legal obligation to do. It has undertaken these obligations in order to minimise inconvenience to its subscribers (who otherwise would have required a switch to be installed to enable switching between free and pay channels) and to ensure that subscribers receive the best quality reception available.

Broadcasting Policy

The *Broadcasting Services Act* commenced operation on 5 October 1992 and the potential of the clear words of the retransmission provision, section 212, to "assist" the subscription television broadcasting industry has been well known. For example, this potential was recognised (and consistently opposed) in numerous submissions by the Federation of Australian Commercial Television Stations ("FACTS") in a number of fora including the ABA inquiry into the proposed exercise of its discretion under section 212(1)(b)(ii) of the *Broadcasting Services Act* and the Copyright Convergence Group inquiry into certain deficiencies of the *Copyright Act*. The FACTS submissions explicitly recognised that legislative amendment was required to section 212 if cable retransmission by competitive new services were to be regulated.

The clear words of section 212 of the *Broadcasting Services Act*, in conjunction with the objects in section 3(a) and (b) and the regulatory policy in section 4(2)(b) support the proposition that Parliament had anticipated new technologies, even for the retransmission of free-to-air broadcasts. The Act has a deregulatory and avowedly technology neutral approach, in recognition of the rapid change in transmission technology, the convergence of broadcasting and telecommunications and the globalisation of communications industries. For these reasons arguments that sought to limit the clear language of section 212 of the *Broadcasting Services Act* by reference to the 1942 Act and its provisions on self-help retransmission were always going to be difficult.

Following the dismissal of the appeal in the Retransmission case, the

retransmission in Australia of free-to-air services within the licence area of the licence accordingly requires no additional licence or administrative action from the ABA. This is consistent with the position in the United Kingdom and, other than the absence in Australia of a "must carry" obligation, is consistent with the position in Canada and the United States.

In the United Kingdom prior to 1991 "must carry" legislation required cable operators to carry free-to-air broadcasting services broadcast in the cable operator's area as well as certain DBS satellite services. Since 1991 cable operators are no longer required to carry any services, although as a matter of practice, free-to-air broadcast services are generally carried by cable operators. No licence for carriage is required if the broadcast is intended for reception in the cable operator's area.

In Canada cable operators require a licence from the Canadian Radio and Television and Telecommunications Commission under the Canadian *Broadcasting Act*. Legislation requires cable operators to carry free-to-air broadcasts in accordance with a priority list found in the *Cable Television Regulations*. The Canadian free-to-air broadcasters are not entitled to payment for retransmission of their broadcasts.

In the United States under the provisions of the *Cable Television Consumer Protection and Competition Act* 1992 cable operators are required to carry the signal of local television stations within their local area. Cable operators with 12 or less channels are required to carry at least 3 local commercial stations. Systems with more than 12 channels must carry local television stations up to one third of their channel capacity. The so called "must carry" stations are entitled to certain channel positioning rights and cable operators are not entitled to accept or request compensation from television stations in exchange for carriage under the "must carry" rule.

Cable operators must broadcast signals of the "must carry" stations in their entirety and as part of their basic package.

Local television stations were required to make an election within 1 year of the enactment of the 1992 Act (and

thereafter every 3 years) as to whether they wished to be categorised as a "must carry" station or not. Where a station has chosen not to assert its "must carry" rights, cable operators must obtain the consent of the station to retransmit its signal. The consent process is effectively unregulated. If a station and a cable operator fail to agree on terms for retransmission, the cable operator will not be obliged to carry the signal of the station.

A "must carry" regime is undoubtedly anathema to the Australian free-to-air licensees: their vision would be more akin to a "may carry" regime, but with provision for copyright remuneration as a precondition to carriage. A United States type of legislative solution may yet result in Australia but in that event the real battle will be joined in necessary amendments to the *Copyright Act* and the structure of the compulsory licence regime.

Copyright Policy

In section 199(4) of the *Copyright Act* provision is made for the retransmission of certain works and films without infringing copyright provided they are part of an authorised television broadcast. That is, there is a defence to an infringement in the Act as it presently stands in section 199(7), the reference to an authorised broadcast is to be read as a reference to a broadcast made by the ABC, the SBS or "the holder of a licence or permit granted under the *Broadcasting Act 1942*".

There was much contention in the Retransmission case and on appeal as to the proper meaning of this expression in section 199(7). Ironically, the free-to-air broadcasters, in arguing that they were not holders of licences under the 1942 Act effectively conceded they had no copyright in their own broadcasts: see section 91 of the *Copyright Act*.

Section 199(7) was interpreted by Davies J. in the Retransmission case by reliance upon section 10 of the *Acts Interpretation Act*. From the perspective of the evident intention of the *Copyright Act* to permit retransmission of certain broadcasts there had been a repeal and re-enactment of the *Broadcasting Act 1942*. Although there are differences in structure and procedure between the 1942 Act and the 1992 Act that replaced it, the principal licences for television were and remained the commercial

broadcasting licences. All that Parliament was concerned to ensure from a copyright perspective was that a licence to broadcast existed. If it did, then the retransmission had the benefit of the defence to infringement provided by section 199(4).

As Davies J. noted in the Retransmission case, by making specific provision with respect to copyright to the same effect as the general provisions appearing in section 212(2) of the *Broadcasting Services Act* it could be concluded that the Parliament intended the provisions should apply together.

On appeal the Full court held that Davies J was correct in finding that the defence provided by section 199(4) was available to the Respondents for retransmission of the broadcasts of the commercial free-to-air stations, although the Court followed a different path in reaching this conclusion. Central to the Full Court's reasoning was the fact that section 199(7) refers to a licence or permit "granted" under the Act. The Court held that the commercial licences granted under the 1942 Act were kept alive by s.5(1) of the *Transitional Provisions and Consequential Amendments Act 1992*, with such licences continuing in force "as if" they were allocated under the 1992 Act. Accordingly, the Court held that "the reference in s.199(7) to the 1942 Act is descriptive of a licence which was in fact granted under the 1942 Act and which remains in force at the time of the alleged infringement of copyright" (*Amalgamated Television Services v FOXTEL Cable Television Pty Limited*, unreported, Federal Ct, Sydney, 26 April 1996 at page 16) and that each of the licences of the Appellants could be described in this way.

The *Copyright Act* position is substantially mirrored in other jurisdictions. In the UK, the *Copyright, Designs and Patents Act 1988* provides that where a broadcast made from a place in the UK is received and immediately retransmitted by a cable operator, copyright is not infringed provided that the broadcast is made for reception in the area in which the cable program service is provided and is not a satellite transmission or an encrypted transmission.

In Canada the free-to-air broadcasters are not entitled to any payment for broadcasts retransmitted on cable other than certain limited rights of distant broadcasters (that is outside the licence

area). For those latter broadcasters retransmission fees are paid. Broadcasters have no copyright in their signal but distance broadcasters can claim royalties for retransmitted programs they own. Collecting bodies have formed to collect royalties paid by cable operators. In the US, the Copyright Royalty Tribunal, a Federal collecting agency, collects and distributes royalties which must be paid to copyright holders by cable operators. The tribunal sets a yearly rate for royalty payments based on the gross monthly revenues of the cable operator and on the number of distant signals it imports. Significantly, the effective royalty rate for the retransmission of local broadcast signals is nil.

CONCLUSION

Unaltered simultaneous retransmission of free-to-air commercial television poses no policy dilemma at all. Broadcasting policy is properly indifferent to the purpose of a local retransmission provided that the retransmission does not alter the content of the original broadcast. The fact that the retransmitter is now a competitor to the free-to-air networks does not mean that it should be taxed by those networks. From a copyright perspective, it is not equitable that the broadcaster and any underlying rights holder should receive a windfall from a local retransmission. The broadcaster is not losing any of its audience as a result of the retransmission. It has had the opportunity to sell that audience to its advertisers. Underlying rights holders have also been remunerated in context of the original broadcast.

The Federal Government proposes to recognise retransmission rights of commercial broadcasters.

However, in the way the free-to-air television stations ran their case in the Federal Court they were prepared to relinquish copyright in their broadcasts to prevent retransmission by FOXTEL. Perhaps this suggests that the more valuable copyright is program production rather than mere compilation. That is, if royalties are to be paid at all it should be to the underlying rights holders not the transmitters of those rights, and only with respect to retransmission in an area outside the original area of broadcast. This is, after all, consistent with international practice.

