

University of New South Wales

University of New South Wales Faculty of Law Research Series

Year 2007

Paper 37

Citizen versus Consumer in the Digital World

Lesley Hitchens*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps/art37>

Copyright ©2007 by the author.

Citizen versus Consumer in the Digital World

Lesley Hitchens

Abstract

As the capabilities of digital television begin, eventually, to be realized in Australia, and content is increasingly available across a variety of platforms, it will be necessary to reconsider the approach to regulation of content. Whilst the Australian Government shows itself willing to respond to consumer concerns about inappropriate or harmful content on these new platforms, it is less clear whether and how the interests of the public as 'citizen' will be recognized and reflected in the regulatory framework. In a multi-channel environment, where content is increasingly likely to be purchased, it will be easy to slip into a rhetoric which views the public only from a customer and consumer perspective. There is very little consideration of the public's interest as 'citizen'. Current proposals for reform of the EU Television without Frontiers Directive are an attempt to address the question of content regulation across a variety of delivery platforms, but these proposals are limited. This paper considers the nature of citizen and consumer interests in the context of media policy, and explores the space for the citizen in the digital regulatory environment.

Citizen versus Consumer in the Digital World

Lesley Hitchens*

Introduction

The 2006 digital reform legislation is a welcome attempt to address some of the deficiencies of the original digital television policy and legislative scheme. However, it represents an inward focus – that is, a focus on traditional media, traditionally delivered, albeit with the prospect of some new digital channels, potentially over different platforms. Increasingly, however, traditional content and new content is being delivered over a variety of platforms, and the public is accessing that content in its own time, making its own selection. An article in the *Sydney Morning Herald* made the following statement:

“[...] is one of a growing number of people who are drawing from a smorgasbord of media and entertainment options that is not dependent on what the networks decide to screen, what radio stations put on their playlists, or what daily newspapers think is fit to print. Rather than heading straight for the most popular or best publicised option, they are using technology to find the books, television, music and journalism that best fit their particular tastes”. (*Sydney Morning Herald*, 2006)

It is commonplace now for governments and rule makers – certainly this can be seen in Australia, as well as the United Kingdom and the United States – to assert that the ability to access content via the Internet, especially, and via other delivery platforms, is making superfluous much of the regulation of traditional media. This can be seen especially in relation to ownership and control regulation and reform (Hitchens, 2006, 300-3). In other words, it is argued, we no longer need to be so dependent upon regulation for the assurance of diversity in our media: instead we can look to this array of new media to provide us with diversity. A degree of scepticism is appropriate here for two related reasons. However, before addressing this, it is important to clarify the type of content with which this essay is concerned. The focus of this essay is upon content which would be understood as news, current affairs, and commentary or opinion; what we might term ‘informational content’. This is not to suggest that other types of content – the more entertainment-focused content, for example – do not have a value in themselves or a role to play in the issues discussed here, but they are not of primary relevance for the concerns which will be explored in this essay. As suggested, a degree of scepticism is appropriate for two related

* I am grateful to Nardia Simpson for research assistance.

purposes of this discussion, will be confined to informational content (that is news, current affairs and commentary) which might be available across a variety of platforms.

Although, as already noted, the 2006 digital reforms were focused on television, and there were legitimate reasons for that focus, the Government is nevertheless beginning to address the implications of digital content. In April 2006, the Government completed a review of options to provide more uniform regulation of audio-visual content delivered across different delivery platforms (Department of Communications, Information Technology and the Arts, 2006b), and, in June 2006, the Minister, Senator Coonan, as a response to the review, announced her intentions to introduce legislation which would provide uniform safeguards for content distributed across these different delivery platforms (or 'convergent devices' as the review referred to it). It is intended that this legislation will address what is regarded as "...inappropriate or harmful material" with a view to the protection of children, in particular (Coonan, 2006a). Although at the time of writing, legislation has not been introduced, the Government's intentions were strengthened by a particular incident associated with the reality programme, *Big Brother*, which occurred in July 2006. Now, infamously known as the 'turkey-slapping' incident, the content had not been broadcast but had been made available as streamed online content. Although a variety of regulatory schemes are already in place to cover broadcasting content, as well as content delivered over other platforms, such as the Internet and mobile phones, the *Big Brother* incident highlighted regulatory gaps when it became clear that regulation of the content in question was dependent upon how the content had been transmitted, and, in that instance, fell into a regulatory vacuum. However, I would suggest that the current focus gives rise to some concerns. It seems that there are two dilemmas about the current focus or approach. First, there is an absence of debate about the policy which should inform the regulatory approach to digital content. This is perhaps not surprising – considered policy discussions about the media are not in the forefront of government agendas in Australia. Secondly, and perhaps as a consequence of the first point, there is a very narrow view of what needs to be considered regarding the regulation of digital content. The Government's focus is only on content which might be deemed as harmful or offensive – the concern is primarily about content safety. I would suggest that there is a need for a wider focus. If it is the case that the traditional media – in the sense of traditionally delivered - are increasingly less significant or dominant, then there needs

