Regulating the Media: It is Dangerous to Give it Special Status

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Competition Law and the Media Sector

What is so special about the media that leads politicians and media pundits to believe we need 'cross-media' laws? Although the media has characteristics that clearly distinguish it from industrial products and many services produced by a modern economy, these distinguishing features alone do not warrant a separate and special set of laws. Separating regulation of the media from other goods and services often leads to the very outcome that the cross-media laws are meant to prevent – the undue influence on information, and ultimately public opinion, that a heavy concentration of media ownership is supposed to create.

Defining the Media

The media[1] embraces all channels of communication. Media products include the various forms of print media, electronic media such as television, radio and various on-line services including the Internet, and the telephone system. Its function is to transmit information and/or entertainment from one source to another.

Information

Information is the acquisition, processing and quantification of knowledge. It includes the functional aspects of using knowledge as well as embracing knowledge itself. There are many types of knowledge and forms of information so the question arises as to whether or not one of the dimensions of the media is unique in handling information or some particular form of information. If this were the case, then that part of the media, including the information, would constitute a separate market. Conversely, if one dimension of the media were capable of crossing over all forms of information/entertainment, then that dimension could link all forms of media into the one market through the transitivity of competition.

In this context it would appear that the Internet is capable of providing all the information that could be obtained including that from other sources. If so, the Internet should be included in all the media markets and is the potential link providing competition between the markets, so that one could define a single media market – at least in the context of information.

Entertainment

Entertainment relates to satisfaction or a form of pleasure, which may involve information. The source of delivery of entertainment clearly has the potential to significantly affect the quality of entertainment and therefore it is possible that there may be more 'markets' for entertainment in the media than for information.

Policy Concerns About the Media

Two related considerations give rise to media regulation. Firstly, there are the general competition issues which are relevant to most economic activities. Secondly, there may be specific concerns relating to the media, such as the information content of the media's services or products.

Information has many of the aspects of normal economic goods and as such is subject to the laws of supply and demand. However, information has some unique characteristics distinguishing it from other economic goods or services. From an economist's viewpoint the distinguishing feature is the difficulty of establishing and, more particularly, policing the property rights over specific pieces of information or knowledge. When we cannot establish a property right over a particular good there is a free riding problem and consequently under-investment in that good or service relative to what is socially desirable. It is this supposed under-investment which provides the rationale for government involvement in the production

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[1] Media is the plural of medium, defined as an intermediate agency or a channel from one source to another.

of information or knowledge, or at least a subsidisation of those who are producing it.

A related aspect of the property right problem associated with information is the 'public good' nature of some information. This is information which, once produced, does not cost any more irrespective of how many people use it. While the information may constitute a 'public good' the medium through which it passes need not be; for example, much of the information content of a newspaper is a 'public good' but the newspaper is not.

In general, producers require that the revenue generated by a product will cover the cost of production, otherwise they will have no incentive to produce. In the case of 'public good' information, there should be no cost to the marginal user of accessing it; it costs nothing to allow another user to access the information and so it becomes impossible for the initial cost of the information to be recovered. It is an argument for government intervention, either by direct provision of information or by subsidy, to enable the producer to recover the costs of production.

Therefore, the difficulty in establishing property rights to information and the public good nature of much information can require government intervention in the form of subsidies or the protection of property rights, through patents and copyright. These in themselves confer a form of monopoly on the recipient and require careful consideration about how and to whom such rights should be extended.

However, this is not the basis for most of the forms of media regulation.

Government regulation often reflects the nature of the information itself. The regulatory dimensions relating to the information provided by the media are typically of three types:

- Censorship – A government believes certain types of information should be restricted because they could lead to anti-social behaviour.
- Information 'bias' – Governments sometimes believe the information provided by the media could bias or otherwise 'adversely' affect public opinion.
- Competition issues – A government believes that undue concentration of the media could restrict the diversity of views, opinions or information.

There is genuine and legitimate concern about providing information that is likely to lead to anti-social behaviour, such as information about how to commit a crime. There is often debate about the level of censorship required, usually related to the degree of anti-social behaviour the particular information could be expected to cause. Legislation involving the v-chip to control television broadcasts of this type of information has been recently introduced in the US.

But while there might be legitimacy in controlling such information, it is not uncommon for governments to justify censorship laws and similar restrictions on information on the grounds that they 'adversely' affect public opinion. In these circumstances 'adversely' often means that it is disrespectful or otherwise critical of government and its policies.