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Mobile Phone Advertising and the Trade Practices Act

Christina Hardy highlights some of the issues for the telecommunications industry which arise from the Federal Court's recent decision on misleading and deceptive conduct in the advertising of a mobile telephone plan.

The latest decision on misleading conduct in the telecommunications industry by a single judge of the Federal Court of Australia has continued to send a hardline message to an industry at an extremely aggressive stage of competition.

Facts

On 6 March Tamberlin J. handed down the decision in *Trade Practices Commission v. Optus Communications Pty Limited and Optus Mobile Pty Ltd* ('Optus').

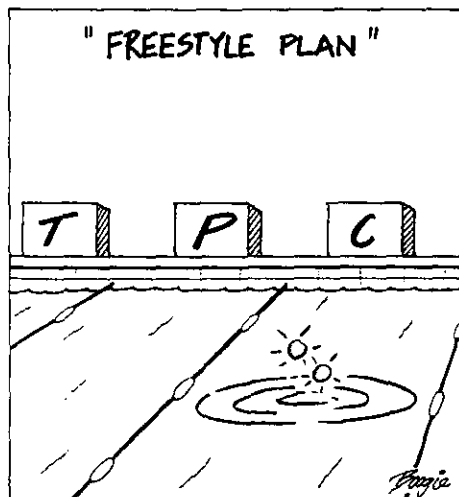
The Trade Practices Commission (TPC - which handed over its regulatory reins to the Australian Competition and Consumer Commission (ACCC) in November 1995) commenced an inquiry into a 30 second television advertisement for the Optus "Freestyle" digital mobile telephone plan following complaints made by Telstra Corporation Limited for misleading and deceptive conduct.

The Freestyle Plan product comprised a digital mobile phone handset and a connection to the Optus network with a connection fee and monthly access fee. In return for purchasing the handset at a low price, the customer committed to a 12 months' network contract. Early termination of the network contract by the customer involved paying out the access fee for the remainder of the term.

The advertisement, which ran on three television stations from 30 March 1995 to 7 June 1995, offered free local calls using the following phrases: "one hour of free local calls on weekends", "free local calls on weekends" and "free local calls". At the bottom of the screen the following superscript appeared for four seconds: "Only Optus Freestyle Plan has free weekend calls (up to \$52 per month). Some exclusions apply".

During the first three weeks of the advertising campaign, the words "See local newspapers for details" appeared at the close of the advertisement.

Newspaper advertisements were run two to three weeks after the launch of the product on 31 March 1995 in conjunction with the television advertisements. In the newspaper advertisements, the word "Free" and "Calls" appeared in large typeface. The words "Some exclusions apply" appeared at the bottom of the advertisement in script that J Tamberlin considered to be one twentieth the size of the words "Free" and "Calls". The newspaper advertisement did not list the exclusions.



Mobile to mobile calls were excluded from the \$52 worth of free weekend "local" calls advertised, but this was not mentioned in the television or newspaper advertisements.

The TPC alleged a series of oral misrepresentations by Optus employees in connection with the Freestyle Plan. To assist with its inquiry, TPC officers visited and telephoned various Optus Centres to obtain more information about the product. Optus staff did not volunteer information about the exclusions of mobile calls when asked about the Freestyle Plan by TPC officers.

Trade Practices Act

The relevant provisions of the *Trade Practices Act 1974* (Cth) (TPA) were

section 52, subsection 53(c) (prohibiting any representation that goods or services have benefit they do not have), subsection 53(e) (prohibiting false or misleading representations with respect to the price of goods or services) and subsection 53(g) (prohibiting a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy).

Issues and Findings

The three issues in the case were:

- Whether there had been misleading or deceptive conduct or representations which fell within sections 52, 53(c), 53(e) or 53(g) of the *Trade Practices Act*

Tamberlin J. found that Optus' conduct was misleading and deceptive and in breach of the relevant sections of the Act.

- Whether an injunction should be granted to restrain Optus

Tamberlin J. decided that "proper protection of the public interest" required that a declaration be made to give effect to his findings that the television advertising was deceptive and misleading and breached subsection 53(e). He also found that an injunction should be granted to restrain further repetition of the Optus conduct. He referred to the fact that this conduct had continued after the TPC had expressed its concern in the months after the issues had first been brought to the attention of Optus by Telecom.

Interestingly, on 17 July and 13 September 1995 Optus had given undertakings to the Court that it would not broadcast the advertisement without a prominent disclaimer referring to the exclusion of calls to other mobile phones. The TPC relied on the fact that it first expressed its concern in writing to Optus on 10 May 1995.

• **Whether corrective advertising by Optus should be ordered**

His Honour did not order corrective advertising on the basis that the declaration of misleading and deceptive conduct and the granting of injunctive relief had sufficiently protected the public interest. In addition, Optus had taken steps to train staff to avoid a repetition of the false representations. Justice Tamberlin considered that the "incentive and monitoring effect" of an injunction would serve to minimise any repetition of the misleading conduct.

Target audience

The TPC submitted that the target audience of the advertisements comprised (in the words of Tamberlin J.) "young people who are relatively inexperienced in the use of mobile phones and are relatively unsophisticated as to the charging mechanisms and terminology used."

Optus, on the other hand, considered that the target audience "must be taken to have substantial familiarity with fixed line services and with telephone directories and services generally, and as a result they should be taken to be familiar with the charging procedures adopted by the communication corporations".

Tamberlin J. found that "the relevant section of the public includes those persons who wish to use the phone for social and recreational purposes, many of whom will be first time mobile phone users". Justice Tamberlin did not accept the contention that this group could be "taken to have sufficient familiarity with mobile phone billing provisions, statements in telephone directories, standard practices of persons using mobile phones, or the timing of mobile calls so as to lead them to infer that the term "local call" as used in the context of a mobile phone, would mean an untimed call".

Further, His Honour stated that "it is inappropriate to view the advertisement on the basis that it is directed to an audience of such sophistication so as to be cognisant of and aware of telephone billing practices".

What is a "local call"?

Of particular interest to telecommunications lawyers is his Honour's approach to what constituted a "local call".

Optus contended that consumers would understand a local call to be an "untimed call". To support this, Optus relied on evidence of a Telstra employee set out in a letter to the TPC from Telecom which stated that "in my view, consumers would consider a local call to be an untimed call regardless of whether it was made on a fixed or mobile phone".

Optus also referred to the telephone directory which describes local calls as "untimed calls". Optus said that since all calls to other mobile phones are timed, they would not be considered a local call and therefore a consumer would not be misled by the advertisement.

The TPC submitted that "local calls" referred to all calls from a mobile phone within a geographic area, whether or not they were timed.

Tamberlin J. agreed with the TPC view that consumers would understand a local call to be a call to a limited geographic location. In support, the TPC referred to the ordinary Macquarie Dictionary and Shorter Oxford English Dictionary meaning of "local". The Shorter Oxford English Dictionary defines "local" as "...of or pertaining to a particular place in a system. 2. Belonging to...a particular place, locality or neighbourhood, esp. a town, country...as opp. to the country as a whole".

The special collation of a "local call" in the Oxford English Dictionary is cited: "a telephone call within a prescribed area around a callers local exchange".

In determining whether the "local call" statement was misleading, his Honour applied the test of the sense in which a reasonable person would understand a statement on a fair viewing (*Typing Centre of NSW Pty Ltd v. Northern Business College Ltd* (1989) ATPR 40-943).

In any event, Tamberlin J. found that even if a consumer understood a local call to be an untimed call, it was not possible to make an untimed call from a mobile phone, and therefore, the exclusion was meaningless.

Post-broadcast steps

Optus argued that there were several points in time between viewing the advertisement and signing a Freestyle Plan contract which would negate any misleading impression that a potential

customer would have gained from viewing the advertisement.