to be a renewed (or perhaps new) debate, about what we mean by media, and what 'public-regarding' role we expect it to play. In the past, the traditional media have been expected to bear that role, even though it might be argued that, in Australia, we have had a very under-developed expectation of what that might entail. However, if the space occupied by the traditional media within the media environment is to diminish, or, in other words, to become one of many mechanisms for the delivery of content, then we need to reconsider where that public-regarding role should be focused. This essay is a start at addressing these issues: that is, what might be an appropriate policy response to digital content, specifically, informational and commentary content; and what might that mean for the regulatory focus.

Regulatory Space

Before addressing these issues, it is worth first clearing up one matter. Inevitably, when one begins to speak of regulation there tends to be something of an alarmist reaction, possibly because of a narrow conception of what regulation might constitute. This is why it is helpful to speak of the 'regulatory space'. To talk of 'regulation' of digital content might create the impression that what is being proposed for digital content is some form of heavy-handed, command-and-control legal regulation (Black, 2002, 2). The 'regulatory space' concept enables one to avoid stark dichotomies, such as regulated/unregulated, regulator/regulated, and public/private (Scott, 2001; Hancher & M Moran, 1998; and Parker, 2004). The regulatory space concept recognizes that regulatory power and authority will not be held within a single formal body, but can be dispersed between any number of entities, both private and public, within that space (Scott, 2001, 331). There will almost certainly be a variety of "regulatory modalities" within the regulatory space (Lacey, 2004, 148). Those modalities are not unknown to the Australian media regulatory environment, which already uses statutory, and self- and co-regulatory models, although the design of some of these regulatory models is open to criticism (see Hitchens, 2004; and Wilding, 2005). For the purposes of this essay, the concept of the regulatory space (even in the somewhat unsophisticated way in which it has been presented here) is useful, because it can provide a broader conception of the resources and tools which might be relevant "...to support the public policy objectives of the regulatory regime" (Scott, 2001, 330). The concept is also helpful because it avoids setting up a false construct whereby the market, and, more particularly, the discipline of market forces, is viewed as outside regulation, or as non-regulation. As Gibbons has suggested, this allows a different way of viewing regulation. Rather

than viewing regulation as a departure from the norm, that is the market, one can instead view the market as simply another instrument within the regulatory space, which may be selected to serve the public policy objectives of the particular regulatory environment (1998, 9-10).

Digital Content and the Citizen

I have argued elsewhere that a normative case can be made for the regulation of media based upon Habermas' public sphere model, appropriately adapted (Hitchens, 2006). This of course is not novel. Nancy Fraser refers to the public sphere as "...an institutionalized arena of discursive interaction" (1992, 110). The public sphere then can provide an essential space for the generation and consideration of public views and opinion, in turn facilitating the democratic process. Despite the concerns which Habermas has expressed about the media, it would be difficult today to envisage the public sphere operating without media participation. In fact, as Dahlgren suggests, the media have become "the chief institutions of the public sphere" (1995, 8). Thus,

"[t]he media are able to provide a focus for citizens within that space, to provide access to different voices, and to facilitate debate. However, the mere presence of the media within the public sphere will not be enough to secure this role. It is essential that the media are not subverted by political or economic power, but are able to function as independent servant-actors within the public sphere. This requires careful attention to the way in which the media are structured and operate. In turn, the recognition of the public sphere model, and media's role within it, can provide the normative basis for determining the shape of, and practices within, the media environment. A media environment which values and promotes pluralism and diversity will help to guarantee that the media fulfil their proper role within the public sphere." (Hitchens, 2006, 58).