In fact, much of the media regulation around the world is designed to protect government. Governments often parade it as a protection of the people against misleading views, but it is really an attempt to entrench government power or at least mute public criticism of its performance. The first thing dictatorships do is to control the media; I can think of no example where a non-government media group has been able to successfully abuse its position on the scale of government-controlled media.

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Such regulation does not benefit the population, only those who wish to protect themselves from scrutiny. It is antithetical to the true role of censorship and the notion of providing diversity of views and opinions in the media.

Unfortunately, the changes in Australian media laws and regulations over the past decade could give the impression that they are directed towards protecting government from adverse commentary and/or to gain favour from those incumbents providing media services. These regulations, resulting in restrictions on the development of the media, have usually been 'dressed up' in the context of ensuring a diversity of opinions and competition in the provision of media services.

'Editorial Independence'

A group that has been particularly vocal about cross-media laws is the 'media squatters'. Like the old pastoral squatters or the more modern tenancy squatters, they claim territory (in the media, in this case) without any property right.

Arguments for such editorial independence are no more legitimate than the squatters' right to access the property in defiance of the owners. There is no special legitimacy to the claim incumbent media managers sometimes express about their right to 'editorial independence' – which is usually a euphemism for a 'I (we) should not be held accountable to anyone but myself (ourselves) and my (our) beliefs (read prejudices)'.

Claims of 'bias' or media proprietors having too much influence should be addressed through competition law.

Competition Issues

There is nothing unique about the media or the services it provides that requires special treatment with respect to competition laws. There are no specific grounds to justify special legislation for the media that are not already covered by the *Trade Practices Act* (TPA).

There is no question of the legitimacy of anti-trust legislation such as the TPA in relation to economic activities, including the media. Debate about the TPA usually relates to the application of the laws and whether they are too lax in allowing concentration that leads to an abuse of market power. Other debate centres on whether the laws are too rigid and prevent industry from evolving into forms that will ultimately serve the public better.

Clearly, the diversity of views and opinions which a society might rightly expect from its media can be enhanced or protected if there are no artificial barriers to entry into the media and there is no undue concentration of market power.

The ultimate power of access to many parts of the media, particularly the electronic and telephonic media, is derived from government licensing. Government restrictions on numbers of licences have been a major barrier to entry. They have been justified on the basis that the limited scale of the market could not support more than a few players or scarcity of spectrum for broadcasters. This is clearly anti-competitive; there is no reason to expect that a competitive market would lead to an 'excess' number of operators. In a competitive market, if operators were all unprofitable their numbers would be unsustainable. If there were 'excess' profits or influence then there would be entry. A competitive market could be expected to allow an optimal number of players insofar as there were no artificial barriers to access – aside from the issues relating to property rights and public goods already discussed.

In recent years there has been some appreciation of the importance of allowing open access and greater freedom for markets to operate. This has been particularly true in the case of radio where limitations on the foreign ownership of commercial radio licences were removed in 1992. At least one group of stations – the Australian Radio Network – is controlled by foreign nationals. There are no limitations on advertising in radio, except prohibition of ads for cigarettes and alcohol, and the minimum Australian content rule has been replaced by a code of conduct on use of Australian music.

Media Markets

There is clearly competition between the various forms of media: radio, television, print and, increasingly, on-line services related to the Internet. However, it is equally clear that this competition, or the extent to which one form of media can replace other forms, is limited. The various forms of the media are not perfect substitutes for each other. So while we might define a media market, there will clearly be sub-markets or niche markets in which one form or other of the media can excel to the detriment of other forms.

But as all forms of media involve the transmission of information and/or entertainment, they have the potential to compete with each other. It would therefore seem inappropriate to have distinct regulations for different elements or aspects of the media because they are potential competitors. To get consistency, to ensure fairness, equity and an appreciation of the social benefits that should be enhanced by regulation, it is important that one regulator has control of all aspects of the media, even if there are specialist areas within the regulator dealing with the technical specialties.

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'Essential Facilities'

There are issues related to some of the systems of media delivery, in particular, providing access to essential facilities such as the distribution system – the cabling, for example. But these issues are adequately handled under Part IIIA of the *Trade Practices Act*. This section was recently introduced to protect the users of 'essential facilities' – infrastructure such as power lines, gas

lines, water and particular transport routes – from being captured by a major player in the industry who might restrict access to them. In short, there is adequate protection under the general competition laws to prevent the media market from developing anti-social tendencies resulting from an undue concentration of ownership.