For example, to participate in the Freestyle Plan, a customer would have to make further enquiries at an Optus Centre or the premises of an Optus agent, and speak to a representative of Optus. In addition, at these locations were numerous materials (including flyers, pocket guides, and information on the back of the handset box) which referred to the mobile to mobile exclusion. His Honour applied *Tec and Thomas (Australia) Pty Ltd v. Matsumiya Computer Co Pty Ltd* (1984) 1 FCR 28. He found that if a viewer did take a further step of making enquiries, they would probably be led to do so as a result of the "attractive but misleading" publicity in the television broadcast. Further, that many viewers would not make specific enquiries about whether mobile to mobile calls were within the exclusions. His Honour also found that, on evidence presented by the TPC, Optus sales staff could not be taken to make it clear to enquirers that mobile to mobile calls were excluded.

Implications

The case has implications for the entire telecommunications industry, not just the mobile telephone sector.

The case illustrates the difficulty in conveying complex product descriptions in television advertisements. It also indicates the importance of following through in any related media advertising, such as local newspapers in the Optus case, with the detail of any applicable exclusions (although it should be noted that there is no indication in the judgment that any follow-through would necessarily negate a finding of a s.52 contravention with respect to a TV advertisement.)

Further, a company cannot assume that post-advertising steps taken by consumers will dispel any misleading impression in an advertisement. The current view is that an advertisement will stand alone to be judged whether it is misleading or deceptive.

In addition to any general in-house trade practices compliance training program, there is need for training on specific products as and when they are released. This becomes more difficult to control when, as is so common in the mobile telephone market, selling is done through agents and dealers.

The ACCC has been successful in obtaining undertakings to conduct compliance training from several mobile telephone service providers. The fact that the ACCC proceeded to prosecution in this case demonstrates that it takes any infringements very seriously indeed.

The literal approach to the meaning of "local" call also sends out a warning to an industry that has developed and relies on technical jargon to "sell" its product and services. When tested in the courts, these assumed terms of art cannot be

relied upon as conveying the correct meaning to consumers.

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Competition, Content and Cultural Identity - Why Free-To-Air TV will thrive in the Future.

Kerry Stokes, Chairman of the Seven Network, discusses the future of broadcast television in the face of competition from pay television and converging technologies.

A question I am often asked is: "Why invest in a Television Network?" "Broadcast Television is an anachronism. Television will be relegated to the pages of history." "It will be surpassed by new communication technologies. Audiences will leave television behind." My answer is simple. You are wrong.

It is clear that broadcast television will thrive in the new world of communication technologies. We can however be certain of one thing. Broadcast television will change.

You may ask how broadcast television will retain a presence in what will undoubtedly become a crowded market. You may also hear a lot of dire predictions about the future of broadcast television. What is being lost in the headlines is the underlying strength of broadcast television. The capability to deliver large unsplintered audiences. What is also being overlooked is the strengthening of broadcast television in international markets.

Much has been written about the future developments in information technology. While the changing shape of telecommunications has been the subject of thousands of column centimetres, uncertainty remains about its form and content. Despite the conjecture, "crystal balling" and in some cases "navel-gazing", we can be certain about a number of key facts.

First, broadcast television will continue to dominate communications, commanding the largest audiences and the biggest slice of advertising revenue.

It is worthwhile to consider some of the latest figures from the United States, where cable has been part of television for 4 decades:

- Despite the continuing dramatic increase in the number of viewing options - in some markets as many as one hundred channels - broadcast television commands more than 70 per cent of total viewing. Cable and pay television attract less than 30 per cent of total viewing, with the leading cable networks attracting household ratings of less than two per cent.
- The four networks in the United States - NBC, CBS, ABC and FOX - command more than 80 per cent of total advertising revenue. Less than 20 per cent of the advertising revenue pie is split between the plethora of cable networks.

Largely overlooked in the ongoing debate about the wonders of new communications technology is the issue of content. Those who own the copyright will be the gatekeepers in this new multi-media environment. All information and entertainment is driven by quality of content - whether it is movies, music, information, sport, text or data. This key fact is driving Seven's future planning and business strategies which ensure the ongoing development of expertise in programme production.

The third key fact is the marketing of broadcast television. Seven is one of Australia's best known and highly regarded brands. Some recent surveys show Seven up there with the likes of Coca Cola and Holden in terms of brand

recognition. The imperative now is to build from this platform of strength and ensure branding across all programmes and markets to reinforce Seven's position as the number of viewing options increase. There has been some interesting consumer research in the United States. In a crowded market - in a battlefield of 100 channels - the three most recognised and highly regarded brands in television are NBC, CBS and ABC. All three networks have worked vigorously to protect their franchise and build their brands. Expect the same of Seven in this country.

The fourth key fact is the evolution of the relationship between the network and the advertiser. The days of simply buying time are behind us. Increasingly networks will form partnerships with advertisers to ensure campaigns are relevant, targeted, flexible to respond to competitive activity and provide "value-added" elements.

Mega-mergers and other alliances over recent times have been drawn between the owners of delivery systems and entertainment software. The relationships between television, entertainment, publishing and computers provide us with the fifth key fact. Telephone companies will increasingly provide a method of distribution of information, particularly into the home. Computer companies will develop control mechanisms and will design systems which will allow the marriage between entertainment companies, publishing companies and telephone companies.

While we are talking about convergence - of competitors and media - it is worth pausing to consider some key socio-economic issues which will affect the take-up of new services. Most people use computers for commercial purpose or reward. Conversely, people watch television for pleasure and entertainment. Most people in the commercial world are conditioned to the thought of replacing computers with new, upgraded models for ease of work and applications. Nobody has conditioned the consumer for the upgrading of television sets that will allow audiences to take advantage of digital technology. If you bought a television set in 1956 to watch the Melbourne Olympic Games, you would still be able to watch television - albeit in black and white. And if you bought a colour television in 1975, you probably have little reason to want to change it. It would be a brave government which alters the delivery system - to the exclusion of analogue broadcasting - over the next twenty years.

There is a final key fact. Back in 1956, pundits predicted television would spell the end of cinema. Not so. Hollywood changed and met the demands of audiences. The studios even embraced the "enemy" and began to produce programming for television. Today, the studios are thriving. Cinemas are back and growing. Not even increased viewer choice through the introduction of prerecorded video cassettes could provide a knock-out punch.

Television pushed radio into the background thirty years ago. Many thought radio was dead and buried. Radio however also met the challenge. It developed new programming formats. Now radio is stronger than ever, with more frequencies than ever and broadcast television will prosper in the dramatic changes to our communications environment. After all, audiences don't care - and don't want to know about - the delivery technology. All they want to know is what is appearing on the television screen. Sure, broadcast television will face more competition. That's a fact of life but we are the only game in town that can deliver a major unduplicated audience.

Broadcast television will continue to command the largest audiences and largest share of advertising revenue in the expanding communications environment - regardless of the number of channels. Cable and satellite delivery platforms bring new and exciting challenges and opportunities for all those involved in

media and communications and not necessarily to the exclusion of broadcasters. There will be new and exciting opportunities for those with entrepreneurial abilities to develop exciting alternatives - an example is MTV in the United States. But these services will always be, by their nature, narrower in their appeal than the services offered by broadcasters. If you look at the pure mathematics of audience delivery, fragmentation will be to the advantage of those who continue to provide a larger market share as a proportion of total viewers. Cable has been around in the United States for more than forty years and, even though the days of the three television networks commanding 90 per cent of the viewing audience have long gone, broadcast television continues to prosper. There are now more television stations in the United States than there were thirty years ago. That country has moved from three networks to four and counting, and then there are the dramatically increasing number of independent and public stations. Add into the mix more than one hundred cable television channels and other options such as direct-to-home satellite programming, and broadcast television still leads the market. The three major networks are buoyant, creative and profitable. They are meeting the competition and thriving.

Let's take a look at cable. CNN is probably one of the best known cable networks. But even today, it is scratching for a substantial audience in the United States. What it generally needs is a good war or murder trial involving a high profile sporting personality live in prime time to generate an audience. However, once the war is over and the jury has delivered its verdict, it slips back.

Then there are the "retro" cable channels. This is a cute, marketing term for channels which show re-runs of network programmes long since relegated to the pages of television history. In a strange twist, network television is now a significant source of programming for cable television channels.

Recent developments in the United States confirm that broadcast television will continue to flourish:

- The merger of the Walt Disney Company with Capital Cities - ABC;
- The Westinghouse purchase of CBS;
- NBC's alliance with Microsoft;

- The success of Fox in becoming a credible fourth television network;
- And the moves by some of the major film studios to develop what will become the fifth and sixth television networks.