The public sphere model can also be helpful in thinking about digital content. With broadcasting (and also with the print media, although the regulatory response has been quite different), there has been a sense, however poorly articulated and realized, of it having a role in serving the public interest, a public-regarding role: its use of public spectrum, its ubiquity, and its homogeneous delivery all contributed to its perception as an influential medium. The print media have similarly claimed this public-regarding role. Although they have not been subject to the same type of sector-specific regulation as broadcasting, adherence to press codes of ethics can be seen to reflect this same sense of fulfilling a public interest role. However, in relation to digital content that is delivered over non-traditional platforms, there seems to be a



quite different sense in which it is perceived. It seems much less likely to be imbued with this public-regarding character. Some reasons for this can be suggested:

- It might be a cynical suggestion, but it suits political leaders to have the digital content environment entertainment-focused, rather than focused on what is happening in public life. Indeed, Monroe Price has thoughtfully argued a similar point in relation to the broadcasting media (1994). Thus, there is little incentive to develop policy which might imbue digital content with a public-regarding role.
- Digital content is not a homogeneous product. In other words, it is not delivered within the framework of a regular schedule, and so there is not the same sense of collective impact.
- It is largely discretionary content. We have now much more control over whether we access it or not, and we often pay for the content (in addition to the delivery platform). Of course, there has always been a cost associated with the media, but in the case of broadcasting, it has usually been an indirect and disguised cost. In another sense, the content can be described as discretionary, because it is content which we pull, rather than it being pushed at us.

These factors contribute to the different way digital content is perceived or characterized when compared to traditional media. It is seen as much more of an individual matter, a private consumer issue (subject only to consumer protection measures, such as I have already indicated). This can be seen in Senator Coonan's statement announcing plans to introduce rules about harmful content (referred to above), where the references were always to the public as 'consumers' (Coonan, 2006a). Of course, there is a legitimate consumer perspective to be considered in relation to digital content, but my argument is that this is not the only perspective requiring attention. To think about digital content – its operation and impact – as simply a private, consumer matter, means that we ignore or fail to acknowledge that it will also have a public nature and a public role to play. As digital content increasingly contributes to the facilitation of public discussion and debate, then it too joins the coffee house, newsprint, and broadcasting in the public sphere domain.

As I have suggested, it might be appropriate to assert that digital content will also have a public-regarding aspect. Because of the way in which digital content is being perceived as a private consumer matter, it is useful to talk of this public-regarding aspect in terms of citizens' interests. This might help to ground the discussion. It

has already been noted that consumers' interests are being addressed in Australia, but we are somewhat behind the starting line when it comes to articulating the public interest in these matters. Certainly, there seems very little recognition of the public's interest in digital content as citizen. There is indeed very little consideration of the public interest generally in the media regulatory field, in Australia, apart perhaps from the odd token reference to the importance of diversity. The recent media reforms, which dealt with regulatory aspects of the media ownership and control and digital television frameworks, are telling in this respect. A discussion paper issued by the Government in March 2006 included 42 references to 'consumer' or 'consumers' (Department of Communications, Information Technology and the Arts, 2006a). The only reference to citizens was a reference to French citizens. Similarly, in a later statement from Senator Coonan announcing the details of the reforms there were 10 references to 'consumer/s', but none to 'citizen/s' (Coonan, 2006b). By contrast when the United Kingdom was undergoing major communications reform in 2002-2003, there was a substantial and protracted debate about the need to recognize both citizen and consumer interests, and the extent to which these different interests were represented in the new regulatory framework. In another context, Brendan Edgeworth has written of "... the re-characterization of the legal subject from citizen to consumer ..." (2003, 137). The question then is whether there is a space for the citizen in this realm of digital content.

Marshall identified three categories of citizenship rights: civil; political; and social (1963, 74). The civil element which included rights which were viewed as necessary for the exercise of individual freedom such as freedom of speech and liberty of person. The political element comprised "...the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body" (Marshall, 1963, 74). The third element was the social element which Marshall described in terms of the right to "a modicum of economic welfare and security", "to live the life of a civilized being according to the standards prevailing in the society" (Marshall, 1963, 74). A fourth category, cultural rights, has emerged in response to Marshall's failure to recognize cultural claims as an aspect of citizenship (Turner, 1992, 37), and his assumption that "...a common and dominant national culture..." could be taken for granted (Stevenson, 2001, 76). Digital content can have a role to play in the maintenance and realization of each of these citizenship rights – both as they impact upon individuals, and their role in the community, and at a more general societal level (Born & Prosser, 2001, 675) -

although for the purposes of this essay, with its focus on informational content, it is probably the political citizenship element to which digital content will be most relevant, given its ready nexus with the functioning of the democratic process. This is not an unfamiliar argument – we are used to the idea (even if we don't see it strongly expressed by policy-makers, nor brought to life in the regulatory space) that if citizens are to participate effectively within their society, then the media will be an essential player and arena for the realization of that participation (Feintuck, 1999, 29). I would argue that as the nature of media changes, we need also to expand the notion of what will be part of that public realm, thus giving rise to the need to think about digital content in this context also.