The Relevance of Media Ownership Concerns

Much of the concern expressed about the media relates to concentration of market shares in the industry, and whether it may have an adverse effect on public opinion and restrict the diversity of views expressed. It is not ownership *per se* that is of concern but the control of a media group in a concentrated media market. Moreover, control may not require 51 per cent of the equity of a media company; it could constitute a lot less depending on the distribution of ownership of other shareholders and their circumstances. Those holding a majority of shares may not necessarily use their influence to interfere in proceedings; they may be 'passive investors', only interested in revenue and returns.

Alternatively, the shareholder may only force management changes if the investment performance is inadequate. The key issue is receiving adequate returns. If it is in the shareholders' power, they will replace the management which does not adequately service them. In such circumstances the owner or manager must ensure that the material distributed by the media organisation is acceptable to customers in order to satisfy the investment requirements of shareholders. One would therefore expect that the views expressed by the organisation were consistent with or otherwise in accord with what the consumers of their product required, or else they would not be prepared to pay for it.

It may still be claimed that some information is anti-social and requires regulation, or more accurately, censorship. Under normal circumstances one would only expect a media organisation being able to profitably distribute anti-social views if those views related to pornography or violence. Even in these circumstances there is likely to be considerable controversy as to whether such programming or information leads to anti-social behaviour – whether people who do not buy the product are adversely affected by the behaviour of those who do. Clearly, there are censorship and libel laws and other forms of protection against unfair or unjustified attacks on particular groups. The infringements are not a function of ownership *per se* and therefore they do not require rules or regulations relating to ownership.

The real issue is whether or not media proprietors can 'adversely' influence opinion and at the same time profit when there are competing organisations selling or distributing alternative views. In short, if there was open entry and no barriers against groups or companies entering the media market, putting aside the issue of censorship, would one be concerned about an entity being able to adversely affect public opinion or distribute views that lead to anti-social behaviour and do so profitably? The notion of profitability is important because it implies there is a sufficient number of consumers of the products for the organisation to trade at a profit, which implies the views are marketable in the face of competitive views. In my opinion, it is only when those views are political and inconsistent with the political powerbrokers that they are likely to be found to be 'adverse' or anti-social.

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It is particularly relevant in the context of today's political scene as to whether or not persons holding opinions, however abhorrent to major sectors of the community, should be allowed to proselytise such views or be subject to restrictions. It is clearly at the core of the censorship debate – a debate unrelated to the current concerns about media regulation. Regulation is about the market structure rather than regulating particular pieces or types of information.

In these circumstances, what role has ownership other than from a competition policy point of view, where common intent across a number of entities with a common owner, or collusion amongst a number of owners, could lead to undue concentration and a restriction on the diversity of information?

What is being implied is that where there is an open

entry and a diversity of views, concern about distribution of information only relates to censorship issues. If so, ownership is peripheral to the core of the problem, which is the nature of the information. A government is better off passing laws relating to that form of information than being concerned about the type or amount of media control by a single owner.

Governments should only be concerned about ownership when there are restrictions on entry or there is likely to be undue concentration restricting the diversity of views and opinions. In these circumstances it is an issue of competition law; if there is a limited market, then one does not want to see a concentration of ownership in that market for reasons of market power.

There is no reason to distinguish the media from other industrial organisations for a specific competition test and therefore they should be subject to the same laws and the same regulatory bodies as other industries, namely the *Trade Practices Act* and the Australian Competition and Consumer Commission (ACCC).

The Specific Issue of Foreign Ownership

Advanced communications and the speed of travel have linked significant centres of population, trade and industry, affecting most aspects of economic and cultural life in these centres.

There is hardly a city that is not exposed to CNN International, on-line business communication systems such as Reuters and Bloomberg, information from the World Wide Web, and regular visits by aircraft from around the world. Most large companies operate across national borders, traversing domestic and international economies. Moreover, it is often difficult to identify the nationality of many of these companies. Cross-country investment is increasing at a significant rate. The interest in things foreign and the international marketplace dominates business news. The coercion by governments for their industry to expand internationally has broadened the mercantilist views of earlier periods.