These corporate manoeuvres which have captured our attention confirm what broadcast television has known for a long time. No one can surpass our audience delivery. Only broadcast television can deliver the audiences. Sure, we'll change the way we do things. Broadcast television will need to adjust to the addition of new channels and the competition which will develop. While we are positive about the future of television, we are not putting our heads in the sand. Over time, broadcast television will lose some audience share and some share of advertising revenue. But you can be assured that broadcast television will work harder and smarter.

While we can make comparisons with the United States, Australia is a different market. The facts are we have a broadcast system, which in my opinion, is equal to the best available in the world. This is primarily the result of having strong alternative broadcasters - such as the ABC and SBS. In addition to the strong commercial competition, Australian audiences are used to getting a broad range of services for free, services which do not exist in most other countries.

One of the driving factors in the future of broadcast television will be a commitment to be "Australian". Only broadcast television will ensure that we do not become a suburb of Los Angeles. Australian programming defines broadcast television. Sports also define television. Seven's agreement with the International Olympic Committee is an indication of the future development of relationships between broadcast television and sports. The network's agreement with the Australian Football League is another tangible indication. Sports draw audiences to television. They allow television to do what it does best - coverage of events of significance to the majority of Australians and the delivery of major events to all Australians, whether or not they decide to subscribe to a particular cable channel.

News and current affairs is the other important linchpin in the future development of broadcast television. News and current affairs must be the flag carrier for a television network. News

and current affairs defines a network and its credibility and respect with audiences.

Technology can do so much to bring us closer. It can increase the sense of community. It can aid in the process of integrating our rich and diverse culture. It can provide the basis for a major export industry that will cement forever Australia's identity on the global stage. It can also, if we aren't very careful, cause us to lose touch with our neighbours and fellow citizens as we disappear in a fog of global technobabble. Technology is a tool and a good and useful tool, but it is a tool nonetheless. 158 years ago, Wheatstone and Cooke in England, and Morse in America, invented a means of transmitting coded letters by copper at close to the speed of light. 158 years is only a brief period in history, but it has delivered all the ingredients to radically change our media, our lives, our culture and our national identity.

Technology took a giant leap forward in 1948 when Shockley's team in the United States invented the transistor. Today, a single chip can contain 10 million transistors - a number that nearly doubles every couple of years. Once it was thought that the world would only need a few computers. Today, computers are a part of our lives and computer capacity doubles and halves in price every two years. 40 years ago, hardware encompassed a typewriter, a telephone, a

radio... and possibly a television set. Today the hardware includes: set-tops, servers, terminals, consoles, CD-Roms, VCRs, facsimiles, PCS and television.

The delivery platforms have also come a long way. Broadcast television, telephone companies, cable television, direct broadcast satellite, personal computers, wireless, on-line, cinemas - even the corner video store. How individuals, community organisations, businesses and government respond to technological changes is very important to Australia. The technologies have the potential to increase our standard of living, not just economically but also qualitatively. They can make us better human beings with a wider knowledge and understanding of the world in which we live. They have their dangers too, especially for a country like Australia. The principal danger is that we become swamped and our culture eroded by the avalanche of material from other countries, particularly the United States.

There is an Australian culture and it is worth preserving. Information and communications policy is essential to that task. Very simply, without communication, there is no culture. The two are almost synonymous: most acts of culture are acts of communication of one sort or another. The greater the level of foreign involvement in these acts or communication, the greater the risk that

our culture will be diluted. There is a unique Australian identity that is worth preserving and this identity is under threat from the globalisation of the information industries and the present lack of direction and co-ordination in the introduction of new communication technologies. At the moment, Australia is hell-bent on laying cable above and below the ground - at a cost of many billions of dollars. All these services could be much more easily provided through satellite delivery, a process which would ensure a quality of service at a fraction of the cost to all Australians. Technically, there is no reason why we cannot be providing hundreds of channels from the sky before the cable is rolled out.

As I outlined in the Boyer Lectures, capital is a limited resource and as a nation we should be looking to optimise its utilisation. A little earlier, I referred to a danger that we could become a suburb of Los Angeles. This is no particular slight on Los Angeles - it's just that Los Angeles is not Australia and there is no need for us to surrender our cultural identity, certainly not without a fight.

Kerry Stokes is Chairman of the Seven Network. This is an edited transcript of a speech presented at a recent Cable and Satellite Television Conference in Sydney.

The Legal Frontier of the Internet I

Robert Cumbow predicts that the United States response to the legal and regulatory challenges posed by the Internet will generally be the adaptation and application of traditional legal principles.

The Internet, though not new, has enjoyed phenomenal growth in the last couple of years, and even more phenomenal media attention in the last few months. The past year has certainly been the year of the Internet. This has been due, in large part, to the advent of the graphically appealing World Wide Web, and computer software that enables it to be accessed and used efficiently.

With the increase in population on the Internet has come an increase in conflicts and controversies, giving rise to a recognition of the need for some form of authority and order, some standard by which conduct on the Internet can be measured.

But because the Internet has, until recently, been a frontier, populated by pioneers, and pioneers do not take easily to being told what they can and can't do, there is considerable resistance to the idea of Law on the Internet.

And not without good reason. It is entirely legitimate to ask not only whether there should be law on the Internet, but whether there can be.

People who ask whether there should be law on the Internet often point out that the Internet doesn't need law, because it is self policing. 'Netiquette' is the term given to the unwritten code of behaviour that governed the Internet community

while it was still a close-knit group of computer cognoscenti.

One rule of Netiquette was 'Thou shalt not advertise'. Any effort to turn the net into a commercial communication medium was staunchly resisted. 'Spamming' - the sending of self-promoting messages to all members of one or more news groups was universally condemned. It was the one form of net misconduct that justified 'flaming' - the sending of harassing and insulting messages in reaction to someone else's communication.

In a way, this resistance to early efforts to use the net for commercial communication led to the growth of the

WorldWide Web. While deliberately sending commercial information to an audience that mostly did not want it was intolerable, no one could fault you if people came to you for it. As soon as it became practical to do so, businesses and other organisations began establishing web sites, offering information about themselves and their services. Spamming is still frowned upon; but the battle to keep the Internet non-commercial has already been lost.

That fact has made it seem increasingly necessary that some form of control be exercised with regard to what can and cannot be done on the Internet. But many people - particularly the long time Net pioneers - ask whether there can be law on the Internet? Some believe the transfer of digital information, by its very nature, excludes the possibility of law - at least in the traditional sense. They speak in terms of 'virtual space', the realm in which Internet communication takes place, a community without boundaries, in which information can be received, copied, altered, and re-transmitted in seconds. There are a number of reasons why such a community does not easily lend itself to the traditional rule of law. Not the least of these is the question, Whose law? The Internet is truly global, so what nation's law can contain it?

But, others argue, virtual space is not real space, and the Internet is not an actual 'place where transactions occur' it is merely a network of relationships, not significantly different from telephone service networks. Telephone services span the globe; yet there has never been a serious legal difficulty in determining what law to apply to a question or dispute arising from some intercontinental communication, transaction, or transgression involving the use of the telephone. Like any new medium, the Internet may simply seem more different than it actually is. Digital information may not, after all, be substantively different from physical property; and people's rights and responsibilities may not be so terribly different on the Internet than they are in any other medium of human intercourse.

Arguments for regulation.

There are certainly compelling arguments for some form of control on Internet communications. Among these are:

- The need to protect Children: There is a need to assure adult's privacy and free expression, while still protecting

children from abusive, harmful, or simply inappropriate materials.

- The need to protect consumers: The Internet may be used as mechanism for consumer fraud. On the Internet, it's easier to pretend to be someone or something you aren't.
- The need to protect business and property interests, to prevent theft or devaluation of intellectual property and to preserve fair competition among businesses.

Even people who see the need for Internet users to recognise the rule of law urge caution in the area of government control. In the United States, a number of questions have arisen with respect to governmental regulation of the Internet.

- Since the government built the Internet, why shouldn't it regulate it?
- If the government should police the airwaves, why shouldn't it police the Net?
- Is the Net enough like broadcasting or publishing to be subject to similar regulation?
- Or is the Net more like the mail? The government doesn't read my mail (at least as far as I know), so why should it read my e-mail?
- Or is the Net more like the phone system? Federal wiretap law applies to phones and faxes - and maybe to e-mail.