Another aspect of the nature of the citizen interest needs to be noted also. We have referred to the consumer perspective or interest as being essentially a private or individual interest. However, the citizen interest is about more than an individual or private interest or right. Thus, citing Arendt, Venturelli writes:

“...our public interests as citizens, ... are quite distinct from our private interests as individuals, and therefore the public interest cannot be automatically derived from the private interest. Indeed, it is not the sum of private interests, nor their highest common denominator.... . The interests of the world, ... are not the interests of individuals: they are the interests of the public realm, the realm of state action and citizenship action. As citizens we share that public realm” (Venturelli, 1998, 72).

A similar point is made also by Born & Prosser who argue that concepts of citizenship and community have been stripped of their meaning by liberal individualism, and that citizenship requires a sense of commonality and plurality (2001, 671).

So, if we are to enjoy the rights we have as citizens, and if the citizen interest is to be protected – then, it is important that the media is also able to provide a space for realization of our rights and our role as citizens. It is the media which facilitates the exchange between citizens and informs citizens, which can act as both a provider of information and ideas, and as a channel for information and ideas. So when we focus on digital content, this needs to be remembered. As we catch our favourite *Chaser* episodes on our mobile phones, download our songs and television programmes via broadband, it is easy to think of digital content as nothing more than an entertainment filler, something to access whilst we are waiting for the bus, winding

down at the end of a work day, and so forth. But, legitimate as this is, there is clearly more to it than that, not only are we accessing traditional media content in different ways, but we are also accessing content which is not available by traditional media delivery – content which can be seen to have a direct relation to our role as citizens and our participation in the body politic. As noted earlier, some of that content will be the professional commentary such as that found in *Open Democracy*, some will be the amateur kind - the weblog, the citizen reporter. (Of course, some of that content is also finding its way into the traditional mainstream providers' content.) It would be difficult for policy makers to deny that digital content has a role to play in the public realm, since, it is this content which is so often presented as playing such a positive role in this respect, for example by providing diversity, and, hence, as a justification for the removal or substantial relaxation of established regulatory approaches to traditional media, such as ownership and control regulation.

Digital Content and Content Integrity

There might be a number of approaches which could be taken to enhance the citizen space within the digital regulatory environment, but, in this essay, I want to concentrate on some specific aspects of what might more usually be termed 'content regulation'. These aspects I group under the term 'content integrity'. By 'content integrity', I refer to rules (or practices) which address the integrity of the information and opinions being broadcast. Ethical standards, is another way to refer to them. Content which observes certain standards of integrity will allow the digital content user to trust the information or opinion being distributed. The availability of trustworthy information and opinion will be crucial for the proper realization of the citizen interest. In the context of broadcasting, content integrity rules can usually be seen in rules which address fairness and accuracy of content, which maintain separation of programming and commercial content, and which ensure that content and editorial independence is not inappropriately influenced by its commercial context. In the Australian broadcasting regulatory context, the 'cash for comment' affair exposed both regulatory and institutional failure to recognize the importance of this area – a failure which has not been wholly rectified (Hitchens, 2004).

Nevertheless, it would seem that there is scope for applying content integrity practices to digital content, where it is appropriate to the context, and it would not be difficult to draw up a set of standards dealing with these matters. To an extent they can already be found in broadcasting codes of practices (although the Australian

radio and television codes might not provide the best guide to good practice in this area), and in journalists' codes of ethical standards which apply in Australia. However, despite the recent focus on media content and the recent media reforms, these issues have been absent from those considerations. However, the European Union has been addressing the issue of digital content and the appropriate regulatory response, and the next section of this essay will examine those deliberations.