It is as pointless as it is futile to try to restrict foreign influences on domestic cultures, as so many governments are inclined to do. A generation ago tariffs and blanket prohibitions on foreign goods were commonplace in an effort to prop up failing domestic industries, but the intellectual battle of the protectionists has largely been lost. The debate is now about the pace at which industries should be opened up to foreign competition.

As an example of this change in attitudes to global and international influences, banking has been amongst the last of the 'preservation' industries that governments have attempted to retain as a domestic industry. However, modern banking is rapidly becoming simply a matter of information exchange with electronic funds transfers being available, instantaneously, around the globe. The more xenophobic a country's banking system is, the more it retards its development, to the ultimate cost of that industry and its customers. At least some of the current financial crises in Asia can be attributed to undue protection and direct government influence on its banking sector. Fortunately, Australia significantly opened up its banking system to competition in December 1983 and the recent Financial Systems Inquiry (Wallis Inquiry) recognised that the significant technological change in banking will increase global influence on the domestic market.

To restrict or attempt to preserve the domestic media industry from foreign influence through controlling ownership would impede the development and growth of the Australian media and disadvantage its consumers.

Along with banking, the media in this country have been subject to industry-specific regulation. Clearly, it would be inconsistent for the media, which rely on information transfers in much the same way as banking, not to be given a global dimension to the ownership when banking has moved so far in this direction. To restrict or attempt to preserve the domestic media industry from foreign influence through controlling ownership would impede the development and growth of the Australian media and disadvantage its consumers.

Does Foreign Ownership Require Special Attention?

The fear of media proprietors 'adversely' affecting public opinion is enhanced when those owners are foreign. The fear that foreign owners not only influence the nature of the information transmitted by their media companies, but might also be insensitive to local political and cultural attitudes, runs counter to common sense. The foreign proprietor is more likely to be apolitical and sensitive to domestic culture than a domestic proprietor simply because there is no reason for them to have a political

agenda unless they are a branch of a foreign government. The very act of operating in a foreign community is likely to sensitise foreign companies to domestic cultural values. In order to maximise the value of its investment, the foreign proprietor needs to take care not to offend the political or cultural attitudes of its clients or potential customers.

Domestic proprietors can choose to ignore these values because they would not suffer the same level of censure. Further, the foreign proprietor is more likely to view its media company solely as an investment than a domestic proprietor, who is likely to be more influenced by political patronage.

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It might be argued that a foreign proprietor would be more likely to use material produced overseas than a domestic proprietor. This may be true, but it should be remembered that the ultimate arbitrator on the suitability of such material is a client or consumer. Criticism of foreign situation comedies ('sitcoms') and movies is not dissimilar to the criticism that is directed at the foreign-manufactured product. The critic is usually the producer of the domestic product who opposes the competition resulting from the foreign product.

The benefit of opening the media to global companies or to foreign ownership,[2] is that the domestic industry is opened up to global products and all the technologies associated with them. The enlarged scope of the global media company must give it access to a greater range of products and therefore benefit the consumer. Perhaps critics of the global media corporation are those involved in the domestic industry who believe their domain is threatened by the foreign entrant.

Concerns about 'undesirable' foreign influences may be genuine, but are likely to reflect an attempt by domestic producers to restrict competition by restricting foreign entry. The entry of foreign media into Australia, through merger or acquisition of domestic companies, should be handled in the context of competition policy. The best regulator to make a judgement on the competitive effects of foreign ownership is the ACCC. Otherwise, 'organic entry' – building an organisation up from a zero base – should be without restriction.

What one hopes is the zenith in media xenophobia was the outcry from many in the 'arts community' at the High Court's Blue Sky decision. This allowed New Zealand programs to be classed in Australian content quotas because of the Closer Economic Relations (CER) treaty, which gives Australia and New Zealand equal access to each other's markets. To witness the outcry against the decision one would have thought it was the end of Australian film and television.

The decision highlighted the regulatory role of the Australian Broadcasting Authority (not to be confused with the Australian Broadcasting Corporation), which protects incumbents from competition. It is a body that the government often hides behind to prevent change or direct change when it cannot be prevented.

Regulation of the Media Environment

It is common knowledge that the media has changed dramatically over the twentieth century. The most dramatic changes in this information revolution have been occurring in the last decade of this century. The development of the high speed and high capacity personal computer together with optic fibre has resulted in the growth of the Internet, one of the most astonishing technological phenomena of the century. At the start of this decade few had even heard of the Internet and even fewer used e-mail for communication purposes. By the middle of the decade up to 50 million people were accessing the Internet and it has been estimated that the number of people tapping into it has doubled every 12 months (*The Economist*, 19 October, 1996).