Arguments against regulation

Those who oppose government regulation argue that such control could mean censorship; but the mere threat of government control could mean self-censorship, which can be just as chilling to free expression. If the Internet stands for anything, it is free expression. That is its principal attraction and another reason that its users are so resistant to external constraint.

A more practical argument is often put forward by those who oppose the rule of law on the Internet - enforcement is difficult if not impossible. As we examine briefly some of the legal disputes that have already arisen with regard to certain Internet issues, we shall see that there is a measure of truth in this. Sometimes it may be difficult to tell whether a wrong has been done, or, if it has, who the perpetrator was. But the

practical difficulties of enforcement should not serve as an excuse to abridge substantive rights such as the right to one's own creative work, or the right to have one's reputation untarnished by lies or misinformation.

One form of enforcement already exists, not in the government but in the online service providers, many of whom have subscriber rules regarding copyright, defamation, offensive language, abusive activities (such as screen scrolling). These are easily enforced by the threat of cancellation of one's access.

Despite the voices of the pioneers who claim that the Internet is so different that traditional law cannot apply to it, the general consensus seems to be that the law as it already exists applies in most ways to Internet communication. Let's look at some of the ways in which traditional law continues to provide the rules of the road for the Internet and some of the areas in which new law is being made.

Defamation

Although the Internet is an important medium of free expression, and has arguably become so popular precisely because its users feel they can truly speak their minds online, there is a limit to what anyone can say about another person. Defamatory speech is not protected as free expression.

Generally, to be defamatory, a statement has to be false, it has to be published, and its publication has to harm the person about whom the statement is made. A statement of opinion, or a mistake of fact, is not defamatory. There must be an intent to publicize a falsehood, or at least negligence with regard to the truth.

Internet users have always been less than careful about the truth, often sending emotionally-driven messages off the tops of their heads, without pausing to consider where they are going, who will see them, and what harm they might do - in both directions. This has made the Internet a particularly hazardous environment for commercial businesses, who are considered fair game for net talk, and who may be seriously damaged (or rewarded) by online commentary about them and their competitors.

But although there is a fair amount of arguably defamatory speech on the

Internet, online defamation cases have so far concerned themselves with the question, Who is liable? The author of online defamatory remarks is often not a likely target for a lawsuit, but the online service provider may be. In *Cubby v. CompuServe*, 776F. Supp. 135 (S.D.N.Y. 1991), an online service provider was held not liable for defamatory information published on its service. It was held to exercise little or no control over the content of messages and postings carried on its service, making it more like a common carrier, and less like a publisher. But in *Stratton Oakmont v. Prodigy*, 1996 N.Y. Misc. LEXIS 229; 23 Media L. Rep. 1794 (Sup. Ct. N.Y. 1995), a court found that the Prodigy online service might, after all, be liable for defamatory comments made on its service, because Prodigy had held itself out to the public as a family online service that supervised for suitability the content of its various service features. More recently, in *Carib Inn v. America On Line*, the question has been asked whether an online service provider has a duty to reveal the identity of a subscriber who used its service to post arguably defamatory comments anonymously.

Harassment

Another form of unprotected speech is the kind of speech that is used to harass or threaten another person. Besides being a matter for civil action, this can potentially be criminal in nature, as was discovered by a Connecticut computer user who was prosecuted and had his equipment briefly confiscated under the State's computer harassment statute after posting unflattering comments about the State's governor. (News media republished the remarks verbatim with impunity under the news reporting privilege.) Jake Baker, a University of Michigan student, was arrested and charged with interstate threat under a federal statute after posting online a story in which he expressed dangerous fantasies about a female classmate. Baker was freed when the court decided that his posting was merely a piece of fiction, not an expression of his intentions regarding the woman.

Advertising

In the United States, commercial speech enjoys a lower level of protection, so a distinction has to be made - in peoples minds, on the net, and in the law - between purely informational

communication and promotional communication. It may be harder to make that distinction online than in the pages of a newspaper or on television. One of the basic precepts about World Wide Web site, for example, is that, to be successful, it has to offer useful information. Does the fact that a commercial web site offers something useful to its visitors entitle the site owners to greater protection than that given to, say, a television commercial?

In the United States, the advertisement of cigarettes and alcoholic beverages are strictly regulated, and altogether prohibited in some media. Will advertisers use the net to find ways around these prohibitions? If they did, would that prompt the government to step in?

In France, advertising that expressly compares the advertiser's product with another is prohibited, and all advertising is required to be in French. Would a web site or a promotional posting in English, promoting one cola that was preferred over another in a taste test, be subject to censorship in France?

These questions are still being asked, so it is clear that, in this area of Internet use, the traditional law is not enough.

Privacy

The privacy questions raised with regard to the Internet express two sorts of concerns:

- Individuals invading one another's privacy
- Government invading everyone's privacy

Whether or not privacy has been violated depends first of all upon whether there was a reasonable expectation of privacy to begin with. Should someone who uses the net have a reasonable expectation of privacy? This comes back to the question whether the net is more public or private, more like a news publication or broadcast, or more like a personal letter or a phone call. But even that distinction does not work as well as it used to. Cellular phone users, for example, know that they are entitled to less expectation of privacy than users of conventional phones or writers of letters. Will the same be held to be true of those who use the Internet?

Questions of security are raised with regard to commercial transactions on the Internet, especially those involving credit card numbers. Ironically, many of the people who most resist the idea of giving out a credit card number online readily give out their credit card numbers on the phone, through the mail, and over store counters every day - yet these media of commercial transactions are no more secure than the Internet.

The ready availability of transaction records, however, can be used to great marketing advantage. Using the net, it may become easier for a business to know who is reading what, asking about what, and buying what. How much of this information *should be* accessible? And would a business be liable if someone got a customer's card number or other information from one of its transaction records? This concern presents an obstacle to online marketing - and that is why online security is one of the big issues of research right now.

One possible solution is the traditional one of limiting access by means of subscriptions (paid or unpaid), keyed to passwords without which a site cannot be accessed or a transaction cannot be made. Another is encryption, with which a site or posting might be accessed but cannot be *interpreted* until it is decoded. Encryption, if not the whole and final answer, is at least a good interim tool.

The United States government's restriction on the export of strong encryption, which it classifies as munitions, has stood in the way of universally available encryption sufficient to ensure a high level of security. But such encryption is already available in and from other countries, and the United States appears to be relaxing its encryption policy.

Its reasons for wanting to control the availability of strong encryption are, of course, good ones. Strong encryption can be a potent weapon in the hands of an opposing military or criminal force. For the same reason, the government pushed for the 'Clipper Chip', a proposed standard component of computer hardware that would provide the government with a 'back door' into encrypted communications. The proposal is virtually dead, following impassioned opposition by computer privacy advocates.

Another way of making online commercial transactions more secure is the use of digital cash. Services known as 'Digicash' and 'Cybercash' have already appeared. Under these systems, generally, a consumer or business opens an account with a deposit of conventional money, and receives an equivalent amount of electronic cash, which can be used for quick, secure online cash transfers at the depositor's command. A system of multiple passwords and coding accounts are kept anonymous, so that only the depositor knows where and how the money has been spent, and is the only one who can access the electronic cash or transaction records.

Online crime

As already noted, some uses of the Internet may go beyond the bounds of merely civil dispute to become actual crime. Although not as prevalent as the news media make them seem, computer 'hackers' are out there, invading other people's files for fun and sometimes profit, occasionally causing costly damage. Less sophisticated, but also becoming Net-wise, are the more traditional thieves and grifters. An Arizona couple cheated Internet users out of \$27,000 by offering to sell trading cards for a popular game called 'Magic', at \$85 per card set. Money was sent, but no cards were delivered. The couple were indicted for mail fraud and went to prison. No wonder some Net users are nervous about online transactions.

The difficulty of detection and investigation makes online crime a continuing - perhaps growing - danger. Another problem in the war against online crime is that of evidence. What constitutes admissible evidence of a crime when you're dealing with digital information? How do you know it hasn't been altered or modified? How do you even know it's genuine? An American

accused of violating child pornography laws escaped several of the charges against him when his prosecutors were not allowed to present into evidence materials from the hard disk of a computer in Denmark from which he had allegedly down loaded the pornographic images. And arrests have been made under child pornography laws for the computer transmission of images that were entirely computer-generated, and not photographs of real children at all.