Approaches in the European Union

Since 1989, the European Union (EU) has had in place a directive, the *Television without Frontiers Directive* (the Directive), which constitutes a minimum set of standards applicable to television broadcasting content (European Union, 1989). The Directive applies to members of the EU, and enables the free flow of audio-visual material across the EU, provided the material complies with the home country's rules implementing the directive. The Directive has been under review. The main areas currently covered by the Directive are:

- European content quotas;
- advertising rules – these include rules on scheduling and frequency; separation of programmes and advertising; prohibitions on tobacco and prescription drug advertising; restrictions on children's advertising; and, restrictions on programme sponsorship;
- protection of major events, for example certain sporting events, for free-to-air audiences;
- protection of minors against inappropriate content;
- prohibitions on content conveying any incitement to hatred on grounds of, for example, race or religion;
- rights of reply.

Until now, the Directive has remained focused on the traditional delivery platforms of television broadcasting. However, the review seeks to extend the Directive to include, what the European Commission terms, 'non-linear audiovisual media services', with a view to extending the Directive's free flow privilege. This proposed change, which would also mean that the Directive would become known as the 'Audiovisual Media Services Directive' replacing the name by which it is currently known, the 'Television without Frontiers Directive', is in recognition of the changing audio-visual market, although the European Commission remains cautious about the extent of digital content's impact in the medium and long term, particularly with

regard to whether linear delivery will remain the core experience, or whether the core experience will be a mix of linear/non-linear delivery (European Commission, 2005a, 8-9). Thus, it was proposed that a revised directive (and it is not without opposition) would regulate not according to delivery platform, but according to the type of audio-visual service. A revised directive would distinguish between linear and non-linear audio-visual media services. A linear audio-visual media service would be one in which the provider decides upon "...the moment in time when a specific programme is transmitted and establishes the programme schedule" (European Commission, 2005b). In other words, a linear service would look like a regularly scheduled television service, but whether it was delivered via traditional broadcasting platforms, IPTV, or mobile phone would be irrelevant. Crucial to the concept of a linear service is that the viewer can not change the order of programmes (European Commission, 2005a, 12). Non-linear services would be defined as "an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider" (European Commission, 2005b). In other words, the references to 'linear' and 'non-linear' are another way of characterizing the old distinction of 'pushed' and 'pulled' content. Another proposed definition should also be noted, because both linear and non-linear services would only be captured by the proposed directive if they can also be described as an 'audiovisual media service'. An audiovisual media service is "...a service ... the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communication networks ..." (European Commission, 2005b). Hence, it can be seen that the proposed directive would not capture all Internet content for example.

However, despite the inclusion of non-linear content into the proposed directive, the intention was not to extend every aspect of the Directive to non-linear content. The proposals for the revised directive recommended the establishment of two tiers of obligations: a basic tier which would apply to all audio-visual media services (linear and non-linear), and a second tier which would comprise a set of more detailed rules applicable only to linear services. The basic tier reflects the current concerns in Australia, and, so, includes rules protecting minors from harmful content. Non-linear services would also be subject to rules prohibiting content which incited hatred on grounds of race, sex, religion etc. However, the proposed directive would also incorporate into the basic tier rules which would markedly distinguish the European

Union approach from the intended Australian approach. These are rules which would be relevant to the content integrity concept, discussed above, and which I have identified as important for the protection of the citizen interest. These rules are:

- Identification of the content provider: the rules would require that media service providers make accessible (easily, directly, and permanently) to the users of their service identification information, including the name, geographic address, and electronic contact details of the provider, and, where relevant, the competent regulatory authority. A media service provider would be defined as the natural or legal person with editorial responsibility for the selection and organisation of the service's audiovisual content.
- Commercial communications: non-linear services would also be required to comply with certain advertising rules. In part, these rules relate to prohibitions on advertising of certain products such as tobacco, but interestingly, there are also rules which directly address the content integrity issue. Hence, non-linear services would be required to ensure that 'audiovisual commercial communications' are clearly identified, whilst surreptitious commercial communications would be prohibited. 'Surreptitious commercial communications' are not defined under the proposed directive, but the Directive defines 'surreptitious advertising as "...the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration" (European Union, 1989, art. 1d).
- For the first time, the European Commission is proposing the introduction of rules which specifically address product placement practices, and these rules would also apply to non-linear services. The rules would permit the practice, but would require disclosure of the product placement. Additional rules would prohibit any promotion of the product within the programme, and any undermining of editorial responsibility and independence. Significantly, product placement is prohibited from news and current affairs content, documentaries, and children's content. Rules on sponsorship of programmes follow a similar approach.