The system is suffering congestion and there are those who believe it will suffer 'gridlock'. But each time congestion develops, advances in technology overcome it before the next congestion point. The enormous capacity of fibre optics as a means of distributing digital

[2] It is interesting to reflect on the classification of News Corporation as foreign owned. The company is headquartered in Australia and excluding the Murdoch shareholding, probably has a majority of Australian shareholders. Its popular image in Britain, the US and indeed Australia, is that it is an Australian company. Its proprietor, Rupert Murdoch, has American citizenship because of that country's xenophobia in relation to its media, not an example to follow in my opinion. The restrictive and xenophobic media laws in many countries almost renders 'stateless' a global media proprietor.

information will help to relieve much of this capacity problem. Moreover, as Moore's Law[3] indicates, the microchip has been doubling in performance every 18 months and this is likely to continue for the next decade at least. The consequence is that the capacity is exploding at the same time as the rate of usage and there would seem little doubt that the Internet as part of the World Wide Web[4] will transform all aspects of our life in both work and leisure. It will affect every method of recording and transmitting knowledge – books, newspapers, magazines, movies, television, telephone systems – and probably cause the demise of a relatively new invention, the fax.

Companies in every industry are using these advances in information technology to re-engineer themselves, with an accompanying increase in competitive pressures on those who lag behind. As a result of this information explosion, the nature of national economies is changing. National boundaries are becoming less relevant, whole industries are becoming redundant, the demarcation between activities is blurring while many professions are changing their ways of providing service.

Regulation of the media belongs within the context of competition law.

In this context, it becomes difficult – if not impossible – to define the bounds of a media market, other than to relate it to all the modes by which information/ entertainment can be transmitted, including the Internet.

Regulation includes controlling change to enhance social outcomes. In the language of the economist, it is about reducing negative externalities by ensuring that the judgements and decisions of individuals take into account their social effects.

Good regulation must have the means to forecast the effect on social outcomes with and without regulatory intervention. Unfortunately, the level of knowledge and capacity of the regulators is usually limited to what they can glean from the industry participants and external advice, which they often receive with a degree of justifiable apprehension and suspicion. Inevitably, to validate the arguments being advanced, they tend to look back at what has occurred in the past. In the context of the media, this is like trying to drive a car by looking in the rear view mirror; it is dangerous because the future is not going to be like the past.

Clearly, regulating in such an environment of change is fraught with danger. It is doubly dangerous to pick off a section of the market and try to regulate that separately because of some perception of difference or independence. The consequence of not fully understanding the market boundaries will be to penalise one of its active participants. These penalties could have the same effect as pushing a boxer into the ring with his shoelaces tied together – the player will stumble and fall at the first onslaught.

Conclusion

Regulation of the media belongs within the context of competition law. This is not an uncritical endorsement of the way competition law is being administered and interpreted in this country. The interpretation of competition law and how it is restructuring – or, rather, limiting the restructuring – of Australian industry is far too conservative, in the true meaning of the word.

The interpretation of competition is almost always focused on the past, as though the law should be interpreted to hold industry in some sort of time warp. There is too little acknowledgement of prospective change and too much impatience for overt signs of competition when there are no clearly identifiable barriers to change and competitive pressures. The courts and the administrators of the law are inadequately equipped and, in the case of the courts, often inadequately trained to pass sound judgements on competition.

It is important to interpret competition law in a manner that is not going to prevent the media industry changing and evolving to meet the competitive pressures of globalisation. Those administering competition policy should recognise that without tariffs and other barriers to entry, few Australian industries will not have to meet international competition or competitors in some form or other.

Sound industry policy, which is what Parts IIIA and IV of the *Trade Practices Act* are about, would be greatly strengthened if the Productivity Commission was given a more direct role in analysing claims of breaches to these parts of the Act. The ACCC and the Productivity Commission should be combined. The judicial administration and judgements would be improved by having a separate bench, trained or at least experienced in commercial matters, dealing with trade practices and related matters.

Policy

[3] Moore's Law is named after Gordon Moore who is Chairman of Intel, the developer of the silicon chip.

[4] The World Wide Web is the means by which this information is accessed.