In the criminal arena, too, encryption can be a threat rather than a welcome assurance of security or privacy. This is why government access to encryption keys is such a hotly debated issue.

Procedural Issues of Law

As mentioned earlier, if law applies on the Internet, whose law applies? Does sending or receiving information via the Net subject someone to the jurisdiction of the courts of a different state even a different country? If so, that could pose a serious obstacle to the much-predicted emergence of the Net as a widespread means of soliciting and transacting business. The problem of disparate advertising laws between the United States and France was mentioned earlier as one example. But even within the United States, local laws and community standards vary. A citizen of California went to prison for operating a bulletin board service that transmitted materials that, while perfectly legal in California, violated local laws in Tennessee, where the stuff was unfortunately down loaded by a US government employee.

Another legal issue arises from the growing use of the Internet as a source of legal research. Should non-lawyers who use the Net to provide information on law be subject to prosecution for practising law without a license? Should people who rely on legal advice given online by

a lawyer from another state or country be entitled to sue that lawyer for malpractice if the advice turns out to be wrong? At what point in an online conversation about a legal issue between a lawyer and a non-lawyer does a lawyer-client privilege attach? If a lawyer sends a client a document by e-mail, is the attorney-client privilege waived by arguably 'publicizing' the document? Should the attorney be required to encrypt the message? What impact will the availability on self-help legal resources on the Internet have on the legal profession?

Already mentioned in the defamation context is the issue of liability. Who is responsible when a civil wrong is committed online? Service providers were held not liable in *Cubby v. Compuserve*; but potentially liable in *Stratton Oakmont v. Prodigy*, and bulletin board operators have been found quite definitely liable for copyright violations in *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (D. Fla. 1993) and for criminal violations of pornography laws as noted earlier.

Conclusion

So what are the trends for the future? Not the development of a complete new concept of former for a law-free Internet community, but the slow, agonizing process of adapting the principles and application of traditional law to fit the special cases that the Internet will, increasingly, present. But despite the agony and the slowness, the legal frontier of the Internet is an interesting place to be, and now is an interesting time to be there.

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The Legal Frontier of the Internet II

David Stewart critiques the US decision in *Religious Technology Centre v Netcomm On-Line Communication Services Inc* (1995) 33 IPR 132 and sees a tough road ahead for plaintiffs claiming copyright infringement over the Net.

The Case

The Religious Technology Centre (RTC) and Bridge Publications Inc held copyright in various works by L. Ron Hubbard, founder of the Church of Scientology. Dennis Erlich, a former minister who has since become a critic of the Church, copied sections of those works and posted those files on the Internet (to a specialist newsgroup, alt.religion.scientology, which he accessed via a bulletin board system (BBS) operated by Thomas Klemesrud. Klemesrud's BBS was not directly connected to the Net, relying instead on a connection to Netcomm On-Line Communications Inc (Netcomm), one of the largest Internet service providers (ISPs) in the US. The entire BBS-Netcomm structure was used to support Internet access for about 500 users other than Erlich. Neither Netcomm nor Klemesrud attempted to or did control the information passing through their computers, although Netcomm had, in the past, denied access to users (eg. for failure to pay subscription fees).

After failing to silence Erlich by approaching him directly, the RTC contacted Klemesrud and Netcomm and demanded that Erlich be denied access to their computers, informing the providers that the RTC and Bridge Publications Inc owned the copyright in the works which had been posted by Erlich. Both Netcomm and Klemesrud refused, on the basis that Erlich had legitimate uses he could make of the BBS, posted non-infringing as well as infringing material, and there was no way they could prescreen his posted material for copyright violations. Klemesrud took the position that he would not act until (at least) the RTC had proven to him that they were the copyright owners of the works posted. Netcomm pleaded technical difficulties, suggesting that it would be impossible to screen material before it was posted, and that Netcomm could not isolate Erlich's connection from the rest of Klemesrud's BBS (and hence denying Erlich access meant denying access to hundreds of users who

had not participated in any way in the alleged infringement).

The RTC sought a preliminary injunction to restrain Netcomm and Klemesrud from permitting Erlich continued access to their computers, while Klemesrud and Netcomm sought summary judgment on the copyright claims.

The Result

The application for the injunction failed, as did the application for summary judgment.

The court (appropriately) deferred a definitive examination of the issue of infringement until a full trial. Nevertheless, the consideration of the application for an injunction restraining Netcomm and Klemesrud from granting Erlich access to the Internet demonstrated quite clearly the likely approach of American courts to the issue

The Court's approach featured:

- a broad definition of copying, which includes impermanent copies of documents or applications created internally within a computer system where those copies are capable of being retransmitted or perceived, reproduced, or otherwise communicated for a period of more than transitory duration (*MAI Systems Corp v Peak Computer Inc* 991 F 2d 511 at 518);
- use of the public facility analogy as a model for ISPs and other network providers role in the process of copying via a network (this is the photocopier for public use model which places facility providers as passive and non-involved in the copying process, appearing in Australia as the rationale for s.39A of the *Copyright Act*);
- a lack of enthusiasm for actions against service providers founded on 'public distribution' and display. Despite the fact that the American courts have already sustained an action for infringement by public display over computer networks

(*Playboy Enterprises Inc v Frena* 839 F Supp 1552), the court in RTC was not entirely convinced that the mere possession of a digital copy on a BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator. Only the subscriber should be liable for causing distribution of plaintiffs work, as the contributing actions of the BBS provider are automatic and indiscriminate;

- a focus on 'control' as the nexus for copyright liability;
- an exploration of the use of contributory liability (specific to US law) as a vehicle for placing ISPs under certain responsibilities to ensure they do not 'induce, cause or materially contribute' to the infringing conduct of another (*Gershwin Publishing Corp v Columbia Artists Management Inc* 443 F 2d 1159 at 1162); and
- a recognition of the validity of public policy arguments, most notably the sustenance by the Internet of a free environment for public debate - although in the US, such issues are far more explicitly dominated by constitutional issues than a common law public policy platform.

Ultimately, the court was not satisfied that the RTC was likely to succeed, and since there was no evidence that granting an injunction would be sufficient to avoid further harm to the plaintiffs copyright, the motion for an injunction was refused against both parties. The court in reaching this decision recognised that granting the orders requested would require Netcomm and Klemesrud to prescreen all material posted with them for copyright infringements, and 'chill the process of communication they provided'.

Commentary

Although only a preliminary hearing, and containing much which is specific to US law, the case gives a glimpse of the ways in which the adaption of copyright theory to network-based information technology can serve to protect ISPs and

network providers by characterising their role as passive players in the copying process. The issues of contributory infringement and vicarious liability find their closest match in Australian courts with the concept of 'authorisation' of the creation of infringing copies. Whether an ISP's role as a facility provider would be construed as 'authorisation' under Australian law remains an open issue.

Naturally, in an area like this, an interlocutory hearing is rarely able to do more than demonstrate the need to proceed to a full hearing sooner rather than later. Nevertheless, a clearer judicial position seems to be emerging regarding copyright liability on the Net. That position is unlikely to be encouraging to copyright owners, since it seems that the courts are increasingly willing to adapt the analogies of legal reasoning used to describe ISPs (the publisher, the photocopier in the library, the tollbooth on the highway, and so on) in order to accommodate a more detailed technological understanding of the Internet's structure. This is particularly difficult for copyright theory, which depends on liability arising at the moment of copying (compared to, for example, defamation, which depends upon communication of imputations to another person and thus manages to remain, in a sense, 'technology neutral'). Network architecture, exemplified by the Internet itself, is suffused with redundant 'copies', a hallmark of the Net's military origins and a source of its remarkable stability in the face of disruption of component computers. There are many (and constantly moving) infringing copies of copyright material on the Internet, made automatically and without the intervention of the proprietors of the network components - a situation which the court recognised could (if RTC's arguments has been sustained) leave any person who sets up a server as a Net domain or analogous network component liable for material simply 'passing by their door'.