As noted above, the proposal for the inclusion of non-linear services has not been without opposition, and there are clearly practical difficulties when contemplating this type of regulation – the jurisdictional issue being one of the most obvious.

Interestingly, it has been the UK Government and Ofcom, the UK communications regulatory authority, which has provided some of the most vigorous opposition (see, for example, Purnell, 2006; and Suter, 2006). Several concerns have been expressed (see Indepen, Ovum and Fathom, 2005; Purnell, 2006; and Suter, 2006). One of the main concerns is that these revisions would impose undue regulatory burdens and costs which could stifle innovation and new business activity. A related concern is that, because of the potential for regulatory by-pass, businesses would move offshore. It should be noted, and consistent with the comments made earlier in this essay about regulatory space, that the proposed directive encourages regulatory flexibility through the use of co-regulatory schemes. Other indirect costs have also been identified such as the impact on broadband services roll-out (Indepen, Ovum and Fathom, 2005, para. 5.4.6). A major area of concern is that the proposals to extend the Directive would create legal uncertainty. There might be difficulties determining what is a linear service, and what is a non-linear service. The example is given of a concert being streamed over the Internet – live and it is linear, recorded and it is non-linear (Purnell, 2006, para. 40). Podcasting (or vodcasting) of programmes would be non-linear, even though it may be an identical version of the linear content. There is likely to be a fine line between linear, non-linear, time-shifted, or format-shifted content.

At the time of writing, the revision to the Directive is still working through the legislative process. The proposal has been passed by the European Parliament, but is awaiting consideration by the European Council, before a return to the Parliament for its second reading. However, and, significantly, for this discussion, the Parliament did not accept the Commission's proposals in their entirety. In essence, and if the amendments are also adopted by the European Council, the Parliament's amendments to the proposed Directive, particularly the definitions of 'audiovisual media service' and 'non-linear' service (also to be known as 'on-demand service') would narrow the coverage of a revised Directive to traditional television broadcasting services as well as to services such as Internet television and video-on-demand services. The revised directive would not affect services such as user-generated content sites as was likely under the original proposals. However, it remains the case that, subject to the newly proposed definition of 'non-linear service', the revised Directive would impose rules as indicated above. In other words, content integrity issues appear likely to be relevant to the European regulation of digital content.

depend upon government regulatory measures, or even the setting up of a framework. It would be open to content providers themselves to develop common standards promoting content integrity practices. One practical measure might be the development of a labelling system. We are familiar with this as a tool in the context of potentially offensive or harmful content: the ladybird labelling scheme which denotes those Internet service providers who offer family-friendly sites; and the Internet Content Rating Association labelling schemes. Content providers could develop a set of standards, and, as noted earlier, there are source materials for what might be included in such a set of standards. The proposed Directive also provides guidance. Content providers who complied with these standards would be entitled to label their content. There would be issues to be dealt with such as who would run the scheme, how to deal with compliance issues, and so forth. There would be scope also for international recognition of the label. Why would such a scheme be adopted? I suggest for the same reasons that I have indicated the imposition of the Directive may not be as burdensome as anticipated. In other words, a content provider could use it positively, as a way to promote the value and quality of its digital content.

Conclusion

The Australian Government has recognized the need to develop a coherent approach to the regulation of content which can be delivered over a variety of different platforms. However, to date, that recognition seems likely to be confined to addressing only certain aspects of digital content: that is, the safety of the content. The characterization of issues related to digital content seems to be that they are consumer issues. However, it has been argued in this essay, that there is scope for taking a wider view of the role that digital content can play within our community: namely, we should be acknowledging that digital content can also serve and promote our rights and obligations as citizens. This is a role, though perhaps not best articulated in the Australian context, which has been ascribed to the traditional media of broadcasting and print, and it seems appropriate that digital content, as successor to the traditional media, should also be imbued with that public-regarding role. Within the concept of the regulatory space there is great flexibility for how that role might be realized, although the practical issues surrounding regulation of digital content make it likely that a self-regulatory approach would be the most appropriate response. This essay has only sketched at what might be an appropriate policy and regulatory response to digital content. However, as Australia seeks to relax substantially media

ownership and control rules, and to make renewed attempts to promote digital television and new digital channels, it is appropriate and timely to ask how the interests of citizens will be promoted and protected in this new digital environment.

References

- BBC News, 'UK gaming rule bid 'not tax grab'' (31 October 2006), http://news.bbc.co.uk/1/hi/uk_politics/6100012.stm, accessed 6 November 2006.
- Black, J 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1
- Born, G & Prosser, T, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC' (2001) 64(5) *Modern Law Review* 657
- Coonan, Senator H (2006a), 'New safeguards for emerging audio-visual content', Media Release, 053/06, 14 June 2006
- Coonan, Senator H, (2006b) 'New Media Framework for Australia', Media Release 068/06, 13 July 2006
- Dahlgren, P, *Television and the Public Sphere* (London, Sage Publications, 1995)
- Department of Communications, Information Technology and the Arts (2006a), *Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age* (March 2006), http://www.dcita.gov.au/data/assets/pdf_file/37572/Media_consultation_paper_Final.pdf.
- Department of Communications, Information Technology and the Arts (2006b), *Review of Regulation of Content delivered over Convergent Devices* (April 2006), http://www.dcita.gov.au/data/assets/pdf_file/39890/Final_Convergent_Devices_Report.pdf
- Edgeworth, B, *Law, Modernity, Postmodernity* (Aldershot, Ashgate, 2003)
- European Commission (2005a), Commission Staff Working Document, Impact Assessment (SEC (2005) 1625/2), Annex to the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, Com (2005) 646 final.
- European Commission (2005b), Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, Com (2005) 646 final.
- European Union Council, Common Position adopted by Council with a view to the adoption of a Decision of European Parliament and of the Council concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), Decision 6233/2006, 20 June 2006.
- European Union, Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989]

OJ L 298/23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 [1997] OJ L 202/60.

Feintuck, M, *Media Regulation, Public Interest and the Law* (Edinburgh, Edinburgh University Press, 1999)

Fraser, N, 'Rethinking the Public Sphere: A Contribution to the Critique of actually existing democracy' in Calhoun, C, ed, *Habermas and the Public Sphere* (1992), 109

Gibbons, T, *Regulating the Media* (London, Sweet & Maxwell, 2nd ed., 1998)

Hancher, L & Moran, M, 'Organizing Regulatory Space' in Baldwin, R, Scott, C & Hood, C (eds), *A Reader on Regulation* (Oxford, Oxford University Press, 1998), 148

Hitchens, L, 'Commercial Broadcasting – Preserving the Public Interest' (2004) 32(1) *Federal Law Review* 79

Hitchens, L, *Broadcasting Pluralism and Diversity: A comparative study of policy and regulation* (Oxford, Hart Publishing, 2006)

Indepen, Ovum and fathom, *Extension of the Television without Frontiers Directive: An Impact Assessment, Final Report for Ofcom*, (September 2005).

Lacey, N, 'Criminalization as Regulation: The Role of Criminal Law' in Parker, C, Scott, C, Lacey, N, & Braithwaite, J (eds), *Regulating Law* (Oxford, Oxford University Press, 2004), 144

Marshall, T H, *Sociology at the Crossroads and other essays* (London, Heinemann, 1963)

Parker, C, Scott, C, Lacey, N, and Braithwaite, J (eds), *Regulating Law* (Oxford, Oxford University Press, 2004)

Price, M E, 'The market for loyalties: Electronic Media and the Global Competition for Allegiances' (1994) 104 *Yale Law Journal* 667

Purnell, J (Creative Industries Minister), 'Lessons for EU Regulation: how does the revised TVWF Directive affect competitiveness?' (Speech delivered at the Foreign Policy Centre Seminar, London, 26 January 2006).

Scott, C, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329

Stevenson, N, (ed.), *Culture and Citizenship* (London, Sage, 2001)

Suter, T, 'Ofcom's View' (Speech delivered at the Public Hearing on the Audiovisual Media Services Directive, European Parliament, 1 June 2006), <http://www.ofcom.org.uk/media/speeches/2006/06/euro>, accessed 4 January 2007.

Sydney Morning Herald 'Access all Areas: How consumers are biting back', 7-8 October 2006, 26

Turner, B, 'Outline of a Theory of Citizenship' in Mouffe, C (ed.), *Dimensions of Radical Democracy* (London, Verso, 1992)

Venturelli, S, *Liberalizing the European Media: Politics, Regulation, and the Public Sphere* (Oxford, Clarendon Press, 1998)

Wilding, D, 'In the Shadow of the Pyramid: consumers in communications self-regulation' (2005) 55(2) *Telecommunications Journal of Australia* 37.



bePress Legal Repository