The court held that Netcomm and Klemesrud, as service providers, were not liable for breaches of copyright which took place using facilities that they had set in place. Part of this conclusion derives from the impractical nature of any alternative conclusion, which could leave the proprietor of each link in the Internet system liable for breaches of copyright which are, by the technological nature of the Net, repeated in sequence across a variety of computer platforms. Rather than begin chasing down the infringing copies through a mirror maze of iterations

across Usenet (the Internet system over which the infringing copies were posted) the court focussed on the issue at hand for the plaintiff establishing a static target for a claim:

'Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the copies to be made'.

This leaves open the issue of what options are open to a copyright owner who can not identify the source of an infringing copy. But this is only part of the court's rationale. The recognition that the court gives to the technological structure of the Internet (for example, by accepting the practicality arguments of Netcomm and Klemesrud) is matched by a judicial recognition of the social (self-) importance that the growing 'Internet lobby' ascribe to the Net as a source of a free domain of public debate: the court concluded that Internet access was deserving of at least an arguable public policy shield ('Netcomm and Klemesrud play a vital role in the speech of their users'). This argument is, of course, less powerful when marshalled on behalf of more limited or functionally specific computer networks (such as stand-alone BBSs or corporate WANs and LANs).

In comparison to the *Prodigy* defamation case, ISPs have not been shoehorned into an awkward 'secondary publisher' model of the Internet. In that case, an on-line content provider was held liable for defamatory material published via their server (essentially because that provider held itself out as editing the available material and producing a 'family friendly service'). In taking responsibility for information content (and seeking market advantage by offering an enhanced product to subscribers) Prodigy interposed itself between subscribers and the Net. In shifting from access provider to editor, Netcomm specifically distanced itself from this approach, at one stage arguing that its role was akin to a common carrier. Forced upon cross-examination to admit that it could and did cut off access for subscribers under certain circumstances (for example, where copyright software had been posted or subscriber fees not paid), Netcomm argued that technical considerations (the speed and volume of

postings) prevented this from being a practical constraint on infringement. The issue remains open, and will be crucial if any action against Netcomm based on the US vicarious liability law is to succeed. The wider ramifications of a possible 'duty to screen' remain unclear.

The plaintiff's dilemma

The case is important for copyright owners and providers of computer facilities in two significant respects.

First, it suggests that the development of copyright protection (or lack thereof) for material on the Net is likely to be anchored firmly to original sources of infringing copies, rather than secondary sources (such as ISPs). For ISPs and other parties with an interest in maintaining high-volume traffic over the Net or LAN/WAN systems (that is, most major organisations in both the public and private sector), the good news in that message is that the party providing the information infrastructure is one more step removed from liability for the conduct that takes place on that infrastructure. The courts seem willing (at this stage) to assess the legal role of the ISP or network proprietor in a way which matches their technological role. The test, in essence, is control: can (or does) each party exercise editorial control over content moving through 'their' BBS, domain or server? (The down side to this type of liability model is the difficult position it places an organisation or ISP which attempts or partially succeeds in regulating content within its systems. The effect of that type of 'half-hearted' regulation will be full exposure to liability for defamation (and possibly copyright) - which would suggest that regulated editorial control over networks and Net domains will look fairly unattractive to proprietors who do not control content *before* it makes it onto the screen).

Secondly, the case starkly documents the diminishing options for parties which wish to protect their interests in copyright or reputation on the Net. While the development of addressing protocols and other forms of 'authorship' and authentication continue, RTC found that even with an identifiable offender within a single jurisdiction (thus negating two of the most problematic issues in Internet-based copyright infringement or defamation) the battle was far from over. Notwithstanding that there may have been unknown reasons for not pursuing Erlich more directly, RTC's difficulty in preventing further infringement must

seem a bleak signpost of difficult days in court for copyright owners. Keep in mind that economic recovery was not even contemplated: all RTC wanted was the prevention of further postings of their material. Where once the smallest defendant in a copyright-infringement action was likely to be a small business

in the retail or publishing sector, computer networks open access to distribution technologies to a new range of participants who (one suspects) will be difficult to identify, (potentially) outside any useful jurisdiction and futile to prosecute. The continued attempts by plaintiffs to place ISPs and network

providers at the heart of infringement actions is a reflection of the awkwardness with which these 'small operators' fit into established patterns of protection and enforcement.

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"The Brave New World of Telecoms"

Andrew Lambert advances some ideas on the future structure of the telecommunications industry.

The End of the World As We Know It

The structure of the telecommunications industry is radically altering from a global structure of traditional state monopoly carriers in an interconnected web of networks. The nature of the structure it will evolve into is difficult to predict. However the processes that are determining it are clearer and involve factors including:

- technological advances;
- artificially high costs;
- accounting imbalances and interconnect pricing;
- deregulation and the introduction of competition;
- globalisation and the growth of multinational corporations.

This has enabled carriers to commence selling capacity to other carriers in an increasingly competitive environment. Carrier refile is becoming widespread and relevant International Telecommunications Union (ITU) rules are often observed more in their breach than their observance. As a result it is becoming possible for entrants to gain some of the benefits of return traffic without formal correspondent relations, by dealing with PTOs which have them.

Factors in the Decline

Technology and the decline of real usage costs

Massive changes in cost capacity ratios gained from new optic fibre integrated circuit technologies have largely removed cost from distance in telecommunications. However many PTOs are able to maintain higher

telecommunications charges based on a market distortion. A number of factors including the legacy of monopolist past practice and international interconnect arrangements support telecommunications tariffing at artificially high levels.

The price of international calls is determined through the interconnect and settlement arrangements between PTOs and international carriers. The technical reality is that sending a call down an international line costs PTOs little more than sending one through a long distance national network. However interconnect arrangements mean that the price of a call from New York to London is nearly four times that of a domestic call from New York to Los Angeles. Calls between EEC countries in Europe cost up to six times as much as long distance national calls.¹ *The Economist* estimates that the world's telephone users in 1993 were paying around \$US10 billion more each year for international calls than they would in a completely free market.

Artificially high interconnect pricing

Interconnect arrangements between PTOs for international calls are based on ITU rules that give recognised "carriers" a right to interconnect with other carriers' networks. However, although the incremental cost of carrying each call is minor, PTOs attempt to secure an adequate return (on call services, international and domestic) to cover their publicly funded fixed capital investment in infrastructure. If international call services were charged on a strictly incremental basis these PTOs would not generate sufficient revenue to recoup their fixed capital costs.

In competition between a PTO with common carriage obligations and a private contract carrier or service provider, the former is at an inherent disadvantage because it may not be able to use differentiated pricing due to

universal service non-discrimination obligations, it cannot prevent arbitrage of pricing differentials by service providers and it cannot select customers on a normal commercial basis. As a result service providers and resellers can "cherry-pick" customers and provide services more cheaply.

One response of PTOs who are common carriers has been to establish their own operational systems as service providers where they can price differentiate. Overseas markets in deregulating telecommunications industries offer an ideal opportunity to do this.

International interconnect and accounting imbalances

As stated above the pricing of international telecommunications bears little relation to usage costs. Accounting rates are generally far larger than the longest trunk tariff for a country.

This accounting rate system benefited monopoly carriers in the past at both ends of international calls. Although the cost possibly lowered demand, PTOs' profits were maintained at high levels through high accounting rates at the expense of subscribers. These high accounting rates also encouraged co-operative construction and sharing of infrastructure, whether by satellite or undersea cable.

However the accounting rate system meant countries with developed telecommunications technology and lowered costs (from competition and liberalisation) developed a growing traffic imbalance with the rest of the world, in turn creating an increasing financial deficit.² The United States with its large population, a high level of multinational business activity and significantly lower end user charges, has developed a deficit with most other countries (including those in the OECD).

That financial deficit is now above US\$3.4 billion per annum.³

Subsidising developing telecommunications countries is becoming increasingly unattractive to PTOs, especially as accounting rates often indirectly help fund global expansion of competitors with direct foreign investment in developing country PTOs. For example, France Telecom and Southwestern Bell are major investors in the Mexican PTO, whose financial deficit with other US telcos is almost as great as the deficit for all OECD countries combined. As a result of direct investment in and licence arrangements with foreign PTOs almost US\$158 million was paid into the Cable & Wireless group of companies by US carriers in 1993.⁴

Carriers in competitive markets will increasingly attempt to bypass the international accounting rate system by establishing global networks where they occupy both ends of an international link. By doing this and providing end-to-end infrastructure PTOs can minimise transit rates and end the subsidisation of other carriers and developing countries. It also creates opportunities to act as a third party carrier for PTOs without common interconnect agreements, allowing them to act as an intermediate switching centre at an agreed rate.

Competition and deregulation

Policy objectives of competition and free trade have led to moves by governments towards deregulation and reconfiguration of national telecoms networks including the breaking up of national monopolies.

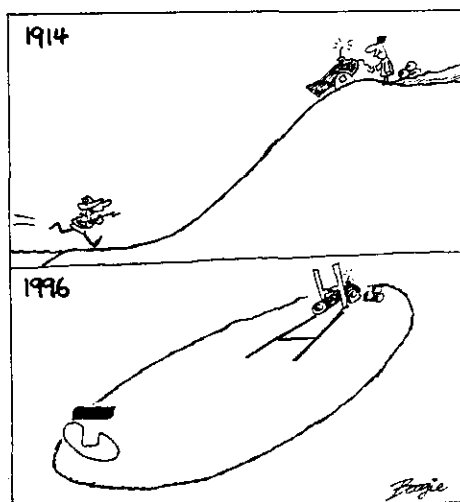
Arguments in favour of open competition are tempered by national policy objectives including support of technical innovation and the development of a domestic telecommunications technology industry, universal service obligation (USO) and common carriage.

This leads to the establishment of regulatory models such as the Australian duopoly, which impose market constraints on the dominant national carrier, attempting to foster competition whilst accommodating other national policy objectives. Shared features of this form of asymmetric regulation include:

- pricing constraints necessary to support cross subsidisation;

- geographically averaged rates structures that do not reflect their actual cost;
- common carriage obligations that require the incumbent carrier to provide capacity on demand and on a non-discriminatory basis; and
- public tariffing and information disclosure requirements that force the incumbent carrier to reveal plans for service offerings, associated prices and strategies.

Globalisation and the growth of multinationals



Multinational corporations now aim to integrate their disparate operations and locations in order to achieve efficiencies from the sharing of information as part of the process known as "Globalisation". As companies attempt to promote competitive advantage by integrating their geographically dispersed units of operation at an international level, access to reliable, seamless and secure communication networks is an imperative. It is estimated that demand for international voice traffic carried over the world's public telephone networks (from all sources) will have increased from 42 billion minutes in 1992 to 60 billion in 1995.⁶

Setting up private international corporate networks requires complex negotiations with a large number of equipment suppliers and maintainers and with numerous PTOs. In addition the creation of such private networks is becoming risky in terms of rapidly changing technology. This has led to the growth of outsourcing which allows multinational corporations to access

PTO's expertise in the management and operation of such infrastructures and minimise this risk.

Global alliances of PTOs

Reasons why PTOs are forming the alliances

PTOs still operate around 90% of the world's satellite and submarine cable capacity and account for more than 80% of international telecommunications services, as measured by outgoing minutes of telephone traffic. Moreover PTOs in the form of the traditional monopoly carrier are still firmly entrenched in many countries around the world and operate at all levels of provision of telecoms services. In consequence new entrants to some of these markets, coming in either as carriers or service providers, have found they cannot truly compete against governments or PTOs except in market niches.

An example is the state owned telecommunications monopolies in Europe such as Deutsche Bundespost Telekom and France Telecom, which have been criticised for pursuing international call markets in the US and other countries whilst restricting entry into their home markets.

A trend of international carrier collaboration has emerged in which major PTOs enter into joint ventures to create seamless, global end-to-end networks. The new global alliances of PTOs and international carriers access the facilities and resources of various telecommunication service suppliers in order to serve geographically diffuse corporates in a more cost effective way.

The economic rationale for this lies in the US\$10 billion spent every year by the top 2,500-3,000 multinational companies on international calls. The PTO alliances are attempting to become "one stop" providers of international Telecom services for multinational companies, carrying voice, data and video around the world.

Competing against PTO alliances in open market

Some commentators consider that in an openly competitive telecoms market internal redistribution is not sustainable once competing PTO service providers and carriers without these redistributive burdens target the subsidising telecoms users as their most likely customers. In telecommunications industries where the PTO is no longer protected by regulation

incoming carriers or service providers will automatically focus on the most lucrative share of the market, corporate services and international calls, leaving the dominant carrier with the unprofitable routes under USO and common carrier obligations.

In a competitive environment service providers would only agree to pay a competing PTO a price based on the latter's short-term marginal cost which they can pass onto their customers. Yet the bulk of cost in a capital intensive industry such as telecommunications networks is the fixed publicly funded infrastructure costs, which would not be compensated in such an arrangement. To survive in the long term the PTOs will need to preserve their share of the lucrative corporate international market.

Imperative towards cartels

PTOs seem to be following a pattern of striving to maintain competitiveness in markets with corporate customers where it is already competitive in terms of both geographical coverage and services, while at the same time co-operating with other PTOs to enter the international call markets in other regions. The wide geographical coverage offered by an alliance is a means for a PTO to attract large customers in its home or near home markets.

All the global alliances target the same needs and interests of the same group of transnational corporations. Although this may initially entail ferocious competition amongst the alliances in the long term there is also considerable potential for the growth of oligopolistic market arrangements given their anticipated market share.

Who is who in the global alliances

Of the global alliances three, Concert (BT and MCI), WorldPartners (AT&T, KDD, Singapore Telecom and Unisource) and Phoenix (otherwise known as Atlas - Sprint, France Telecom and Deutsche Telekom) are the front runners. They have established networks with dense coverage and local support through national carriers in many countries.

MCI's Concert alliance with BT was officially launched in June 1994. BT's deal with MCI has given it a long sought strategic partner after it was involved in unsuccessful alliance discussions with AT&T, France Telecom and Deutsche Telekom. Concert will provide the platform for setting up the global services

with the parent companies maintaining responsibility for sales and marketing. MCI will target the Americas and the Caribbean, BT will target the rest of the world.

AT&T, in the form of the new international call company shorn of its network systems and hardware elements, is regarded as the only US carrier with financial resources to lead a global alliance. MCI and Sprint are both involved in other alliances which are led by European concerns.

With WorldPartners, AT&T's approach is to form partnerships with local and regional telecom providers in targeting the multinational business market. Apart from its equity partners, WorldPartners associate members include Telstra, Hong Kong Telecom, Unitel and Telecom New Zealand. In Europe Unisource is itself an alliance of four European PTO equity partners each with a 25% stake. As with Concert, sales and marketing for WorldPartners is carried out by parent companies and associated members.

The third alliance, Phoenix, results from an understanding signed by all participants - Sprint, France Telecom and Deutsche Telekom. Each will be responsible for its own region, with two other joint ventures covering the rest of Europe and the world.

The Impact on Australia

Austel's recent findings in favour of continuing to restrict Telstra from competing in the international call market on a discriminatory basis reinforces the favouring of competition from foreign PTOs and their alliances. Although not yet significant, these groups are starting to enter the Australian international call and hubbing markets dominated by Telstra and may soon provide a real competitive threat. Telstra's response (apart from intensive government lobbying) has been to join the WorldPartners alliance and energetically compete in overseas markets.

The post 1997 environment will exacerbate the competition from foreign PTOs and their alliances as the Australian telecoms market becomes open to further competition. However, the "privileges" of being a carrier may be progressively undermined by the competitive advantages service providers have in terms of cost against the incumbent carrier.

The possibility of the national carrier losing its most profitable markets due to a "tilted" playing field would seem to be an unacceptable outcome were competition from foreign PTOs to become threatening.

The New Telecommunications World Order

The growth of global alliances of PTOs and the tendencies toward oligopolistic relationships between them could lead to a new network of cartels. PTOs will increasingly construct alliances to create end-to-end global networks to maintain market share in the lucrative multinational corporate international services market. At the same time they will attempt to maintain their dominant positions in their home markets against intrusions by PTOs and their alliances.

Unless a co-ordinated international regulatory response attempts to curtail this oligopolistic movement, national regulators will face increasing tension between free trade and competition considerations and the need to preserve an incentive for investment in domestic telecoms infrastructure and policy objectives such as universal service and common carriage.

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